United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 12-1937**
	)	**Issued: April 19, 2012**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Brooklyn, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director,

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2012 appellant filed a timely appeal from the August 16, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained more than 19 percent impairment of the left arm for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In a June 21, 2012 decision, the Board set aside OWCP's October 24, 2011 decision which found that appellant had not established more than 18 percent impairment of the left arm for which he received a schedule award. The Board found that OWCP's medical adviser did not properly apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) (hereinafter, A.M.A., *Guides*). Further, Dr. Hernan Jimenez, a Board-certified internist, did not follow the appropriate procedures with regard to measuring range of motion. The Board also found that it was unclear whether the medical adviser was aware of the accepted left rotator cuff syndrome condition for which appellant underwent surgery on May 13, 2008. The Board remanded the case for further development of the medical evidence. The facts contained in the prior decision are incorporated by reference.

On June 20, 2012 OWCP provided its medical adviser with an update regarding the accepted conditions. It noted that the accepted conditions included brachial neuritis/radiculitis, cervical radiculopathy, left shoulder bursae/tendons and left rotator cuff rupture.

In a June 29, 2012 report, Dr. James W. Dyer, an OWCP medical adviser, explained that appellant had 18 percent impairment of the left arm or no additional impairment greater than the previous rating. He noted that appellant's left shoulder was repaired in the past and the maximum impairment allowed under the diagnosis-based method for a full thickness tear of the rotator cuff was seven percent. Dr. Dyer allowed the range of motion method as it provided for the higher impairment.

By letter dated July 9, 2012, OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. William A. Somers, a Board-certified orthopedic surgeon.

In a July 27, 2012 report, Dr. Somers noted appellant's history of injury and treatment and examined him. He provided findings for the left shoulder which included that the Spurlings maneuver in flexion and extension produced some aching between the scapulae, but no radiculopathy. Active elevation of the shoulders was about 90 degrees on the right and 70 degrees on the left. Motor examination was normal except for external rotation of the left shoulder 4+/B, supraspinatus strength on the left at 4/5. Dr. Somers noted that appellant was more tender about the right than the left acromioclavicular (AC) joint with definite greater prominence about the right AC joint. He noted that appellant was more tender about the left than the right long head of the biceps anteriorly and tender about the lateral and posterior rotator cuff, greater on the left than the right. Range of motion of the left shoulder while sitting showed 50 degrees external rotation, internal rotation "gets thumb to about L3," extension was 30 degrees, flexion 80 degrees, abduction 60 degrees and adduction 20 degrees. While supine on the left, appellant's flexion went to 150 degrees, internal rotation 20 degrees, external rotation 60 degrees, abduction 70 degrees and adduction 30 degrees. Dr. Somers diagnosed left rotator cuff disease and possible rotator cuff arthropathy secondary to the March 30, 2006 injury. He

[2] Docket No. 12-207 (issued June 21, 2012).

indicated that appellant had arthrofibrosis of the left shoulder with significant posterior capsular tightness secondary to left rotator cuff disease and status post arthroscopic surgery. Appellant had degenerative arthritis of left AC joint aggravated by the injury of March 30, 2006 and degenerative joint disease of the right AC joint with rotator cuff disease, right shoulder, not related to the injury of March 30, 2006.

Dr. Somers also diagnosed multilevel cervical disc disease with no evidence of radicular problems and lumbar disc disease. He explained that appellant continued to have left shoulder problems and that further treatment could decrease his left shoulder pain but would not resolve his condition. Dr. Somers did not have records to document appellant's true pathology in the left shoulder at the time of his surgery. While appellant had a diagnosis which was accepted for rotator cuff tear, no rotator cuff tear was identified on his magnetic resonance imaging scan. X-rays showed degenerative arthritis in the left glenohumeral joint. Dr. Somers noted that, if appellant had a rotator cuff tear or dysfunction of the rotator cuff, he might be developing a rotator cuff arthropathy, which would be related to his March 30, 2006 injury. He noted that appellant's degenerative arthritis of the AC joint was aggravated by the work injury.

Dr. Somers utilized the A.M.A., *Guides* and explained that, while he reviewed the diagnosis-based method, the range of motion method yielded a higher result. He referred to Table 15-34 for shoulder range of motion and determined that flexion of 150 degrees resulted in three percent impairment, extension of 30 degrees resulted in one percent impairment, internal rotation of 20 to 30 degrees, resulted in four percent impairment, external rotation of 50 degrees warranted two percent impairment, abduction of 70 degrees resulted in six percent impairment and adduction of 20 degrees resulted in one percent impairment.[3] Dr. Somers added the values and determined that appellant had 17 percent impairment of the left arm. He referred to Table 15-35 to determine appellant's grade modifier.[4] Dr. Somers determined that appellant had a net grade modifier of 2 under which the total range of motion impairment should be increased by 10 percent. He multiplied 10 percent of the 17 percent for range of motion and found 1.7 percent. Dr. Somers added this to the 17 percent and opined that this would result in an 18.7 percent impairment, which he rounded up to 19 percent for the left arm.

On August 3, 2012 OWCP provided its medical adviser with a copy of Dr. Somers' report for review. In an August 13, 2012 report, Dr. Dyer concurred with Dr. Somers with regards to the additional one percent impairment. He noted that, based upon the range of motion grade modifiers in Table 15-35 and Table 15-36,[5] appellant had 19 percent impairment or an additional 1 percent impairment. The date of maximum medical improvement was July 25, 2012.

[3] A.M.A., *Guides* 475.

[4] *Id*. at 477.

[5] *Id*.

By decision dated August 16, 2012, OWCP granted a schedule award for an additional one percent impairment to the left arm. The period of the award was from January 26 to February 16, 2012.[6]

[6] OWCP noted that appellant had previously received an award for 18 percent of the left arm from December 28, 2010 to January 25, 2012.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing federal regulations[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] For decisions issued after May 1, 2009, the sixth edition will be used.[10]

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[11]

Table 15-5 provides an impairment rating for diagnosis-based evaluation. It also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis-based impairment.[12] The range of motion method involves the taking of active and passive range of motion findings and then comparing of the two types of motion in order to evaluate credibility issues. Range of motion is measured after a warm up in which the individual moves the joint through its maximum range of motion at least three times.[13]

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted that appellant sustained left rotator cuff syndrome and cervical radiculopathy. Appellant underwent left shoulder surgery on May 13, 2008. On remand, OWCP referred him for a second opinion examination with Dr. Somers who rated 19 percent left arm impairment. Its medical adviser concurred with this and relied upon the clinical findings contained in Dr. Somers' July 27, 2012 report.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a).

[10] FECA Bulletin No. 09-03 (issued March 15, 2009).

[11] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[12] *See* A.M.A., *Guides* 405, 475-78.

[13] *See id.* at 461-64.

The Board notes that Dr. Somers, in his July 27, 2012 report, concluded that appellant had a 19 percent upper extremity permanent impairment according to the A.M.A., *Guides*, but the record does not establish that he measured range of motion three times after a warm up and then utilized the average of the measurements as required by section 15.7 of the A.M.A., *Guides*.[14] The Board notes that the procedures are designed to ensure the credibility of range of motion testing. The Board notes that Dr. Dyer's report is based upon that of Dr. Somers. As the physicians did not follow the appropriate procedure with regard to measuring range of motion, the case is not in posture.[15]

It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[16] Accordingly, once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a proper manner.[17] The reports from Dr. Somers and OWCP's medical adviser are insufficient to resolve the issue of whether appellant was entitled to an additional schedule award; OWCP did not properly discharge its responsibilities in developing the record.[18] The Board, therefore, finds that the case must be remanded for further development of the medical evidence and a reasoned opinion regarding whether appellant has additional permanent impairment of the upper extremities due to his accepted employment injuries. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

On appeal, appellant made arguments related to his other accepted injuries. However, in light of the Board's finding, it is premature to address these arguments.

CONCLUSION

The Board finds that this case is not in posture for decision.

[14] *Id.*

[15] *See supra* note 14.

[16] *Richard E. Simpson*, 55 ECAB 490 (2004).

[17] *Melvin James*, 55 ECAB 406 (2004).

[18] *Richard F. Williams*, 55 ECAB 343 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: April 19, 2012
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board