United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 13-940**
	)	**Issued: August 19, 2013**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Buffalo, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2013 appellant filed a timely appeal from an October 22, 2012 merit decision of the Office of Workers' Compensation Programs granting him a schedule award. 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 an eight percent permanent impairment of the right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On December 20, 2007 appellant, then a 58-year-old mail processor, filed a traumatic injury claim alleging that on December 20, 2007 he sustained right elbow and forearm strain in

[1] 5 U.S.C. § 8101 *et seq.*

the performance of duty. He stopped work on December 20, 2007 and returned to his usual employment on March 18, 2008. OWCP accepted the claim for a right elbow contusion and right rotator cuff syndrome. It further accepted that appellant sustained a recurrence of disability beginning April 21, 2008. On August 7, 2008 appellant underwent a debridement of the labrum and subscapular tendon with a partial acromionectomy and repair of a right rotator cuff tear. On April 8, 2009 he underwent a right shoulder manipulation and lysis of adhesions.

On May 5, 2010 appellant filed a claim for a schedule award.[2] OWCP requested that he submit an impairment evaluation from his attending physician using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). On June 28, 2010 appellant's attending physician indicated that he did not have a copy of the sixth edition of the A.M.A., *Guides*.

On July 9, 2010 OWCP referred appellant to Dr. Robert Ungerer, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 25, 2010, Dr. Ungerer measured range of motion of the right shoulder and found full strength with no atrophy. He further found some tenderness "lateral to the acromion process on the right" and pain with internal and external rotation. Dr. Ungerer diagnosed a right shoulder rotator cuff tendon tear, partial tears of the labrum and subscapular tendon and postoperative right shoulder adhesive capsulitis. He opined that appellant reached maximum medical improvement on December 4, 2009. Dr. Ungerer found that, under the sixth edition of the A.M.A., *Guides*, appellant "does not fit the diagnosed based impairment of a rotator cuff tear, since he does not have normal motion; therefore his impairment determination will be determined *via* the range of motion." He applied Table 15-34 on page 475 and found that, for the right shoulder, 128 degrees of flexion yielded a three percent impairment, 55 degrees extension yielded no impairment, 112 degrees abduction yielded a three percent impairment, 40 degrees adduction yielded no impairment, 55 degrees internal rotation yielded a two percent impairment and 85 degrees external rotation yielded no impairment, for a total of an eight percent permanent impairment of the right upper extremity due to loss of shoulder motion. Utilizing Table 15-35 and Table 15-36 on page 477, Dr. Ungerer applied a grade modifier of 1 for range of motion and Functional History (GMFH) and found no change from the total right upper extremity impairment of eight percent.

On September 14, 2010 OWCP's medical adviser reviewed Dr. Ungerer's report and concurred with his impairment determination.

By decision dated January 24, 2011, OWCP granted appellant a schedule award for an eight percent permanent impairment of the right upper extremity. The period of the award ran for 24.96 weeks from January 16 to July 9, 2011.[3]

[2] By decision dated April 30, 2010, OWCP reduced appellant's compensation effective May 9, 2010 based on its finding that he had the capacity to work as a surveillance systems monitor.

[3] OWCP adjusted the start date of appellant's compensation from December 4, 2009, the date of maximum medical improvement, to January 16, 2011 after noting that he could not receive compensation for a schedule award concurrently with disability compensation.

In a report dated May 28, 2011, Dr. Donald J. Nenno, II, a Board-certified orthopedic surgeon, evaluated appellant for pain and loss of motion in his right shoulder. Citing the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as a full thickness rotator cuff injury under Table l5-5 on page 403, which he found constituted a 10 percent impairment. Dr. Nenno further found a 5 percent impairment due to the acromioclavicular joint resection, for a total right upper extremity impairment of 15 percent.

On June 27, 2011 appellant, through his attorney, requested reconsideration. On October 1, 2011 OWCP's medical adviser reviewed Dr. Nenno's report and noted that he did not provide "any objective findings upon which to calculate data." He recommended that OWCP obtain a supplemental report from Dr. Nenno.

In response to OWCP's request for additional information, on November 30, 2011 Dr. Nenno indicated that appellant had 90 degrees forward flexion and decreased rotation. He stated, "According to Table 15.5 [appellant] has a rotator cuff full thickness injury with continued painful problems and resistance. I would feel that he has a 13 percent lost use based on [c]lass 1, Level E disability."

On February 29, 2012 OWCP's medical adviser determined that Dr. Nenno failed to apply grade modifiers and thus failed to properly apply the sixth edition of the A.M.A., *Guides* in reaching his impairment rating.

On April 3, 2012 OWCP again referred appellant to Dr. Ungerer for an impairment rating. In a report dated May 4, 2012, Dr. Ungerer noted that appellant had fractured his right shoulder on December 16, 2010 while working in private employment. He diagnosed status post right rotator cuff tear, partial tears of the labrum subscapularis tendon, postoperative right shoulder adhesive capsulitis and a new fracture of the right humerus proximal neck, unrelated to the prior work injury. Dr. Ungerer measured range of motion and found that, according to Table 15-34 on page 475 of the A.M.A., *Guides*, 102 degrees flexion constituted a three percent impairment, 98 degrees abduction constituted a three percent impairment, 52 degrees extension constituted no impairment, 24 degrees adduction constituted a one percent impairment and 80 degrees internal and external rotation constituted no impairment, for a total right upper extremity impairment of seven percent. He applied the grade modifiers set forth in Table 15-35 and Table 15-36 on page 477 to find no change from the seven percent upper extremity impairment. Dr. Ungerer indicated that he was unclear why he was reevaluating appellant after an injury to his shoulder that occurred in private employment.

On June 24, 2012 OWCP's medical adviser reviewed Dr. Ungerer's report and concurred with his findings.

In a report dated June 30, 2012, Dr. Nenno reviewed appellant's history of injury and the medical reports of record. He identified the diagnosis as a full-thickness rotator cuff tear causing pain and loss of motion. Dr. Nenno stated, "I would feel that he has a [g]rade C Level 6 disability which would result in a [six] percent permanent loss [of] use as far as the rotator cuff. [Appellant] also had acromioclavicular disease of a lesser degrees which would have given him an additional [4] percent loss [of] use resulting in a total [10] percent loss [of] use of the body as a result of his injuries."

On August 5, 2012 OWCP's medical adviser reviewed Dr. Nenno's report and related that he provided insufficient information to reach an impairment rating as he failed to provide grade modifiers or explain how he used the net adjustment formula. He recommended that OWCP request clarification from Dr. Nenno and indicated that he should also consider appellant's elbow contusion in reaching his impairment rating.

By letter dated September 19, 2012, OWCP requested that Dr. Nenno clarify how he determined the extent of appellant's permanent impairment.

In a decision dated October 22, 2012, OWCP denied modification of its prior decision as it found that the evidence showed that appellant had no more than an eight percent right upper extremity impairment. It noted that Dr. Nenno had not responded to its request for clarification.

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 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.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS

OWCP accepted that appellant sustained a right elbow contusion and right rotator cuff syndrome due to a December 20, 2007 employment injury. Appellant underwent a right rotator cuff repair and partial acromionectomy on August 7, 2008.

On July 9, 2010 Dr. Ungerer, an OWCP referral physician, diagnosed a tear of the right rotator cuff, partial labrum and subscapular tendon tears and adhesive capsulitis after surgery on the right shoulder. He rated appellant's right upper extremity impairment using range of motion.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] 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).

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

While diagnosis-based impairment is the method of choice for calculating impairment under the sixth edition of the A.M.A., *Guides*, in certain circumstances range of motion may be selected as an alternative approach in rating impairment.[9] Table 15-5 on page 401 of the A.M.A., *Guides*, the Shoulder Regional Grid, provides that for the relevant listed diagnoses of a rotator cuff tear, a tendon injury or post-traumatic degenerative joint disease that if motion loss is present, the impairment may be alternatively assessed using the range of motion section. The rating for loss of range of motion is not combined with a diagnosis-based impairment rating.[10] After measuring right shoulder motion, Dr. Ungerer found that, according to Table 15-34 on page 475, 128 degrees of flexion equaled a three percent impairment, 55 degrees extension equaled no impairment, 112 degrees abduction equaled a three percent impairment, 40 degrees adduction equaled no impairment, 55 degrees internal rotation equaled a two percent impairment and 85 degrees external rotation equaled no impairment. He added the impairment ratings to find an eight percent permanent impairment of the right upper extremity due to loss of shoulder motion. Dr. Ungerer then applied a grade modifier of 1 for range of motion and functional history using Table 15-35 and Table 15-36 on page 477, and concluded that there was no change from the eight percent right upper extremity finding. OWCP's medical adviser reviewed Dr. Ungerer's clinical findings and concurred with his impairment rating. Based on Dr. Ungerer's July 9, 2010 report, on January 24, 2011, OWCP granted appellant a schedule award for an eight percent permanent impairment of the right upper extremity.

On June 27, 2011 appellant requested reconsideration of the January 24, 2011 decision and submitted a May 28, 2011 report from Dr. Nenno, who found that he had a 10 percent impairment due to a full thickness rotator cuff tear according to Table 15-5 and a 5 percent impairment due to his acromioclavicular joint resection, for a total right upper extremity impairment of 15 percent. Dr. Nenno, however, did not provide the objective evidence upon which he based his impairment rating or explain how he applied grade modifiers. Further, the A.M.A., *Guides*, states that typically only one diagnosis is used per region to determine impairment.[11] As Dr. Nenno's report does not conform to the A.M.A., *Guides*, it is of diminished probative value.[12]

On November 30, 2011 Dr. Nenno related that appellant had forward flexion to 90 degrees and decreased rotation. Citing Table 15-5, he found a 13 percent impairment due to a class 1, level E rotator cuff injury. Dr. Nenno did not, however, identify the grade modifiers or

[9] *Id.* at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

[10] *Id*. at 405.

[11] *Id*. at 389, 499.

[12] *Mary L. Henninger*, 52 ECAB 408 (2001).

otherwise explain the basis for his finding of a Level E impairment. As he did not explain the protocols used in making the impairment determination his opinion is insufficient to establish permanent impairment.[13]

On April 3, 2012 OWCP again referred appellant to Dr. Ungerer for an impairment evaluation. On May 4, 2012 Dr. Ungerer noted that he had fractured his right shoulder on December 16, 2010 in private employment and questioned the reason for the reevaluation.[14] He measured range of motion of the right shoulder and properly found that 102 degrees flexion equaled a three percent impairment, 98 degrees abduction equaled a three percent impairment, 52 degrees extension constituted no impairment, 24 degrees adduction equaled a one percent impairment and 80 degrees internal and external rotation equaled no impairment, for a total right upper extremity impairment of seven percent.[15] Dr. Ungerer applied the grade modifiers to find no change from the seven percent upper extremity impairment.[16] OWCP's medical adviser reviewed his report and concurred with his findings. As this is less than the amount previously awarded appellant by OWCP, the evidence does not establish that he has more than eight percent right upper extremity impairment previously awarded.

On June 24, 2012 Dr. Nenno found that appellant had a 10 percent impairment due to his rotator cuff injury and acromioclavicular disease. He did not, however, provide grade modifiers or explain how he applied the provisions of the A.M.A., *Guides* in reaching his conclusions; consequently, his opinion is of diminished probative value.[17] Further, as previously noted, under the A.M.A., *Guides* in most circumstances only one diagnosis is used per region to rate an impairment.[18] OWCP requested clarification from Dr. Nenno but received no response. Appellant has not submitted probative medical evidence conforming to the sixth edition of the A.M.A., *Guides* supporting that he has more than an eight percent impairment of the right upper extremity.

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.

[13] *See Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment.

[14] The Board notes that in determining entitlement to a schedule award, preexisting impairments to the scheduled member are included. *See Peter C. Belkind*, 56 ECAB 580 (2005). There is no basis for including subsequently acquired conditions. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.5(d) (February 2013).

[15] A.M.A., *Guides* 475, Table 15-34.

[16] *Id*. at 477, Table 15-35 and Table 15-36.

[17] *See supra* note 12.

[18] A.M.A., *Guides* 389, 499.

CONCLUSION

The Board finds that appellant has no more than an eight percent permanent impairment of the right upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 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