United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 14-873**
	)	**Issued: August 14, 2014**
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTE SAFFORD, Safford, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 7, 2014 appellant filed a timely appeal of a February 19, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying an additional 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 consider the merits of the case.

ISSUE

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

FACTUAL HISTORY

On April 5, 2012 appellant, then a 47-year-old warehouse worker, strained his right elbow while loading a heavy bundle of cardboard onto a wooden pallet. He felt a pop in his right

[1] 5 U.S.C. § 8101 *et seq.*

elbow. Appellant's physician diagnosed sprains and strains of the shoulder and upper arm beginning on April 9, 2012. OWCP accepted his claim for sprain of the right elbow and forearm, with a radial collateral ligament and a biceps tendon rupture.

Appellant underwent a magnetic resonance imaging (MRI) scan on June 7, 2012 which demonstrated a mildly retracted full-thickness avulsion of the biceps tendon from the radial bicipital tuberosity. On June 11, 2012 Dr. John Medlen, a Board-certified orthopedic surgeon, reviewed the MRI scan and diagnosed biceps tenosynovitis and biceps tendon rupture on the right. He recommended surgery. On August 1, 2012 Dr. Medlen performed an examination of the right elbow under anesthesia with right elbow arthroscopy, reattachment of the avulsed biceps tendon distally off the radial tuberosity and a release of the median nerve and lateral antebrachial cutaneous nerve with exploration of brachial artery and vein.

Dr. Medlen examined appellant on March 21, 2013 and found that his right elbow demonstrated full range of motion, no instability, no areas of focal tenderness and normal sensation. He noted that appellant had loss of strength in flexion and supination of 4/5.

In an April 2, 2013 letter, OWCP asked Dr. Medlen to provide an impairment rating with a detailed description of objective findings and application of the sixth edition of the A.M.A., *Guides.*

In a report dated April 17, 2013, Dr. Medlen stated that appellant had reached maximum medical improvement. Appellant had some weakness in flexion and supination of his forearm as well as a lack of range of motion in extension and supination. Dr. Medlen stated, "At this point in time, according to my clinical judgment and [American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2]] [appellant] has approximately a 50 percent permanent partial impairment of the involved limb on the basis of loss of motion, weakness and some chronic intermittent pain."

OWCP requested that Dr. Ellen Pichey, a Board-certified family practitioner and medical adviser, provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.[3] On June 20, 2013 Dr. Pichey noted the accepted conditions of right elbow radial collateral ligament sprain, biceps tendon rupture with repair and reattachment of the biceps tendon at the elbow. She applied the A.M.A., *Guides* and found that a distal biceps tendon rupture was a class 1 impairment with a default impairment value of five percent.[4] Dr. Pichey stated that impairment for clinical studies was used for placement and that impairment for physical examination was grade modifier 1.[5] She further found that the functional history grade

[2] A.M.A., *Guides*, 6th ed. (2009).

[3] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[4] A.M.A., *Guides* 399, Table 15-4.

[5] *Id.* at 408, Table 15-8.

modifier was 1[6] and that using the net adjustment formula, the default position was not modified.[7]

Dr. Pichey reviewed Dr. Medlen's impairment rating of 50 percent and found that he did not provide any rationale based on the protocols of the sixth edition of the A.M.A., *Guides.* She stated that he gave an approximation based on his clinical judgment and an assessment of the A.M.A., *Guides*. Dr. Pichey noted that the highest impairment rating for the elbow was 46 percent of the upper extremity based on a total elbow arthroplasty. Therefore, Dr. Medlen's impairment rating of 50 percent was not in accordance with the A.M.A., *Guides*.

By decision dated July 16, 2013, OWCP granted appellant a schedule award for five percent impairment of his right upper extremity.

Appellant requested reconsideration on February 3, 2014. He requested an impartial medical examination.

In a February 19, 2014 decision, OWCP denied modification of the July 16, 2013 schedule award. It found that Dr. Medlen's rating was of reduced weight as he did not correlate his findings to the A.M.A., *Guides*. OWCP found insufficient medical evidence to create a conflict or to establish more than five percent impairment of his right upper extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[8] and its implementing regulations[9] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[10]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers

[6] *Id.* at 406, Table 15-7.

[7] *Id.* at 411.

[8] 5 U.S.C. §§ 8101-8193, 8107.

[9] 20 C.F.R. § 10.404.

[10] For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11]

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[12]

ANALYSIS

OWCP accepted that appellant sustained right elbow radial collateral ligament sprain, biceps tendon rupture with repair and reattachment of the biceps tendon at the elbow as a result of his April 5, 2012 employment injury. Appellant's attending physician, Dr. Medlen found that appellant had 50 percent impairment of his right upper extremity due to loss of strength, loss of range of motion and pain. The Board notes that Dr. Medlen did not provide any citations to Chapter 15 of the A.M.A., *Guides* in support of his impairment rating. Dr. Medlen did not provide any adjustments to the upper extremity formula as required by the sixth edition of the A.M.A., *Guides*. The April 2, 2013 OWCP letter requested an impairment rating by Dr. Medlen comporting with the standards of the A.M.A., *Guides.* Dr. Medlen's April 17, 2013 report listed a 50 percent impairment rating without addressing how the sixth edition of the A.M.A., *Guides* were applied.

OWCP referred the medical evidence to Dr. Pichey, a medical adviser, for correlation of Dr. Medlen's findings to the A.M.A., *Guides*. Dr. Pichey provided a detailed report with citations to the A.M.A., *Guides* for her diagnosis-based estimate, the functional history, clinical studies and physical examination adjustments. She utilized the elbow regional grid and noted that distal biceps tendon rupture with residual loss of strength but functional with normal range of motion was a class 1 impairment with a default C impairment value of five percent.[13] Dr. Pichey stated that clinical studies grade modifier was not applicable as it was a component of defining the diagnosis-based estimate.[14] She found that impairment for physical examination was grade modifier 1[15] due to the range of motion found by Dr. Medlen and that the functional history grade modifier was 1[16] due to appellant's mild pain. Dr. Pichey used the net adjustment formula which equaled zero, and found the default position was not modified resulting in five percent impairment of the right upper extremity.[17] The Board finds that Dr. Pichey's rating properly utilized the A.M.A., *Guides* and represents the weight of medical opinion.

[11] A.M.A., *Guides* 411.

[12] *Linda Beale*, 57 ECAB 429 (2006).

[13] A.M.A., *Guides* 399, Table 15-4.

[14] *Id.* at 414, Example 15-4.

[15] *Id.* at 408, Table 15-8.

[16] *Id.* at 406, Table 15-7.

[17] *Id.* at 411.

In support of his request for reconsideration, appellant contended that there was a conflict of medical opinion evidence between Dr. Medlen and Dr. Pichey. When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA. It provides that when 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 and resolve the conflict of medical evidence.[18] The Board finds that Dr. Medlen's impairment rating is of reduced probative value. Dr. Medlen did not provide any discussion of his findings with reference to the appropriate sections of the A.M.A., *Guides* or provide any clear reasoning for an impairment rating of 50 percent. As noted by Dr. Pichey, Dr. Medlen's rating exceeds the impairment provided by the A.M.A., *Guides* for an elbow injury.[19] As noted, when the attending physician's report does not comport with the A.M.A., *Guides*, OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[20]

The Board finds that appellant has no more than five percent impairment of his right arm for which he has received a schedule award.

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 five percent impairment of his right upper extremity for which he has received a schedule award.

[18] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[19] A.M.A., *Guides* 399-400. The highest value for a class 3 impairment of the elbow is 46 percent impairment. There are no class 4 diagnosis-based estimates of the elbow which include impairment ranges from 50 to 100 percent of the upper extremity.

[20] *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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