United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 13-141**
	)	**Issued: April 10, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Jersey City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 25, 2012 appellant, through her attorney, filed a timely appeal from a July 3, 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 has more than a three percent right arm permanent impairment.

FACTUAL HISTORY

On March 25, 1993 appellant, then a 38-year-old mail handler, filed an occupational claim (Form CA-2) alleging wrist conditions as a result of performing her assigned duties. OWCP accepted the claim for right rotator cuff tendinitis. Appellant underwent right shoulder

[1] 5 U.S.C. § 8101 *et seq.*

surgery on February 1, 1995.[2] By decision dated May 26, 1998, OWCP found that her actual earnings in a modified position since April 15, 1997 represented her wage-earning capacity.

Appellant submitted a July 21, 1999 report from Dr. David Weiss, an osteopath, who stated that she had work injuries on October 1, 1992 and June 23, 1994.[3] Dr. Weiss opined that, under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a 45 percent right arm impairment.

On July 21, 2008 appellant resubmitted the July 21, 1999 report from Dr. Weiss. On January 16, 2009 she submitted an August 11, 2008 report from Dr. Weiss, who provided a history and results on examination.[4] Dr. Weiss opined that appellant's right arm impairment, under the fifth edition of the A.M.A., *Guides*, was 59 percent, based on surgery, loss of range of motion, sensory and motor deficits.

In a letter dated June 16, 2009, OWCP advised Dr. Weiss that, as of May 1, 2009, an impairment rating must be made under the sixth edition of the A.M.A., *Guides* (hereinafter references to the A.M.A., *Guides* are to the sixth edition unless otherwise noted). On September 29, 2009 Dr. Weiss submitted a report with the August 11, 2008 examination results and an opinion that, under the A.M.A., *Guides*, appellant had a seven percent right arm impairment. He identified Table 15-34 for loss of range of motion.

OWCP referred the case for a second opinion examination by Dr. P. Leo Varriale, a Board-certified orthopedic surgeon. In a report dated April 13, 2010, Dr. Varriale reviewed a history of medical treatment and provided results on examination. With respect to a permanent impairment, he applied Table 15-5 of the A.M.A., *Guides*, finding a default value of three percent for tendinitis of the shoulder. Dr. Varriale found that no adjustment was warranted based on applicable grade modifiers. The date of maximum medical improvement was reported as August 1, 1995 or six months after the shoulder surgery. In a report dated June 14, 2010, an OWCP medical adviser concurred that the right arm impairment was three percent.

By decision dated June 30, 2010, OWCP granted a schedule award for a three percent right arm permanent impairment. The period of the award was 9.36 weeks commencing September 30, 1998.[5]

Appellant requested a hearing before an OWCP hearing representative, which was held on October 6, 2010. By decision dated December 27, 2010, the hearing representative remanded the case to refer the case to an OWCP medical adviser to review the medical evidence as to permanent impairment.

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[2] The surgery was a decompressive acromioplasty of the right shoulder with release of coracoacromial ligament.

[3] The reference to October 1, 1992 appears to be the current right shoulder claim. The June 23, 1994 injury was a traumatic injury claim for a back injury.

[4] The initial page is dated August 9, 2008, but subsequent pages are dated August 11 and Dr. Weiss stated that the examination was performed on August 11, 2008.

[5] Appellant had received wage-loss compensation through September 29, 2008.

In a report dated March 21, 2011, an OWCP medical adviser stated that Dr. Varriale's report was based on a more current examination and he found no basis for an increased award. By decision dated April 25, 2011, OWCP found that appellant was not entitled to an additional schedule award.

Appellant again requested a hearing before an OWCP hearing representative, which was held on August 8, 2011. With respect to medical evidence, she submitted a July 26, 2011 report from Dr. Weiss, again listing the August 11, 2008 physical examination findings. Dr. Weiss opined that appellant had a 12 percent right arm impairment under Table 15-5 of the A.M.A., *Guides*.

By decision dated September 19, 2011, the hearing representative found a conflict in opinion between Dr. Weiss and Dr. Varriale as to the degree of permanent impairment. Appellant was referred to Dr. Andrew Carollo, a Board-certified orthopedic surgeon, selected as an impartial referee physician.

In a report dated November 29, 2011, Dr. Carollo provided a history and results on examination. He noted that appellant had undergone surgery on February 1, 1995. Dr. Carollo diagnosed tendinitis of the right shoulder and status post decompression of the right shoulder. He found that under Table 15-5 there was three percent arm impairment for tendinitis. With respect to an adjustment of the default value, Dr. Carollo found a grade modifier of one for functional history, physical examination and clinical studies, resulting in no adjustment. He concluded that appellant had a three percent right arm impairment. An OWCP medical adviser concurred with the three percent impairment in a December 12, 2011 report.

By decision dated December 27, 2011, OWCP found that appellant was not entitled to an additional schedule award.

Appellant again requested a hearing before an OWCP hearing representative, which was held on April 23, 2012. She submitted an April 16, 2012 report from Dr. Weiss, who reiterated his opinion that she had a 12 percent right arm impairment. Dr. Weiss disagreed with Dr. Carollo's application of Table 15-5.

In a decision dated July 3, 2012, the hearing representative affirmed the December 27, 2011 decision. The hearing representative found that the weight of the evidence did not establish more than a three percent right arm impairment.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[6] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall

[6] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[8]

With respect to a shoulder impairment, the A.M.A., *Guides* provides a regional grid at Table 15-5. The class of impairment (CDX) is determined based on specific diagnosis and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH, Table 15-7), Physical Examination (GMPE, Table 15-8) and Clinical Studies (GMCS, Table 15-9). The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.[10] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11]

It is well established that when a case is referred to a referee physician for the purpose of resolving a conflict under 5 U.S.C. § 8123(a), the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[12]

ANALYSIS

OWCP found there was a disagreement between attending physician, Dr. Weiss and second opinion physician, Dr. Varriale. Dr. Weiss opined that appellant had a 12 percent right arm impairment, while Dr. Varriale found that the impairment was 3 percent. Appellant was referred to Dr. Carollo as a referee examiner pursuant to 5 U.S.C. § 8123(a) to resolve the conflict.

In a November 29, 2011 report, Dr. Carollo identified Table 15-5, the shoulder regional grid. He specified the diagnosis of tendinitis, which has a default (grade C) arm impairment of three percent for a class 1 impairment.[13] The grade C value may be adjusted by assigning grade

[7] *A. George Lampo*, 45 ECAB 441 (1994).

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

[9] The net adjustment is up to +2 (grade E) or -2 (grade A).

[10] 5 U.S.C. § 8123.

[11] 20 C.F.R. § 10.321 (1999).

[12] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[13] A.M.A. *Guides* 402, Table 15-5.

modifiers for functional history, physical examination and clinical studies, applying the adjustment formula. Dr. Carollo assigned each a grade modifier one (mild problem) under the appropriate tables. Under the adjustment formula noted above, there is no adjustment from the grade C value of three percent.

The Board finds that Dr. Carollo provided a rationalized medical opinion on the issue. He identified Table 15-5 and his application of the table was consistent with the diagnosis of the accepted tendinitis condition. The rationalized opinion of a referee physician, as noted above, is entitled to special weight. The Board finds that Dr. Carollo represents the weight of the medical evidence and establishes that appellant sustained three percent permanent impairment to the right arm. The April 16, 2012 report of Dr. Weiss, reiterated his opinion that she had a 12 percent impairment. The Board notes that this does not shift the weight of the evidence. Additional reports from a physician on one side of the conflict that is properly resolved by a referee are generally insufficient to overcome the weight accorded the referee's report or to create a new conflict.[14]

On appeal, appellant argues that Dr. Carollo did not take into account the right shoulder decompression surgery, whereas Dr. Weiss applied Table 15-5 based on the surgery' but Dr. Carollo had a proper background and noted the 1995 surgery in his history and included a diagnosis of status post decompression of the right shoulder. He was aware of the surgery, but applied Table 15-5 in accord with the diagnosis of tendinitis. The Board finds that Dr. Carollo represents the weight of the medical evidence.

Appellant may at any time request an increased schedule award based on probative medical evidence showing an increased permanent impairment.

CONCLUSION

The Board finds that appellant has not established more than a three percent permanent impairment to the right arm.

[14] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 3, 2012 is affirmed.

Issued: April 10, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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