United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 12-453**
	)	**Issued: September 11, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Staatsburg, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 29 2011 appellant, through his attorney, filed a timely appeal of a July 7, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision granting a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than 10 percent impairment of his right upper extremity for which he received a schedule award.

On appeal counsel argued that appellant should not be penalized due to OWCP's delay in issuing a timely decision prior to the adoption of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] A.M.A., *Guides* (6th ed. 2009).

FACTUAL HISTORY

On November 3, 2004 appellant filed an occupational disease claim alleging that on October 15, 2004 he became aware of pain in his right shoulder, arm and neck. He first attributed this condition to his employment on October 17, 2004 and implicated his duties of repetitive motion involving large amounts of mail including bundles. On January 24, 2005 OWCP accepted appellant's claim for affections of the shoulder region. Appellant underwent a magnetic resonance imaging (MRI) scan of the right shoulder on February 11, 2005 which demonstrated severe degenerative changes at the acromioclavicular joint, a subscapularis intramuscular cyst, and partial tearing in the rotator interval and subluxation of the biceps tendon. He underwent a right shoulder arthroscopy, subacromial decompression, distal clavicle resection and open biceps tenodesis on March 23, 2005.

Appellant underwent an MRI scan of the thoracic spine on August 9, 2005 which demonstrated moderately severe narrowing of the C5-6 and C6-7 disc spaces with large posterior osteophytic ridges as a result of advanced cervical degenerative disc disease and severe spondylosis at C5-6 and C6-7 with possible cord compression.

On April 7, 2006 Dr. Adam D. Soyer, an osteopath, reported that appellant had full active elevation, 5-/5 strength in abduction and external rotation, negative impingement and intact neurovascular examination with no pain. He opined that appellant had 25 percent loss of use of his right upper extremity due to his cervical and thoracic degenerative disc disease. Appellant requested a schedule award on August 28, 2006.

By decision dated November 3, 2006, OWCP found that appellant's private-sector employment fairly and reasonably represented his wage-earning capacity. It reduced his compensation benefits based on his demonstrated earning capacity.

OWCP requested an additional medical report regarding appellant's permanent impairment on July 12, 2007. Dr. Soyer responded on November 13, 2007 and reported that appellant had good muscle tone with elevation of 180 degrees, internal rotation of 80 degrees, external rotation of 70 degrees and abduction of 120 degrees. He found that appellant had 5-/5 strength in all groups. Dr. Soyer indicated that appellant had active elevation to 180 degrees, internal rotation to 80 degrees, external rotation to 70 degrees and abduction to 120 degrees. He again opined that appellant had 25 percent loss of use of the right upper extremity due to surgical management and cervical degenerative disc disease. Dr. Soyer stated that no further orthopedic follow up was necessary. On November 13, 2007 he completed an OWCP form reporting range of motion of 80 degrees of internal rotation, 70 degrees of external rotation, 180 degrees of forward elevation, 45 degrees of backward elevation and 120 degrees of abduction. Dr. Soyer stated that appellant reached maximum medical improvement on April 7, 2006 and recommended an impairment rating of 25 percent.

An OWCP medical adviser reviewed the medical records on September 2, 2008 and applying the fifth edition of the A.M.A., *Guides*[3] found that appellant had four percent impairment of his right upper extremity due to loss of range of motion including external rotation

[3] A.M.A., *Guides*, (5th ed. 2001).

of 70 degrees, one percent impairment;[4] and abduction of 120, three percent impairment.[5] He further found that appellant had 10 percent impairment due to a resection arthroplasty.[6] The medical adviser concluded that appellant had 14 percent impairment of the right upper extremity. He noted that Dr. Soyer did not explain how he reached his impairment rating of 25 percent.

OWCP found that there was a conflict of medical opinion evidence between OWCP's medical adviser and Dr. Soyer and referred appellant to Dr. John Ioia, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated January 20, 2009, Dr. Ioia, reported appellant's history of injury and medical history. He found 70 degrees of internal rotation, 90 degrees of external rotation, 160 degrees of forward flexion, 45 degrees of backward elevation and 160 degrees of abduction. Dr. Ioia applied the fifth edition of the A.M.A., *Guides* and found that appellant had 4 percent for loss of range of motion and 10 percent due to resection arthroplasty. A new OWCP medical adviser reviewed the medical evidence on March 27, 2009 and agreed with Dr. Ioia's impairment rating.

On October 30, 2009 OWCP requested that Dr. Ioia review appellant's impairment under the sixth edition of the A.M.A., *Guides*.[7] Dr. Ioia did not respond and OWCP referred appellant for a second opinion evaluation with Dr. Edwin Mohler, a Board-certified orthopedic surgeon. On October 1, 2010 OWCP suspended appellant's compensation benefits for failing to appear for the scheduled examination. In a report dated October 22, 2010, Dr. Mohler provided appellant's history of injury and medical history. He found 165 degrees of shoulder flexion, 150 degrees of abduction, 45 degrees of internal rotation, 90 degrees of external rotation, 45 degrees of extension and 30 degrees of adduction. Dr. Mohler found that appellant reached maximum medical improvement on April 7, 2006. He applied the sixth edition of the A.M.A., *Guides*, specifically the *Shoulder Regional Grid*[8] and found that a distal clavicle resection has a class 1, default C impairment of 10 percent.[9] Dr. Mohler used a grade modifier of 1 for functional history,[10] finding with a *Quick*DASH[11] score of 23. He found a physical examination modifier grade 1[12] as range of motion was within 1 to 90 percent of normal compared to his uninjured left shoulder, as well as slight instability or subluxability of the shoulder.[13] Dr. Mohler employed

[4] A.M.A., *Guides* 479.

[5] *Id.* at 477, Table 16-43.

[6] *Id.* at 506.

[7] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[8] A.M.A., *Guides* 401, Table 15-5.

[9] *Id.* at 403.

[10] *Id.* at 406, Table 15-7.

[11] *Id.* at 485, Table 15-39.

[12] *Id.* at 475, Table 15-34.

[13] *Id.* at 408, Table 15-8.

clinical studies grade modifier 1 based on clinical studies that confirmed appellant's diagnosis.[14] He applied mathematical formula and found that appellant remained at a default grade C or 10 percent impairment Dr. Mohler noted that he considered appellant's range of motion in reaching his physical examination modifier and that no additional impairment rating for loss of range of motion was appropriate. An OWCP medical examiner considered the medical evidence on December 1, 2010 and approved Dr. Mohler's methodology and rating.

By decision dated July 7, 2011, OWCP granted appellant a schedule award for 10 percent impairment of his right upper extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[15] and its implementing regulations[16] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[17]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[18]

ANALYSIS

The Board finds that the medical evidence does not establish that appellant has more than 10 percent impairment of his right upper extremity for which he has received a schedule award. Dr. Soyer, appellant's treating physician, originally opined on April 7, 2006 that he had a 25 percent impairment of the upper right extremity according to the A.M.A., *Guides*, fifth edition. Dr. Mohler evaluated appellant's permanent impairment under the appropriate sixth edition of the A.M.A., *Guides* and followed the protocol set forth in that edition. He identified the

[14] *Id.* at 410, Table 15-9.

[15] 5 U.S.C. §§ 8101-8193, 8107.

[16] 20 C.F.R. § 10.404.

[17] For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[18] A.M.A., *Guides* 411.

appropriate diagnosis, distal clavicle resection[19] and explained how he reached the grade modifiers of 1 for functional history, physical examination and clinical studies.[20] Dr. Mohler noted that appellant's *Quick*DASH score of 23 placed him in grade modifier 1 for functional history,[21] found that based on his observed findings including range of motion that appellant had grade modifier 1 for physical examination[22] and noted that appellant's clinical studies including MRI scan confirmed his diagnoses.[23] He properly applied the above-described formula to explain why the class 1 default value C of 10 was appropriate for appellant. The Board notes that (1-1) + (1-1) + (1-1) = 0 and the A.M.A., *Guides* state, "If all of the grade modifier numbers are the same as the impairment class number, the net adjustment will be 0 and the default value (C) will be the impairment rating value for that diagnosis."[24] The medical adviser reviewed Dr. Mohler's report and agreed with his impairment rating. As there is no medical evidence in the record applying the appropriate edition of the A.M.A., *Guides* and reaching more than 10 percent impairment, the Board finds that Dr. Mohler's report is entitled to the weight of the medical evidence.

On appeal counsel argued that the fifth edition of the A.M.A., *Guides* should be applicable in this case. In *Harry D. Butler*,[25] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[26] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[27] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed. As OWCP issued the decision in this case on July 7, 2011, application of the sixth edition of the A.M.A., *Guides* was appropriate.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

---

[19] *Id.* at 403, Table 15-5.

[20] *Id.* at 406-12.

[21] *Id.* at 406, Table 15-7.

[22] *Id.* at 408, Table 15-8.

[23] *Id.* at 410, Table 15-9.

[24] *Id.* at 409.

[25] 43 ECAB 859 (1992).

[26] *Id.* at 866.

[27] FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

CONCLUSION

The Board finds that appellant has no more than 10 percent impairment of his right upper extremity for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board