United States Department of Labor
Employees' Compensation Appeals Board

M.V., Appellant	)	
	)	**Docket No. 13-798**
and	)	**Issued: August 14, 2013**
DEPARTMENT OF HOMELAND SECURITY, U.S. SECRET SERVICE, New York, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2013 appellant, through his attorney, filed a timely appeal from October 10, 2012 merit decisions 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.

ISSUES

The issues are: (1) whether appellant has more than a 7 percent permanent impairment of the left upper extremity and a 20 percent permanent impairment of the right upper extremity, for which he received schedule awards; (2) whether he received an overpayment of $20,227.46 because he received compensation for a schedule award to which he was not entitled; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 19, 2001 appellant, then a 43-year-old special agent, filed a traumatic injury claim alleging that on September 11, 2001 he injured both shoulders and was exposed to hazardous smoke, fumes and dust during the terrorist attack at the World Trade Center. OWCP accepted the claim for bronchitis, bilateral shoulder tendinitis and instability, a right labral tear, a cervical disc herniation at C4-5, cervical radiculopathy and cervical spondylosis.

OWCP previously accepted that appellant sustained a strain of the right rotator cuff and a right shoulder subluxation due to a December 17, 1991 employment injury under file number xxxxxx765. In a decision dated April 17, 1995, it granted him a schedule award for an 11 percent permanent impairment of the right upper extremity under file number xxxxxx765.

On June 29, 2002 appellant underwent an arthroscopic labral and capsular repair of the right shoulder.On June 2, 2004 he underwent an anterior cervical discectomy and fusion at C5-6 with an anteriocervical prosthetic implant, anterior cervical plate fixation and anterior spinal cord decompression.

On June 14, 2005 appellant filed a claim for a schedule award. In an impairment evaluation dated February 21, 2005, Dr. David Weiss, an osteopath, applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*(A.M.A., *Guides*) (5th ed. 2001) and found that appellant had a 20 percent right upper extremity impairment due to loss of shoulder motion, the resection arthroplasty, a nerve deficit at C6 and pain. Dr. Weiss further found a six percent left upper extremity impairment due to loss of shoulder motion and pain.

On June 8, 2005 an OWCP medical adviser reviewed Dr. Weiss' findings and found that he improperly included the three percent impairment due to pain for each extremity.

In a decision dated December 8, 2005, OWCP granted appellant a schedule award for a 17 percent permanent impairment of the right upper extremity and a 3 percent permanent impairment of the left arm. By decision dated June 28, 2006, an OWCP hearing representative set aside the December 8, 2005 decision. She found that an OWCP medical adviser did not explain why he disallowed the rating of three percent for pain. The hearing representative further determined that OWCP failed to consider appellant's prior schedule award for a right upper extremity impairment under file number xxxxxx765.

On August 24, 2006 an OWCP medical adviser explained that Dr. Weiss' finding of pain was not supported by objective evidence. In a decision dated September 14, 2006, OWCP found that appellant was not entitled to a schedule award beyond the previously awarded combined 20 percent impairment for both extremities. It further determined that it failed to subtract the 11 percent previously awarded for the right arm from his schedule award and thus found that he had an overpayment of compensation.

By decision dated March 21, 2007, an OWCP hearing representative vacated the September 14, 2006 decision. He found that OWCP should refer appellant for a second opinion examination to determine the extent of any permanent impairment.

In a report dated May 19, 2007, Dr. David Rubinfeld, a Board-certifiedorthopedic surgeon and OWCP referral physician, found that appellant had a two percent permanent impairment of the right upper extremity due to his shoulder condition according to the fifth edition of the A.M.A., *Guides*. An OWCP medical adviser reviewed Dr. Rubinfeld's report and found that appellant had a three percent left upper extremity impairment and a seven percent right upper extremity impairment.

By decision dated July 10, 2007, OWCP determined that appellant was not entitled to an additional schedule award. On October 22, 2007 a hearing representative set aside the July 10, 2007 decision. He remanded the case for OWCP to obtain a supplemental report from Dr. Rubinfeld.

On January 26, 2008 Dr. Rubinfeld explained that his findings differed from the medical adviser because he used a standard different than that set forth in the A.M.A., *Guides* for determining normal range of motion.

On August 12, 2008 OWCP referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination. In a September 9, 2006 evaluation, Dr. Dennis found that he had an 11 percent right upper extremity impairment and a 4 percent impairment of the left upper extremity.

By decision dated October 24, 2008, OWCP granted appellant a schedule award for an additional one percent left upper extremity impairment.In a decision dated May 19, 2009, a hearing representative set aside the October 24, 2008 schedule award decision. She found that Dr. Dennis' report was insufficiently rationalized to constitute the weight of the evidence and remanded the case for a supplemental report.[2]

In a supplemental report dated July 13, 2009, Dr. Dennis concluded that appellant had an 18 percent impairment of the right upper extremity, a 17 percent impairment of the left upper extremity and a 5 percent impairment of the spine. In response to a second request for additional information, on December 3, 2009, Dr. Dennis advised that he was unable to offer further clarification.

On March 25, 2010 OWCP referred appellant to Dr. Ian Fries, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Weiss and Dr. Rubinfeld. In a report dated June 8, 2010, Dr. Fries reviewed the evidence of record and discussed appellant's current complaints of right shoulder instability, pain and loss of motion, neck pain, right hand paresthesias and loss of strength of the right upper extremity. He measured range of motion of the shoulder bilaterally and found mild weakness on the right of the biceps. Dr. Fries diagnosed an anterior cervical fusion, radiculopathy of the right upper extremity, unstable shoulders bilaterally after surgery and residual right shoulder instability and decreased motion. Using the cervical spine regional grid set forth in the sixth edition of the A.M.A., *Guides* at Table 17-2 on page 565, he found a six percent impairment of the cervical spine. Dr. Fries noted that the sixth edition of the A.M.A., *Guides* did not provide a method for evaluating an impairment of the extremities resulting from the spinal column. He thus alternatively assessed appellant's upper

[2] The hearing representative also set aside a preliminary overpayment determination.

extremity impairment due to motor and sensory deficits originating at C5-6 using Table 15-20 on page 434 of the A.M.A., *Guides*, used for determining impairments of the brachial plexus. Dr. Fries found that appellant had a nine percent impairment of the right upper extremity due to his cervical radiculopathy. He further found that using range of motion instead of the shoulder grid diagnoses provided a better method for rating impairment. Dr. Fries determined that appellant had a 12 percent right upper extremity impairment due to loss of range of motion of the shoulder and a 7 percent left upper extremity impairment due to loss of range of motion of the shoulder according to Table 15-34 on page 475.

On July 28, 2010 an OWCP medical adviser concurred with Dr. Fries' impairment rating. In a decision dated September 7, 2010, OWCP found that appellant had no more than the previously awarded 21 percent permanent impairment for both extremities together. Following a preliminary review, on March 8, 2011 an OWCP hearing representative set aside the September 7, 2010 decision. She found that Dr. Fries' report was entitled to special weight as the impartial medical examiner but that OWCP had not issued a schedule award for the additional four percent left upper extremity impairment.

By decision dated March 25, 2011, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the left upper extremity. Following a preliminary review, a hearing representative vacated the March 25, 2011 decision. She found that it was unclear from Dr. Fries' report whether appellant had a right upper extremity impairment due to his cervical condition and noted that he did not apply *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009) for rating upper extremity impairment originating in the spine.

In a supplemental report dated November 18, 2011, Dr. Fries reaffirmed his prior findings. He indicated that he had combined the 12 percent right shoulder impairment with a 9 percent cervical impairment to find a 20 percent right upper extremity impairment. Dr. Fries again asserted that appellant had a seven percent left upper extremity impairment.

On February 3, 2012 an OWCP medical adviser concurred with Dr. Fries' finding that appellant had a 20 percent right upper extremity impairment due to cervical radiculopathy of 9 percent and loss of shoulder motion of 12 percent.

By decision dated April 3, 2012, OWCP granted appellant a schedule award for a 7 percent permanent impairment of the left upper extremity and a 20 percent permanent impairment of the right upper extremity. The period of the award ran for 84.24 weeks from June 8, 2010 through January 18, 2012.

On April 3, 2012 OWCP advised appellant of its preliminary determination that he received an overpayment of $20,227.46 because he received a 28 percent permanent impairment of the right upper extremity when he was only entitled to a schedule award for a 20 percent permanent impairment. It found that he was not at fault in creating the overpayment.

On April 9, 2012 appellant, through his representative, requested an oral hearing. By letter dated July 11, 2012, he requested a review of the written record in lieu of an oral hearing.

By decision dated October 10, 2012, an OWCP hearing representativeaffirmed the April 3, 2012 schedule award decision. In a separate decision dated October 10, 2012, she found that appellant received an overpayment of $20,227.46 because OWCP paid him an incorrect schedule award. The hearing representativedetermined that he was not entitled to waiver as he had not submitted any financial information.

On appeal, appellant's attorney challenged the selection of Dr. Fries under the Physicians Directory System. He further argues that Dr. Fries did not apply *The Guides Newsletter* in rating the upper extremity impairment on the right. Counsel also contends that Dr. Fries did not sufficiently explain his left upper extremity rating and that OWCP should not declare an overpayment when a lower impairment rating is found under another sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT-- ISSUE 1

The schedule award provision of FECA[3] and its implementing federal regulations,[4] 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.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

The sixth edition requires identifying 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).[7] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that*The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009) is to be applied.[8]

---

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also*Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A.,*Guides* 494-531.

[8] *See G.N*., Docket No. 10-850 (issued November 12, 2010); *see alsosupra* note 6 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS-- ISSUE 1

OWCP accepted that appellant sustained bronchitis, bilateral shoulder tendinitis and instability, a right labral tear, a C4-5 disc herniation, cervical radiculopathy and cervicalspondylosis due to a September 11, 2001 employment injury. It further accepted that he had previously sustained a right rotator cuff strain and right shoulder subluxation due to a December 17, 1991 work injury. In a decision dated April 17, 1995, OWCP granted appellant a schedule award for an 11 percent right upper extremity impairment due to the December 17, 1991 injury.

On June 14, 2005 appellant filed a claim for an increased schedule award. He submitted a February 21, 2005 impairment evaluation from Dr. Weiss, who found a 20 percent right upper extremity impairment and a 6 percent upper extremity impairment using the fifth edition of the A.M.A., *Guides*. OWCP granted appellant a schedule award for a 17 percent permanent impairment of the right upper extremity and a 3 percent impairment of the left upper extremity; however, this decision was subsequently set aside by a hearing representative. It referred appellant to Dr. Rubinfeld, who found that appellant had a two percent permanent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides*.

OWCP determined that a conflict existed between Dr. Weiss and Dr. Rubinfeld and referred appellant to Dr. Fries for an impartial medical examination.When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[10] The Board finds that Dr. Fries, however, did not properly apply the sixth edition of the A.M.A., *Guides* and thus his opinion is insufficient to result the conflict in medical opinion.

In his June 8, 2010 report, Dr. Fries found that appellant had a six percent impairment of the cervical spine. FECA, however, specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.[11] Dr. Fries noted that the A.M.A., *Guides* did not provide a method for evaluating an upper extremity impairment originating from the spine. He used Table 15-20 on page 434 applicable to determining a brachial plexus impairment to rate the cervical impairment to the upper extremity. Dr. Fries concluded that appellant had a nine percent right upper extremity impairment as a result of motor and sensory deficits caused by a C5-6 disc lesion. In a supplemental report dated November 18, 2011, hereaffirmed his prior finding ofa nine percent impairment due to cervical radiculopathy

[9] *Barry Neutuch*, 54 ECAB 313 (2003);*David W. Pickett*, 54 ECAB 272 (2002).

[10] *See Darlene R. Kennedy*, 57 ECAB 414 (2006).

[11] *Francesco C. Veneziani*, 48 ECAB 572 (1997).

using Table 15-20 on page 434. An OWCP medical adviser concurred with his determination. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* should be used.[12] As neither Dr. Fries nor the medical adviser used *The Guides Newsletter* to determine appellant's nerve impairment due to his spinal injury, the case must be remanded for a proper determining of the extent of his impairment.

For the right and left shoulders, Dr. Fries found that it was more accurate to use range of motion than the diagnosis-based impairment. With respect to the shoulder, reference is first made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. A class of diagnosis may be determined from the Shoulder Regional Grid (including identification of a default grade value).[13] Table 15-5 also provides that, if motion loss is present for a claimant who has undergone certain shoulder surgeries, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Dr. Fries did not specifically indicate which diagnosis he identified under Table 15-5 and thus the Board is unable to determine whether he could properly use range of motion as an alternative assessment.[14]

On remand, OWCP should refer appellant for a new impartial medical examination to determine the extent of permanent impairment of the right and left upper extremity.[15] Following this and such further development as deemed necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.[16]

[12] *See supra* note 8.

[13] *See* A.M.A., *Guides* at 401-11.

[14] The Board notes that Dr. Fries generally diagnosed bilateral shoulder instability. Table 15-5 provides that unidirectional and multidirectional shoulder instability can be alternately assessed using range of motion but that bilateral multidirectional shoulder instability may not be assessed using range of motion. *Id*. at 404, Table 15-5.

[15] In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist. *See Guiseppe Aversa*, 55 ECAB 164 (2003). OWCP previously sought clarification from Dr. Fries and thus on remand it should refer appellant to a new impartial medical examiner.

[16] In view of the Board's determination of the schedule award issued, it is premature to address the question of whether appellant received an overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 14, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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