United States Department of Labor
Employees' Compensation Appeals Board

O.C., Appellant	)	
and	)	**Docket No. 12-1858**
	)	**Issued: February 25, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, 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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 6, 2012 appellant, through his attorney, filed a timely appeal from a June 12, 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 12 percent right arm permanent impairment.

FACTUAL HISTORY

On January 26, 2009 appellant, then a 64-year-old custodian, filed an occupational claim (Form CA-2) alleging a shoulder injury causally related to moving boxes earlier that month. On

[1] 5 U.S.C. § 8101 *et seq.*

October 7, 2010 OWCP accepted the claim for right shoulder strain and cervical radiculopathy. Appellant subsequently claimed a schedule award for permanent impairment.

In a report dated April 1, 2011, Dr. Irwin Moskowitz, a Board-certified orthopedic surgeon, provided a history and results on examination. With respect to right shoulder range of motion, he reported 160 degrees of flexion, 100 degrees abduction, 65 degrees external rotation and 45 degrees internal rotation. Dr. Moskowitz noted hypesthesia in the digits consistent with a C6, C7 and C8 radiculopathy. As to permanent impairment, he applied Table 15-34 (shoulder range of motion) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Moskowitz found a three percent impairment for loss of flexion and abduction and six percent for loss of internal rotation. In addition, he found a one percent impairment based on a *Quick*DASH score of 47.[2] Dr. Moskowitz applied Table 15-21 for peripheral nerve impairments, identifying the axillary nerve (C6) and the radial nerve (C7 and 8) and finding an additional one percent for each nerve, resulting in a 15 percent right arm impairment.

In a report dated August 4, 2011, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, opined that appellant's right arm impairment was 12 percent. The medical adviser found that application of the range of motion table (Table 15-34) resulted in a 10 percent arm impairment. An additional one percent was found due to the *Quick*DASH score. Dr. Berman disagreed with Dr. Moskowitz with respect to a peripheral nerve impairment. He stated that only a C6 impairment was warranted based on electromyogram (EMG) and magnetic resonance imaging (MRI) scan results. Under the A.M.A., *Guides* Newsletter (July/August 2009) (*The Guides Newsletter*), the C6 nerve impairment was one percent.

By decision dated November 30, 2011, OWCP granted a schedule award for a 12 percent right arm permanent impairment. The period of the award was 37.44 weeks from April 1, 2011.

In a letter dated December 5, 2011, appellant, through his representative, requested a hearing before an OWCP hearing representative. A hearing was held on March 27, 2012.

By decision dated June 12, 2012, the hearing representative found the evidence did not establish more than a 12 percent right arm permanent impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing 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

[2] *Quick*DASH refers to Disabilities of the Arm, Shoulder and Hand, a functional assessment methodology discussed in the A.M.A., *Guides*.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] For schedule awards issued after May 1, 2009, the impairment is evaluated under the sixth edition.[7] As to peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[8]

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.[9] The implementing regulations states 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.[10]

ANALYSIS

In the present case, there are two probative medical reports with respect to a right arm permanent impairment. Dr. Moskowitz examined appellant and found that he had a 15 percent right arm impairment under the A.M.A., *Guides*. Dr. Berman found that appellant had a 12 percent impairment. While OWCP found the medical adviser's report to represent the weight of the evidence, the reports are of similar probative value on the issue.

With respect to application of Table 15-34, Dr. Moskowitz reported 160 degrees of shoulder flexion, 100 degrees abduction, 65 degrees external rotation and 45 degrees internal rotation. According to Table 15-34, there is no impairment for external rotation, a three percent arm impairment for flexion and three percent for abduction.[11] As noted by an OWCP medical adviser, Dr. Moskowitz incorrectly found a six percent impairment for internal rotation, as 45 degrees results in a four percent arm impairment under Table 15-34.[12]

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[5] *See Ronald R. Kraynak,* 53 ECAB 130 (2001); *August M. Buffa,* 12 ECAB 324 (1961).

[6] 20 C.F.R. § 10.404 (1999).

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

[8] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); s*ee also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). The Newsletter is included as Exhibit 4.

[9] 5 U.S.C. § 8123.

[10] 20 C.F.R. § 10.321 (1999).

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

[12] *Id.*

Since the loss of range of motion impairment is less than 12 percent, under Table 15-35 the grade modifier is one.[13] This may be adjusted by the functional history as provided under Table 15-36 and the *Quick*DASH score of 47 results in a net modification of +.5 percent.[14] Both Dr. Moskowitz and the medical adviser provided an additional one percent based on the functional history adjustment.

The disagreement between Dr. Moskowitz and the medical adviser occurs over whether a peripheral nerve impairment for the C7 or C8 nerve root was appropriate. The medical adviser stated that the diagnostic tests showed a C6 radiculopathy only and that nerve root should be considered.[15] Dr. Moskowitz examined appellant and noted hypesthesias that were consistent with C6, C7 and C8 radiculopathy. The case will be remanded for resolution of the conflict on this issue.

An OWCP medical adviser correctly noted that *The Guides Newsletter* (July/August 2009) is the appropriate method for evaluating peripheral neuropathies under FECA. The Newsletter provides separate impairments for C6, C7 and C8.[16] The Board notes that the medical adviser did not explain how the Newsletter was applied for a C6 nerve impairment. According to the table provided in the Newsletter, the default value of one percent may be adjusted (up to an additional one percent based on functional history and clinical studies) for mild sensory deficit, but the medical adviser applied the default value without further explanation.

Pursuant to 5 U.S.C. § 8123(a), the case will be remanded for selection of a referee physician and referral for a rationalized medical opinion on the issue presented. The referee physician should explain whether a C7 or C8 impairment exits, identify the applicable tables for rating impairment and apply the tables and Newsletter as warranted.[17] After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case must be remanded for resolution of a conflict in the medical evidence.

[13] *Id.* at 477, Table 15-35.

[14] A *Quick*DASH score of 47 is a grade modifier 2 under Table 15-7, resulting in a net modifier of 1 (2-1) under Table 15-36. According to Table 15-36 the impairment is thus 5 percent of 10 percent or .5 percent.

[15] There is an EMG report dated January 28, 2011 stating that the findings were suggestive of a C6 radiculopathy. The report also generally noted a mild sensory peripheral neuropathy.

[16] *The Guides Newsletter* (July/August 2009), Proposed Table 1. According to Proposed Table 1, there is a maximum of two percent for mild sensory deficit in the C6 nerve root and a maximum of one percent each for C7 and C8 for mild sensory deficit.

[17] The Board notes that, while an OWCP medical adviser may review a referee's report, it is referee who must properly resolve the conflict, not the medical adviser. *Thomas J. Fragale,* 55 ECAB 619 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 12, 2012 is set aside and the case remanded for action consistent with this decision of the Board.

Issued: February 25, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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