United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer**	)	**Docket No. 12-1876** **Issued: March 14, 2013**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2012 appellant, through her attorney, filed a timely appeal from the June 13, 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 met her burden of proof to establish that she has more than a 10 percent permanent impairment of her right arm, for which she received schedule awards.

FACTUAL HISTORY

OWCP accepted that on July 15, 2002 appellant, then a 48-year-old rural carrier, sustained a right shoulder sprain due to performing her work duties. Appellant underwent right shoulder surgery in November 2002 which was authorized by OWCP. Under a different file,

[1] 5 U.S.C. §§ 8101-8193.

OWCP accepted that appellant sustained a new traumatic injury on October 12, 2003 in the form of affections of the right shoulder region. In June 2005, appellant underwent additional right shoulder surgery in June 2005.[2]

By decision dated June 4, 2009, OWCP awarded appellant a schedule award for a five percent permanent impairment of her right arm.

In a November 3, 2009 decision, an OWCP hearing representative found that a September 25, 2009 report of Dr. Steven Allon, an attending Board-certified orthopedic surgeon, warranted further development of the medical evidence by OWCP. It was explained that Dr. Allon had correctly identified that appellant had undergone a resection of the distal clavicle, which was not indicated in OWCP's statement of accepted facts. OWCP's hearing representative also noted that Dr. Howard Zeidman, a Board-certified orthopedic surgeon, had served as an impartial medical specialist in order to resolve a conflict in the medical opinion evidence between Dr. Allon and Dr. Henry Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. However, Dr. Zeidman also failed to address the November 2002 resection surgery. OWCP's hearing representative therefore remanded the case to OWCP to amend the statement of accepted facts and to request that Dr. Zeidman provide a supplemental report.

Following development of the medical evidence in accordance with the remand, OWCP issued a September 23, 2010 decision in which it denied appellant's claim that she was entitled to additional schedule award compensation.

In a December 27, 2010 decision, OWCP set aside its September 2010 decision finding that Dr. Zeidman failed to provide sufficient clarification of the reports he produced as an impartial medical specialist. The case was remanded to OWCP for referral of appellant to a new impartial medical specialist.

OWCP referred appellant Dr. Zohar Stark, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on appellant's permanent impairment. In an April 7, 2011 report, Dr. Stark concluded that appellant had 10 percent permanent impairment of her right arm under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). Dr. Stark stated:

> "According to the [sixth edition of the A.M.A., *Guides*], it is my opinion that [appellant] is entitled 10 percent impairment of her right upper extremity. That percentage was arrived at as follows. Patient had a resection of her distal clavicle, and according to the [A.M.A., *Guides*], Table 15-5, page 403, she is considered a [c]lass 1 with 10 percent default. Her functional history, Table 15-7, page 406, gives her a [g]rade [m]odifier of 1. Her physical exam[ination] modifier, Table 15-8, page 408, entitles her to a [g]rade [m]odifier of 1. Her clinical studies, Table 15-9, page 410, allow her a [g]rade [m]odifier of 1. The total adjustment is 0, and, therefore, she is entitled to 10 percent permanent impairment of her right upper extremity."

[2] Appellant's surgery included resection of her right distal clavicle.

In a May 12, 2011 report, Dr. Magliato discussed Dr. Stark's report and explained that he concurred with Dr. Stark's impairment rating methods.

As Dr. Magliato was a part of the initially identified conflict, a second OWCP medical adviser was requested to review the medical records. In his October 1 and November 7, 2011 reports, Dr. Andrew Merola, a Board-certified orthopedic surgeon, discussed his review of the medical evidence. He stated that he concurred with Dr. Stark's conclusion of 10 percent impairment.

By decision dated December 8, 2011, OWCP awarded appellant compensation for an additional five percent impairment of her right arm for a total right arm impairment of 10 percent.

Appellant requested a hearing with an OWCP hearing representative. At the hearing held on March 27, 2012, counsel argued that there was no conflict in the medical opinion evidence between Dr. Allon and Dr. Magliato and therefore a referral to an impartial medical specialist was improper.

In a June 13, 2012 decision, OWCP's hearing representative affirmed OWCP's December 8, 2011 decision finding that Dr. Stark properly calculated appellant's 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 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5] For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[6]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401.

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*.

[6] *See* FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

After the Class of Diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[7] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[8]

Section 8123(a) of FECA provides in pertinent part: "If there is 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 an examination."[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[10] In situations where 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.[11]

ANALYSIS

In the present case, OWCP accepted that on July 15, 2002 appellant sustained a right shoulder sprain due to performing her work duties. Appellant underwent right shoulder surgery in November 2002 which was authorized by OWCP. Under a different file, OWCP accepted that she sustained a new traumatic injury on October 12, 2003 in the form of affections of the right shoulder region. In June 2005, appellant underwent additional right shoulder surgery in June 2005.[12]

Appellant received schedule awards for 10 percent permanent impairment of her right arm. The Board finds that OWCP properly relied on the April 7, 2011 report of Dr. Stark, a

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[7] *See* A.M.A., *Guides* 401-11 (6th ed. 2009). Table 15-5 also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, 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 impairment. *Id.* at 405, 475-78.

[8] *Id.* at 23-28.

[9] 5 U.S.C. § 8123(a).

[10] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[11] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[12] Appellant's surgery included resection of her right distal clavicle.

Board-certified orthopedic surgeon, who served as an impartial medical specialist, in granting appellant this amount of schedule award compensation.[13]

The Board has carefully reviewed the opinion of Dr. Stark and finds that it is based on a complete and accurate factual and medical history and contains medical rationale in support of its opinion on impairment. Therefore, the weight of the medical evidence with respect to appellant's arm impairment rests with Dr. Stark's opinion.

In an April 7, 2011 report, Dr. Stark properly concluded that appellant had a 10 percent permanent impairment of her right arm under the standards of the sixth edition of the A.M.A., *Guides*. He stated that appellant had had a resection of her distal clavicle and according to Table 15-5 on page 403 she was considered a class 1 with a 10 percent default value. Appellant's functional history modifier (Table 15-7, page 406) gave her a grade modifier of 1, her physical examination modifier (Table 15-8, page 408) entitled her to a grade modifier of 1 and her clinical studies modifier (Table 15-9, page 410) allowed her a grade modifier of 1. Dr. Stark noted that the total adjustment was zero and, therefore, appellant was entitled to compensation for a 10 percent permanent impairment of her right arm.

The Board notes that Dr. Stark chose the correct diagnosis-based impairment upon which to base his evaluation and his modifier values were appropriate given the medical findings of record. Dr. Stark properly applied the relevant standards of the A.M.A., *Guides* and explained his calculations.

The Board finds that appellant did not submit sufficient medical evidence to show that she has more than a 10 percent permanent impairment of her right arm, for which she received schedule awards.

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 did not meet her burden of proof to establish that she has more than a 10 percent permanent impairment of her right arm, for which she received schedule awards.

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[13] OWCP properly found a conflict in the medical evidence between Dr. Allon, an attending Board-certified orthopedic surgeon, and Dr. Magliato, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser. On appeal, counsel argued that there was no conflict in the medical evidence between the two physicians, but he did not adequately explain this assertion.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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