United States Department of Labor
Employees' Compensation Appeals Board

T.E., Appellant	)	
and	)	**Docket No. 12-1691**
	)	**Issued: January 29, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 6, 2012 appellant filed a timely appeal from the June 28, 2012 Office of Workers' Compensation Programs' (OWCP) schedule award decision. 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 sustained more than 11 percent permanent impairment of her right arm, for which she received a schedule award.

FACTUAL HISTORY

On January 26, 2007 appellant, then a 48-year-old mail processing clerk, filed an occupational disease claim alleging she experienced right shoulder pain in the performance of duty. OWCP accepted her claim for sprain/tear of the right shoulder and upper arm and rotator

[1] 5 U.S.C. § 8101 *et seq.*

cuff tear.[2] Appellant underwent an acromioplasty with rotator cuff tear repair on March 8, 2007 and returned to modified work beginning May 22, 2007. She was provided with a permanent rehabilitation position on July 16, 2007. On October 1, 2008 OWCP issued a loss of wage-earning capacity decision.

On February 13, 2008 appellant requested a schedule award. By decision dated February 9, 2009, OWCP granted her a schedule award for 11 percent impairment of the right arm, for a total of 34.32 weeks of compensation.

In a report dated May 23, 2011, Dr. Paul Ho, a treating Board-certified orthopedic surgeon, noted appellant's history. He provided findings which included that neck range of motion was mildly limited. The upper extremity neurological examination showed no reflex motor or sensory deficit. Circulation was normal to the fingers. Dr. Ho advised that, regarding the right shoulder, there was no muscle atrophy and a well-healed anterior four centimeter incision. He provided findings for range of motion of the right shoulder. Dr. Ho diagnosed a right shoulder recurrent and chronic rotator cuff tear, mild acromioclavicular joint and degenerative joint disease. He found that appellant reached maximum medical improvement. Dr. Ho noted that she previously assessed with 10 percent impairment to the right arm and advised that a new rating could be provided if requested.

On August 13, 2011 appellant filed a claim for increased schedule award.

By letter dated September 22, 2011, OWCP advised appellant and Dr. Ho to submit medical evidence based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). No response was received.

By letter dated December 2, 2011, OWCP referred appellant for a second opinion to Dr. Norman Mindrebo, a Board-certified orthopedic surgeon. In a report dated December 22, 2011, Dr. Mindrebo noted appellant's history of injury and treatment and utilized the A.M.A., *Guides.* He examined her and provided findings for the right arm. Appellant had well-healed incisions, some tenderness to palpation at the longhead of the biceps and anterior acromion. Dr. Mindrebo determined that she had significant weakness against external rotation resistance, abduction resistance and forward flexion resistance as well as extreme limitations of active motion. Appellant had limited forward flexion of 90 degrees, extension of 30 degrees, abduction of 90 degrees, adduction of 30 degrees, internal rotation of 70 degrees and external rotation of 60 degrees. Dr. Mindrebo determined that she was otherwise neurologically intact as to strength testing of the right arm, elbow, wrist and digits. He referred to Table 15-34 and determined that appellant had a 10 percent impairment of the right upper extremity for loss of range of shoulder motion.[3] Dr. Mindrebo explained that the range of motion impairment was based upon three percent for forward flexion, one percent for extension, three percent for abduction, one percent for adduction and two percent for internal rotation. He advised that appellant reached maximum

[2] The record reflects that appellant has a prior claim for a September 11, 2005 injury. OWCP accepted the claim for abdominal wall strain.

[3] A.M.A., *Guides* 475.

medical improvement as January 5, 2009, the date of the examination utilized for the prior award.

In a March 4, 2012 report, Dr. Brain M. Tonne, OWCP's medical adviser reviewed the medical evidence and utilized the A.M.A., *Guides.* He concurred with the findings of Dr. Mindrebo, but stated that Dr. Mindrebo had failed to apply a functional history grade modifier to his calculations. Regarding permanent functional impairment, Dr. Tonne explained that Dr. Mindrebo documented a 10 percent right arm impairment rating based upon range of motion loss. He noted that this was correct based upon Table 15-34.[4] This was consistent with a range of motion grade modifier 1 according to Table 15-35.[5] Dr. Tonne noted that Dr. Mindrebo did not include a functional history grade modifier. He indicated that appellant would be entitled to a grade 2 functional history modifier due to pain symptoms with normal activity and ability to perform self-care activities with modification but unassisted according to Table 15-7.[6] Dr. Tonne explained that the net modifier was +1, the upper extremity impairment should be adjusted by five percent of the impairment rating. He explained that the 10 percent impairment would consequently be multiplied by 5 percent. Dr. Tonne determined that this equated to 10 percent plus .5 percent or 10.5 percent, which he rounded up to 11 percent. He found that appellant had 11 percent right arm impairment instead of the 10 percent assessed by Dr. Mindrebo. Dr. Tonne explained that this was consistent with the previously awarded 11 percent right arm impairment rating.

By decision dated March 22, 2012, OWCP denied appellant's claim for an increased schedule award. It found that the medical evidence did not support a greater impairment rating.

On March 28, 2012 appellant requested a review of the written record.

By decision dated June 28, 2012, OWCP's hearing representative affirmed the March 22, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing federal regulations[8] 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.[9] For decisions after

[4] A.M.A., *Guides* 477.

[5] *Id.*

[6] *Id.* at 406.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a).

February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10] For decisions issued after May 1, 2009, the sixth edition will be used.[11]

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).[12] 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). Such a range of motion impairment stands alone and is not combined with a diagnosis-based impairment.[13] Impairment ratings for limited shoulder motion are derived from Table 15-34 on page 475.[14] Under Table 15-35 on page 477, a grade modifier value is assigned to the impairment ratings calculated from Table 15-34. Table 15-36 on page 477 provides standards for adjusting the grade modifier value based on a claimant's functional history.[15]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[16]

ANALYSIS

Regarding appellant's right upper extremity, appellant's treating physician, Dr. Ho, and the second opinion physician, Dr. Mindrebo, opined that she had a 10 percent impairment of the right upper extremity. Both physicians found that the stand alone range of motion method was appropriate. Dr. Tonne concurred with Dr. Ho's and Dr. Mindrebo's findings with the exception of granting an additional percent for functional history and which resulted in an 11 percent impairment of the right upper extremity.

The Board finds that Dr. Tonne properly utilized the findings provided by Dr. Mindrebo to reach the rating of impairment for the right shoulder. Under Table 15-34 on page 475, right shoulder flexion of 90 degrees resulted in three percent upper extremity impairment and extension of 30 degrees resulted in one percent impairment. Abduction of 90 degrees gave three percent and adduction of 30 degrees yielded one percent. Internal rotation of 70 degrees yielded two percent and external rotation of 60 degrees resulted in zero percent impairment. Dr. Tonne

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

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

[12] *See* A.M.A., *Guides* 401-11 (6th ed. 2009).

[13] *Id.* at 405, 475-78.

[14] *Id.* at 475, Table 15-34.

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

[16] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

found additional impairment of one percent for a functional history grade modifier that exceeded the range of motion impairment class. He noted that appellant's 10 percent impairment was consistent with a range of motion grade modifier of one (Table 15-35) but noted that she had a grade 2 functional history modifier due to pain symptoms with normal activity, able to perform self-care activities with modification but unassisted according to Table 15-7.[17] Dr. Tonne explained that the net modifier was +1, and that the upper extremity impairment should be adjusted by five percent of the impairment rating which was consistent with Table 15-36 at page 477. He applied the net modifier and explained that 10 percent multiplied by 5 percent yielded 10.5 percent. Dr. Tonne rounded up to 11 percent. It is proper OWCP policy to round the calculated percentage of impairment to the nearest whole number.[18] Dr. Tonne found that appellant had 11 percent right upper extremity impairment. As this was consistent with the previously awarded 11 percent right upper extremity impairment rating, appellant was not entitled to a greater award.[19] The Board finds that Dr. Tonne correctly utilized the A.M.A., *Guides* to determine that appellant had an impairment of 11 percent of the right upper extremity.

On appeal, appellant asserts that she has greater impairment and that she is no longer able to perform tasks that she could perform before her injury, but she did not submit sufficient medical evidence conforming with the A.M.A., *Guides* establishing that she has a greater impairment. The Board has also held that factors such as employability or limitations on daily activities have no bearing on the calculation of a schedule award.[20]

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.[21]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained more than 11 percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

[17] A.M.A., *Guides* 406.

[18] *J.Q.*, 59 ECAB 366 (2008). *See Carl J. Cleary*, 57 ECAB 563 (2006) (fractions are rounded down from 0.49 and up from 0.50).

[19] When a current impairment duplicates a prior impairment, the schedule award benefits are reduced by the period of compensation paid under the schedule award for an earlier injury. *T.S.*, Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

[20] *Kimberly M. Held*, 56 ECAB 670 (2005).

[21] Appellant submitted new evidence on appeal. However, the Board may not consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2012 Office of Workers' Compensation Programs' decision is affirmed.

Issued: January 29, 2013
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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