

**United States Department of Labor
Employees' Compensation Appeals Board**

C.F., Appellant)

and)

DEPARTMENT OF STATE, INTERNATIONAL)
BOUNDARY & WATER COMMISSION,)
El Paso, TX, Employer)

**Docket No. 13-406
Issued: August 14, 2013**

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 December 10, 2012 appellant filed a timely appeal of a November 1, 2012 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than two percent impairment of the left arm for which he received a schedule award.

On appeal, appellant contends that the medical evidence of record is sufficient to establish greater than two percent impairment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on October 28, 2011 appellant, then a 55-year-old heavy mobile equipment mechanic, sustained bursae and tendons disorder in an unspecified region of the left shoulder as a result of performing his work duties at the employing establishment.²

In a March 5, 2012 medical report, Dr. Terren D. Klein, an attending Board-certified orthopedic surgeon, stated that appellant was being followed for a near full thickness tear of the supraspinatus tendon in the left shoulder due to the October 28, 2011 work injury. On physical examination of the left shoulder, he reported full motion, minimal tenderness and good strength. Dr. Klein diagnosed left shoulder partial rotator cuff tear. Appellant was released to return to full-duty work with no restrictions.

On April 27, 2012 appellant filed a claim for a schedule award.

In an April 18, 2012 report, Dr. Michael J. Mrochek, an attending Board-certified physiatrist, reviewed a history of the October 28, 2011 employment injuries and appellant's medical treatment, social and family background. On physical examination, he advised that the right shoulder motion was not normal due to appellant's previous shoulder surgery. Dr. Mrochek reported 150 degrees of flexion, 36 degrees of extension, 39 degrees of adduction, 141 degrees of abduction and 80 degrees of external rotation in each shoulder. He also reported 70 degrees and 50 degrees of internal rotation in the right and left shoulder, respectively. Dr. Mrochek cited to Table 15-5, Shoulder Regional Grid, on page 402 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He noted that the footnote to this table indicated that, if motion loss was present, this impairment may alternatively be assessed using Section 15.7, Range of Motion Impairment. Using the range of motion measurements, he evaluated impairment under Section 15-7, Shoulder Motion, and Table 15-34, Shoulder Range of Motion, on page 475 to find three percent impairment each for abduction and flexion, one percent impairment for adduction and extension and two percent impairment for internal rotation. Dr. Mrochek added the range of motion impairment ratings to rate 10 percent impairment of the left upper extremity. He diagnosed rotator cuff sprain and concluded that appellant reached maximum medical improvement on April 3, 2012.

On May 17, 2012 an OWCP medical adviser reviewed the medical record and Dr. Mrochek's impairment rating. He utilized Table 15-34 to determine that 150 degrees of flexion constituted three percent impairment, 40 degrees of extension constituted one percent impairment, 140 degrees of abduction constituted three percent impairment, 40 degrees of adduction constituted no impairment, 50 degrees of internal rotation constituted two percent impairment and 80 degrees of external rotation constituted no impairment, totaling nine percent impairment. The medical adviser referenced Table 15-35 on page 477 and assessed a grade 1 modifier for appellant's range of motion deficit. He found no grade modifier for functional history adjustment under Table 15-7 on page 406. The medical adviser concluded that appellant

² In a prior claim under File No. xxxxxx721, OWCP accepted that appellant sustained a sprain of the right shoulder and upper arm rotator cuff while in the performance of duty on November 7, 2005. On February 6, 2006 appellant underwent arthroscopic right shoulder surgery. OWCP granted him a schedule award for 13 percent impairment of the right upper extremity.

had nine percent impairment of the left upper extremity. He noted that Dr. Mrochek incorrectly rated one percent impairment for adduction as the 39-degree measurement should have been rounded up to 40 degrees based on the sixth edition of the A.M.A., *Guides*, which resulted in no impairment. The medical adviser further noted that a discrepancy provided by Drs. Klein and Mrochek regarding the extent of appellant's left shoulder range of motion deficit. He recommended a second opinion impairment evaluation under the sixth edition of the A.M.A., *Guides*.

By letter dated May 29, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Sofia M. Weigel, Board-certified physiatrist, for a second opinion.

In a July 13, 2012 report, Dr. Weigel reviewed the statement of accepted facts and medical record. On physical examination, she reported that appellant was cooperative and in no distress. On neurological examination, Dr. Weigel found an appropriate affect. Muscles had normal bulk and tone. Motor strength was without deficit. Reflexes were symmetric in the bilateral biceps, triceps and brachioradialis tendons. On examination of the left shoulder, Dr. Weigel reported a negative drop arm test. There was no erythema, effusion, swelling, warmth or impingement sign. There was good range of motion and minimal pain over the acromioclavicular (AC) joint. Dr. Weigel diagnosed a partial tear of the left rotator cuff. She advised that appellant reached maximum medical improvement on April 18, 2012, the date of Dr. Mrochek's examination. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Weigel referenced Table 15-5 on page 402 and determined that appellant had a class 1 impairment for a history of painful injury with residual symptoms without consistent objective findings. She assessed a grade 1 modifier for Functional History (GMFH) for pain with strenuous activity and ability to perform self-care, a grade 1 modifier for Physical Examination (GMPE) for minimal palpitory findings without observed abnormality and a grade 2 modifier for Clinical Studies (GMCS) that confirmed the diagnosis of a partial tear of the rotator cuff. Dr. Weigel determined that appellant had a *QuickDASH* score of 34. Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), she found a net adjustment of one which yielded a class 1 impairment, moving the default grade from C to D, equaling two percent of the left upper extremity.

On August 2, 2012 a second OWCP medical adviser reviewed the medical record. He found that maximum medical improvement was reached on April 18, 2012. The medical adviser referenced Table 15-5 of the sixth edition of the A.M.A., *Guides* and determined that appellant had a class 1 impairment with a default value of one percent for a partial thickness tear of the rotator cuff. Applying the net adjustment formula to Dr. Weigel's findings resulted in a net adjustment of 1. The medical adviser found that the corresponding upper extremity impairment for a class 1 impairment with an adjustment of 1 from the default value of C equaled a class 1, grade D or two percent impairment of the left upper extremity.

In a November 1, 2012 decision, OWCP granted appellant a schedule award for two percent impairment of the left upper extremity.³

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁶ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ For decisions issued after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸ For decisions issued after May 1, 2009, the sixth edition will be used.⁹

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹¹

ANALYSIS

OWCP accepted appellant's claim for bursae and tendons disorder in an unspecified region of the left shoulder. On November 1, 2012 appellant received a schedule award for two percent impairment of the left upper extremity. The Board finds that he did not meet his burden of proof to establish that he sustained greater impairment.

In an April 18, 2012 report, appellant's attending physician, Dr. Mrochek, opined that appellant had a rotator cuff sprain and found that, under Table 15-34 of the sixth edition of the

³ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. See 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Ausbon N. Johnson*, 50 ECAB 304 (1999).

⁷ *Supra* note 5.

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁹ *Id.* at Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 494-531.

¹¹ *Id.* at 521.

A.M.A., *Guides*, he had three percent impairment each for 150 degrees of flexion and 141 degrees of abduction, one percent impairment each for 36 degrees of extension and 39 degrees of adduction and two percent impairment for 70 degrees internal rotation of the left shoulder. He combined these range of motion impairment ratings to calculate a 10 percent impairment of the left upper extremity. A medical adviser noted that appellant had nine percent impairment of the left upper extremity under Table 15-35 and Table 15-7, pages 477 and 406, respectively, of the sixth edition of the A.M.A., *Guides*. He found that Dr. Mrochek incorrectly awarded one percent impairment for adduction as the 39-degree measurement should have been rounded up to 40 degrees.¹² The medical adviser further noted that Dr. Klein found that appellant's left shoulder had full motion, minimal tenderness and good strength while Dr. Mrochek found limited range of motion of the left shoulder. He recommended a second opinion impairment evaluation under the sixth edition of the A.M.A., *Guides*.

OWCP referred appellant to Dr. Weigel, a Board-certified orthopedic surgeon. In her July 13, 2012 report, she provided a diagnosis-based impairment under the sixth edition of the A.M.A., *Guides*. Dr. Weigel diagnosed a partial tear of the left rotator cuff, with a history of painful injury, residual symptoms without consistent objective findings, fell under class 1 with a default value of one percent impairment under Table 15-5, page 402. Under functional history adjustment, she found a grade 1 modifier for pain with strenuous activity and ability to perform self-care and a *QuickDASH* score of 34.¹³ Under physical examination adjustment, Dr. Weigel found that appellant had a grade 1 modifier for minimal palpatory findings without observed abnormality.¹⁴ She found that clinical studies confirmed a partial tear of the rotator cuff.¹⁵ Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) resulted in a modifier total of 1, moving the default grade from C to D, equaling two percent impairment of the left upper extremity. An OWCP medical adviser concurred with Dr. Weigel's rating methodology and calculations.

The Board finds that Dr. Weigel's impairment rating, as reviewed by OWCP's medical adviser, was thorough, detailed and properly applied the appropriate portions of the A.M.A., *Guides*. Therefore, OWCP's November 1, 2012 schedule award determination was proper under the law and facts of this case.

On appeal, appellant asserted that he has greater than two percent impairment of his left upper extremity and submitted new factual evidence. The issue in this claim is medical in nature and must be resolved by the submission of probative medical evidence.¹⁶ Appellant did not submit sufficiently rationalized medical evidence addressing the extent of his permanent impairment. Dr. Mrochek's report failed to properly utilize the A.M.A., *Guides* in assessing appellant's percentage of permanent impairment due to the left shoulder rotator cuff sprain.

¹² *Id.* at 461.

¹³ *Id.* at 406 (Table 15-7) (Functional History Adjustment: Upper Extremities).

¹⁴ *Id.* at 408 (Table 15-8) (Physical Examination Adjustment: Upper Extremities).

¹⁵ *Id.* at 410 (Table 15-9) (Clinical Studies Adjustment: Upper Extremities).

¹⁶ See *Jaja K. Asaramo*, 55 ECAB 200, 206 (2004).

Dr. Weigel's report, as supported by OWCP's medical adviser, provided a left upper extremity impairment rating in conformance with the A.M.A., *Guides*. This evidence is sufficient to establish that appellant had no more than two percent impairment of the left upper extremity.

On appeal, appellant submitted new evidence. However, the Board lacks jurisdiction to review evidence for the first time on appeal.¹⁷

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.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than two percent impairment of the left upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2013
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

¹⁷ 20 C.F.R. § 501.2(c)(1).