

**United States Department of Labor
Employees' Compensation Appeals Board**

A.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lincolnton, NC, Employer**

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**Docket No. 13-1961
Issued: April 22, 2014**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 26, 2013 appellant filed a timely appeal of a March 22, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. The Board also has jurisdiction over a June 12, 2012 nonmerit decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established that he is entitled to a greater than 10 percent impairment of the left arm and one percent impairment for his left leg, for which he received schedule awards; and (2) whether OWCP properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a June 14, 2011 decision, the Board affirmed a June 9, 2010 decision of OWCP's hearing representative, which affirmed a December 22, 2009 schedule award decision for a six percent permanent impairment of appellant's left hand.² In affirming OWCP's decision, the Board found that OWCP properly relied upon the opinions of Dr. Donald McQueen, a second opinion Board-certified orthopedic surgeon and an OWCP medical adviser, that appellant had no more than a 30 percent impairment of the left index finger, which was converted to a 6 percent impairment of the left hand.³ The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.⁴

On February 14, 2012 appellant's treating physician, Dr. Maher F. Habashi, a Board-certified orthopedic surgeon, concluded that appellant had an 18 percent impairment of his left arm. He reported that appellant had limited left shoulder abduction to 140 degrees and tenderness over the acromioclavicular (AC) joint. In a March 27, 2012 report, Dr. Habashi concluded that appellant had an eight percent impairment of the left leg based on tenderness to palpations over medial joint line of the left knee, crepitus and increased pain with activities.

OWCP's medical adviser concluded on April 25, 2012 that there was no basis for Dr. Habashi's finding of eight percent impairment of the left leg. He explained that there were no diagnostic studies, no objective evidence to support the impairment rating and no explanation to support the rating. The medical adviser concluded that, based on Table 16-3, page 509 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a class 1 impairment due to soft tissue injury contusion, resulting in one percent impairment of the left lower extremity. Additionally, based on Table 15.5, page 403 of the A.M.A., *Guides*, he concluded that appellant had a class 1 impairment due to arthritis of the AC joint, resulting in a 10 percent impairment of the left upper extremity.

In a decision dated May 9, 2012, OWCP granted appellant a schedule award for a 10 percent impairment of his left arm, minus the 5 percent previously paid, for an additional schedule award of 5 percent impairment to the left arm.⁵ It also granted him a schedule award

² Docket No. 10-1850 (issued June 14, 2011).

³ OWCP's hearing representative, in a June 16, 2009 decision, had set aside a March 6, 2009 schedule award for a five percent impairment of appellant's left arm. When issuing the December 22, 2009 schedule award, OWCP noted that Dr. McQueen found that appellant had not reached maximum medical improvement with regards to the injuries to his left knee and shoulder and, thus, the case was not in posture for an impairment rating relative to these affected areas.

⁴ On November 30, 2005 appellant, then a 39-year-old city carrier, filed a traumatic injury claim alleging that on that day he sustained injuries to his whole body due to a motor vehicle accident. OWCP accepted the claim for a cervical sprain and thoracic sprain, which was subsequently expanded to include the conditions of cerebral concussion, left knee internal derangement, left shoulder, hand and knee contusions and left supraspinatus partial tear.

⁵ OWCP noted that the prior schedule award, for a six percent impairment to the left hand, was converted to a five percent impairment of the left arm.

for one percent impairment to his left leg. The number of weeks was 18.48 and the period of the award was February 14 to June 22, 2012.

On May 14, 2012 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on September 13, 2012.

By decision dated November 28, 2012, OWCP's hearing representative affirmed the May 9, 2012 schedule award decision.

On December 4, 2012 appellant requested reconsideration and submitted a November 1, 2012 impairment rating by Dr. Habashi in support of his request. In a November 1, 2012 report, Dr. Habashi noted an employment injury date of November 30, 2005 and injuries of lumbar and cervical strains; left knee internal derangement; left wrist and hand contusion; and left shoulder contusion with rotator cuff tear. He stated that appellant reached maximum medical improvement on February 14, 2012 for his left shoulder and March 27, 2012 for his left knee. Dr. Habashi concluded that appellant had an 18 percent permanent impairment of the left arm pursuant to the A.M.A., *Guides*. Using Table 15-34, page 475, he assigned class 1 for limited motion and muscle weakness which resulted in a 10 percent impairment. Next, Dr. Habashi determined that there was a five percent impairment for pain using Table 3-1, page 40. He then concluded that distal clavicle bone loss was a class 1 using Table 15-5, page 403, resulting in a three percent impairment. Dr. Habashi then combined these impairment ratings to find a total 18 percent permanent impairment of the left arm. He determined that appellant had an eight percent permanent impairment of the left leg based on a three percent impairment for pain using Table 3-1, page 40 and a five percent impairment for muscle weakness and finding of meniscus tear by magnetic resonance imaging (MRI) scan using Table 16-3, page 509.

On February 28, 2013 OWCP's medical adviser reviewed Dr. Habashi's November 1, 2012 impairment rating and concluded that appellant was not entitled to an additional schedule award. He noted that no new findings were presented warranting an additional schedule award. The medical adviser also noted that claims for pain and muscle weakness claims are subjective and nonverifiable.

By decision dated March 22, 2013, OWCP denied appellant's request for an additional schedule award.

On May 31, 2013 appellant requested reconsideration.

By decision dated June 12, 2013, OWCP denied appellant's reconsideration request.⁶

⁶ The Board notes that, following the June 12, 2013 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time it issued its final decision. See 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

Under section 8107 of FECA⁷ and section 10.404 of the implementing federal regulations⁸ schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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.⁹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹⁰ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹²

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through 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.¹³

Section 8123(a) provides that, 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.¹⁴ 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.¹⁵

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

¹⁰ A.M.A., *Guides* (6th ed., 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹¹ *Id.* at 383-419.

¹² *Id.* at 411.

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹⁴ 5 U.S.C. § 8123(a). See *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁵ *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.*, 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

ANALYSIS

OWCP accepted the claim for cervical sprain, thoracic sprain, cerebral concussion, left knee internal derangement, left shoulder, hand and knee contusions and left supraspinatus partial tear. On December 22, 2009 it granted appellant a five percent impairment of his left arm. By decision dated May 9, 2012, OWCP granted him an additional 5 percent impairment for his left arm, for a total 10 percent impairment of the left arm. It also granted appellant a one percent impairment for his left leg. It is his burden of proof to establish increased impairment as determined under the sixth edition of the A.M.A., *Guides*.

In a November 1, 2012 report, Dr. Habashi concluded that appellant had an 18 percent left arm impairment using the A.M.A., *Guides*. Using Table 15-34, page 475, he assigned class 1 for limited motion and muscle weakness, resulting in a 10 percent impairment. Next, Dr. Habashi found a five percent impairment for pain using Table 3-1, page 40. Using Table 15-5, page 403, he assigned class 1 for appellant's distal clavicle bone loss, which resulted in a three percent impairment. Dr. Habashi then combined these impairment ratings to find a total 18 percent permanent impairment of the left arm. He also determined that appellant had an eight percent permanent impairment of the left leg based on a three percent impairment for pain using Table 3-1, page 40 and a five percent impairment for muscle weakness and finding of meniscus tear by MRI scan using Table 16-3, page 509. In a February 28, 2013 report, OWCP's medical adviser reviewed Dr. Habashi's report and concluded that appellant was not entitled to an additional schedule award as there were no new findings supportive of an additional award.

The Board finds there is an unresolved conflict in the medical opinion evidence concerning the extent of permanent impairment arising from appellant's accepted employment injury. OWCP's medical adviser concluded that appellant was not entitled to an additional schedule award for his left arm and left leg while Dr. Habashi found appellant was entitled to an additional schedule award for his left arm and left leg using the A.M.A., *Guides*. Therefore, in order to resolve the conflict in the medical opinions, the case will be remanded to OWCP for referral of the case record, including a statement of accepted facts, and, if necessary, appellant, to an impartial medical specialist for a determination regarding the extent of appellant's left arm and left leg impairments as determined in accordance with the relevant standards of the A.M.A., *Guides*. After such further development as OWCP deems necessary, a *de novo* decision should be issued regarding the extent of appellant's left arm and left leg impairments.

CONCLUSION

The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion evidence. In view of the Board's decision on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs' dated June 12 and March 22, 2013 are set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: April 22, 2014
Washington, DC

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

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

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