United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 13-1087**
	)	**Issued: October 21, 2013**
DEPARTMENT OF VETERANS AFFAIRS, EDWARD HINES, JR., VETERANS AFFAIRS HOSPITAL, Hines, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2013 appellant filed a timely appeal from the December 7, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which granted 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 to review this decision.

ISSUE

The issue is whether appellant has a seven percent impairment of his right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On February 8, 2011 appellant, a 45-year-old supply technician, sustained a traumatic injury to his right shoulder in the performance of duty while lifting boxes from a cart to a pallet.

[1] 5 U.S.C. § 8101 *et seq.*

A magnetic resonance imaging (MRI) scan obtained on February 25, 2011 showed a large near full-thickness undersurface tear of the distal supraspinatus tendon.

OWCP accepted appellant's claim for a partial tear of the right rotator cuff and right rotator cuff impingement syndrome. Appellant underwent arthroscopic acromioplasty, distal clavicle resection and rotator cuff repair on May 13, 2011. The operative report described the area of the tear as a very high-grade, partial thickness tear with just the membrane and tissue left intact.

Appellant filed a claim for a schedule award. Dr. Mark A. Neault, the attending Board-certified orthopedic surgeon, examined appellant on June 11, 2012 and found that he had reached maximum medical improvement. Appellant had no significant discomfort with activities of daily living. His shoulder was not affecting his sleep pattern. "It gets a little stiff and achy at times." Appellant had no problem lifting or carrying, though he was trying not to carry too much. He took no pain medication and had no sleep issues due to his shoulder. Objective clinical findings were essentially normal. Dr. Neault released appellant to return to full duty with no restrictions on activity and he was released from care.

On August 3, 2012 Dr. Mark Sokolowski, a consulting Board-certified orthopedic surgeon, evaluated appellant's permanent impairment. He noted that appellant had a large full-thickness rotator cuff tear. Dr. Sokolowski found that appellant had some limitation in range of motion on the right relative to the left with some episodic stiffness that precluded him from full participation in activities of daily living. "He still has pain on occasion as well."

Based on a diagnosis of rotator cuff injury, full-thickness tear, Dr. Sokolowski gave a default impairment rating of five percent of the right upper extremity. He increased this rating to seven percent based on appellant's functional history and the February 25, 2011 MRI scan, which confirmed the tear.

An OWCP medical adviser reviewed Dr. Sokolowski's impairment evaluation and found that it was accurate.

On December 7, 2012 OWCP issued a schedule award for a seven percent impairment of appellant's right upper extremity.

On appeal, appellant notes that his work injury caused him a great amount of pain, as well as disability before and after surgery. He underwent physical therapy for nearly nine months. "To-date I still experience pain and discomfort."

LEGAL PRECEDENT

The schedule award provision of FECA[2] and the implementing regulations[3] set forth the number of weeks of compensation payable for permanent impairment from loss or loss of use of

[2] *Id*. at § 8107.

[3] 20 C.F.R. § 10.404.

scheduled members, functions and organs of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[4]

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. OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

ANALYSIS

Diagnosis-based impairment is the primary method of evaluation for the upper extremities under the sixth edition of the A.M.A., *Guides*. The first step is to choose the diagnosis that is most applicable for the region being assessed. Selection of the optimal diagnosis requires judgment and experience. If more than one diagnosis can be used, the highest causally related impairment rating should be used. This will generally be the more specific diagnosis. Typically, one diagnosis will adequately characterize the impairment and its impact on activities of daily living.[7]

Specific criteria for that diagnosis determine which class is appropriate, from no objective problem to a very severe problem approaching total function loss. The A.M.A., *Guides* assigns a default impairment rating for each diagnosis by class, which may be slightly adjusted using such grade modifiers or nonkey factors as functional history, physical examination and clinical studies.[8]

Dr. Sokolowski, the consulting orthopedic surgeon who evaluated appellant's impairment, based his rating on a diagnosis of rotator cuff injury, full-thickness tear. The MRI scan obtained on February 25, 2011 showed a near full-thickness tear, which Dr. Neault, the attending orthopedic surgeon, confirmed during surgery on May 13, 2011. OWCP accepted appellant's claim for a partial tear.

While appellant's diagnosis is more precisely described as a partial-thickness tear, for which he can receive no more than a five percent impairment rating,[9] Dr. Sokolowski impairment based on rated a full-thickness tear. The Board finds this reasonable under the

[4] *Danniel C. Goings*, 37 ECAB 781 (1986).

[5] 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[7] A.M.A., *Guides* 387 and 389 (6th ed. 2009).

[8] *Id*. at 497.

[9] *Id*. at 402 (6th ed. 2009) (Table 15-5, Shoulder Regional Grid).

circumstances. As Dr. Neault observed during the operation, appellant had a very high-grade, partial-thickness tear with just the membrane and tissue left intact.

Table 15-5, page 403, of the A.M.A., *Guides* provides the impairment ratings for rotator cuff injury, full-thickness tear. The default rating for residual loss, functional with normal motion, is five percent. Dr. Sokolowski adjusted this rating to six percent due to appellant's moderate functional history[10] and further adjusted the rating to seven percent due to the very severe pathology confirmed by MRI scan on February 25, 2011.

However, if a grade modifier or nonkey factor, such as a clinical study, was used for primary placement in the regional grid, that same specific finding may not be used again to determine a grade modifier.[11] The A.M.A., *Guides* gives an instructive example of this on page 418. In the example, a 44-year-old woman sustained a full-thickness rotator cuff tear that left her with residual pain on active range of motion, which interfered with normal activities, such as dressing and bathing. An MRI scan showed a moderate full-thickness rotator cuff tear, for which she underwent surgical repair. The diagnosis used for her impairment rating is the same as appellant's rotator cuff injury, full-thickness tear with residual loss, functional with normal motion. The default impairment rating, like appellant's, is five percent. As the woman had pain with normal activity, the default impairment rating is increased to six percent. But no adjustment is made for clinical studies because, as in appellant's case, the MRI scan was used as the basis for diagnosis. The woman's final rating, the A.M.A., *Guides* explains, is six percent.

Accordingly, the Board finds that Dr. Sokolowski improperly used the February 25, 2011 MRI scan as a grade modifier. The MRI scan was already used to place appellant within the regional grid and it cannot be used once more to modify the default rating. This leaves appellant with a one percent adjustment for his moderate functional history and an increase of the default rating to six percent. The Board will modify OWCP's December 7, 2012 schedule award to reflect that appellant has a six percent permanent impairment of his right upper extremity and will affirm the schedule award, as modified.

Appellant still experiences pain and discomfort, but that does not entitle him to compensation for his permanent impairment. His impairment rating makes allowance for most of the functional losses accompanying his pain.[12] The fact that appellant continues to experience pain and discomfort beyond the period of his schedule award is no basis for increasing his compensation. FECA provides a limited number of weeks of compensation for permanent impairment. For the complete loss of an upper extremity, as with amputation at the shoulder, FECA provides a maximum of 312 weeks of compensation,[13] even though the employee must live the rest of his life without an arm. Partial losses are compensated proportionately.[14]

[10] *Id*. at 406 (Table 15-7).

[11] *Id*. at 405 and 407.

[12] *Id*. at 25.

[13] 5 U.S.C. § 8107(c)(1).

[14] *Id*. § 8107(c)(19).

Appellant's six percent impairment entitles him to six percent of 312 weeks, or 18.72 weeks of compensation. This is so regardless of whether he continues to experience pain and discomfort.

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 has no more than a six percent impairment of his right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: October 21, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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