United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 14-126**
	)	**Issued: April 3, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Palatine, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 24, 2013 appellant filed a timely appeal from the June 12, 2013 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 his burden of proof to establish more than a six percent permanent impairment of his right arm, for which he received a schedule award.

FACTUAL HISTORY

On May 9, 2001 appellant, then a 49-year-old manual distribution clerk, sustained injury when he was lifting boxes weighing between 15 and 35 pounds. He felt pain in his right arm and elbow while lifting. Appellant's claim was accepted for right lateral epicondylitis and right

[1] 5 U.S.C. §§ 8101-8193.

brachial neuritis. He underwent right ulnar surgery on September 23, 2005 and right lateral epicondylectomy and radial tunnel release surgery on January 9, 2006. The procedures were authorized by OWCP.[2]

On September 3, 2010 appellant filed a claim for a schedule award due to his accepted conditions.

In a September 3, 2010 report, Dr. Jacob Salomon, an attending Board-certified orthopedic surgeon, described appellant's medical history and reported findings on physical examination. Under Table 15-4 on page 399 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), appellant's right lateral epicondylitis would be rated as class 1 with mild pain, an abnormal magnetic resonance imaging (MRI) scan study which shows postoperative changes of the right elbow surgery and decreased activities of daily living. Dr. Salomon indicated that the functional history grade modifier was 2, the physical examination grade modifier was 1 and the clinical studies grade modifier was 1, which resulted in a final grade D impairment under Table 15-4. This resulted in six percent impairment of the right arm for the right lateral epicondylitis. Dr. Salomon rated appellant's bilateral carpal tunnel syndrome using Table 15-21 and found that he had five percent permanent impairment in each arm on this basis. The combined upper extremity deficit was then 11 percent in the right arm (epicondylitis deficit combined with carpal tunnel deficit) and 5 percent in the left arm (carpal tunnel deficit). Appellant's date of maximum medical improvement was August 16, 2010.

On September 22, 2010 Dr. Neil Ghodadra, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that his rating differed from that of Dr. Salomon because he had included bilateral carpal tunnel syndrome in his assessment -- a condition which had not been accepted as work related. According to Table 15-4 on page 399, appellant's epicondylitis corresponded to a class 1 rating with abnormal MRI scan findings and mild pain. Electromyogram (EMG) testing also showed mild changes. Dr. Ghodadra stated that this corresponded to six percent permanent impairment of appellant's right arm.

In a September 29, 2010 decision, OWCP granted appellant schedule award for six percent permanent impairment of his right arm. The award ran for 18.72 weeks from August 16 to December 25, 2010.

In a November 12, 2012 report, Dr. Anatoly Rozman, an attending Board-certified physical medicine and rehabilitation physician, discussed appellant's medical history and examination findings. He stated that EMG testing revealed carpal tunnel syndrome but did not show a strong diagnostic evidence of radiculopathy in spite of Dr. Salomon's finding of a cervical radiculopathy. Dr. Rozman noted that a February 28, 2011 MRI scan of the lumbar

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[2] In a September 13, 2012 decision, the Board set aside a September 12, 2011 OWCP decision, which denied appellant's request for modification of a loss of wage-earning capacity decision and directed further development. Docket No. 12-809. In a January 16, 2013 decision, OWCP vacated its June 1, 2007 wage-earning capacity decision as the evidence of file supported modification of the decision. It further found that there was no rationalized medical evidence showing that appellant had disability due to his accepted work injuries on or after July 12, 2010. This matter is not the subject of the present appeal.

spine revealed that appellant had disc protrusions at C3-4, C4-5 and C5-6 with mild stenosis.[3] This problem was managed conservatively with a long course of physical therapy and appellant reached maximal improvement on August 16, 2010 as per Dr. Salomon's opinion. Dr. Rozman stated that appellant still had pain to palpation of the right radial epicondyle, but noted that he continued to work. He indicated that Phalen's test was positive on both hands, but noted that carpal tunnel syndrome condition was not an accepted work condition in this case. Dr. Rozman then applied Table 15-4 on page 399 of the sixth edition of the A.M.A., *Guides* to find that appellant's right lateral epicondylitis fell under class 1 which was equal to a five percent impairment of his right arm. He found that applying the grade modifiers from Table 15-7, Table 15-8 and Table 15-9 meant that appellant had six percent impairment of his right arm due to this diagnosis-based condition. Dr. Rozman further stated:

> "For right brachial neuritis/radiculitis, I used Table 17-2 on page 563. This injury belongs to the class 3 with interval disc herniation at multiple levels with radiculopathy, single clinical appropriate level, with preserved muscle extensors and flexors and positive Spurling's maneuver. This impairment rating belongs to 90 percent of the upper extremity impairment. The grade modifier for this condition from [Table] 17-7 physical examination is grade modifier 2, for clinical studies modifier 2, for functional history Table 17-6 modifier is 2, the adjuster combined modifier -3, which brings permanent impairment for this condition to 16 percent of the WPI [whole person impairment]. For this claim, I need to convert right lateral epicondylitis six percent of the upper extremity to the WPI, which will be equal four percent. Altogether for right lateral epicondylitis and cervical radiculitis/cervical disc disease will be 16 percent plus 4 percent, altogether 20 percent of the WPI impairment for this case."

On January 14, 2012 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that Dr. Rozman had recommended 20 percent WPI impairment, 16 percent of which was for brachial neuritis. He stated that the rating was flawed because Dr. Rozman recommended a WPI rating, but FECA only recognized extremity impairment. Dr. Garelick indicated that Dr. Rozman's impairment rating was not consistent with appellant's upper extremity EMG study which was negative for any proximal electrical abnormality. Given the negative study, there was no documented pathology and no impairment could be awarded for the brachial neuritis. Dr. Garelick stated that Dr. Rozman recommended six percent impairment of appellant's right arm for the residual lateral epicondylitis according to Table 15-4 on page 399 of the sixth edition of the A.M.A., *Guides*. He noted that he had reviewed Dr. Rozman's rationale and believed that he had accurately interpreted and applied the A.M.A., *Guides* for this condition. Dr. Garelick found that appellant had six percent permanent impairment of his right arm with maximum medical improvement occurring on July 9, 2006, six months post right arm surgery.

In a June 12, 2013 decision, OWCP affirmed its September 29, 2010 decision noting that Dr. Garelick provided a proper impairment rating based on the findings of the case record,

[3] The record contains the findings of the EMG testing from February 18, 2011 and the MRI scan testing from February 28, 2011. The EMG testing showed "no strong electrodiagnostic evidence of cervical radiculopathy."

including the report of Dr. Rozman. It found that appellant had not submitted probative medical evidence showing that he had more than six percent permanent impairment of his right arm.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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.[6] 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.[7]

A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[8] In determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[9]

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 elbow, reference is made to Table 15-4 (Elbow Regional Grid) beginning on page 398. After the class of diagnosis (CDX) is determined from the Elbow 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).[10] Under

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] *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.

[8] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[9] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(3) (January 2010). This portion of OWCP procedures provide that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[10] *See* A.M.A., *Guides* 398-400 (6th ed. 2009).

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.[11]

ANALYSIS

OWCP accepted appellant's claim for right lateral epicondylitis and right brachial neuritis and appellant filed a claim for a schedule award. In a September 29, 2010 decision, it granted appellant schedule award for a six percent permanent impairment of his right arm. The award ran for 18.72 weeks from August 16 to December 25, 2010.

Appellant contends that he was entitled to additional schedule award compensation, but the Board finds that he did not submit sufficient medical evidence to establish greater impairment. He submitted a November 12, 2012 report of Dr. Rozman, an attending Board-certified orthopedic surgeon. The Board finds that Dr. Rozman properly applied the standards of the sixth edition of the A.M.A., *Guides* to find that appellant had a six percent right arm impairment due to right lateral epicondylitis. Dr. Rozman applied Table 15-4 on page 399 to find that appellant's right lateral epicondylitis fell under class 1 which was equal to a five percent impairment of his right arm. He properly found that applying the grade modifiers for functional history, physical examination and clinical studies (from Table, 15-7, Table 15-8 and Table 15-9 on pages 406 through 411) to the net adjustment formula meant that appellant had six percent impairment of his right arm due to this diagnosis-based condition.

The Board further notes that Dr. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, properly pointed out that Dr. Rozman's conclusion that appellant's 20 percent impairment of the whole person was incorrect. Dr. Garelick properly noted that a schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[12] Dr. Rozman's evaluation in this regard was based on the accepted condition of right brachial neuritis, but Dr. Garelick advised that this evaluation was improper because the medical evidence of record at the time of the evaluation, including diagnostic testing, did not establish the existence of residuals of that condition in appellant's right arm.[13] For these reasons, appellant did not establish that he has more than a six percent permanent impairment of his right arm.[14]

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.

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

[12] *See supra* note 8.

[13] The record reveals that appellant had bilateral carpal tunnel syndrome, but this condition has not been accepted as work related and there is no evidence that it preexisted appellant's May 9, 2001 work injury. *See supra* note 9.

[14] Appellant submitted additional evidence after OWCP's June 12, 2013 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a six percent permanent impairment of his right arm, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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