United States Department of Labor
Employees' Compensation Appeals Board

S.V., Appellant	)	
and	)	**Docket No. 14-969**
	)	**Issued: August 20, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2014 appellant, through her attorney, filed a timely appeal from a January 15, 2014 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 the decision.

ISSUE

The issue is whether appellant met her burden of proof to establish a permanent impairment due to the accepted right shoulder and back conditions.

On appeal appellant's attorney asserts that the January 15, 2014 decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In an October 8, 2010 decision, the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits for the accepted orthopedic conditions on August 1, 2008 on the grounds that she had no employment-related residuals, that she did not establish that she had any continuing employment-related disability or condition after that date due to these conditions, and that she did not meet her burden of proof to establish entitlement to disability compensation for the accepted emotional condition.[2] The law and facts of the previous Board decision are incorporated herein by reference.

On September 22, 2011 appellant's attorney requested a schedule award. He submitted a September 2, 2011 report in which Dr. William N. Grant, a Board-certified internist, noted the history of injury and accepted diagnoses. Counsel reported appellant's complaints of pain and paresthesias in the right shoulder, radiating into the arm and painful paresthesias radiating into both lower extremities. Dr. Grant indicated that appellant was at maximum medical improvement with a *Quick*DASH score of 53. Right shoulder examination demonstrated tenderness to palpation and limited range of motion. On examination of the lumbar spine, heel/toe and straight leg tests were positive with limited range of motion and diminished deep tendon reflexes. Dr. Grant referenced Table 15-5, Shoulder Adjustment Grid, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[3] He indicated that appellant had a class 1 upper extremity impairment and, after applying the net adjustment formula to each individual calculation, advised that she had 2 percent upper extremity impairment due to the right shoulder sprain, 1 percent impairment due to right rotator cuff syndrome, and 1 percent impairment due to right shoulder region disorder; and that under Table 15-20, Brachial Plexus Impairment, she had an additional 13 percent impairment due to peripheral nerve impairment, for a total 17 percent impairment of the right upper extremity. Dr. Grant further found that, under Table 16-12, Lower Extremity Peripheral Nerve Impairment, she had a class 2, moderate motor deficit of the sciatic nerve, applied the net adjustment formula and concluded that appellant had 25 percent impairment of each lower extremity.

In a November 17, 2011 report, Dr. Nabil F. Angley, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Grant's September 2, 2011 report. He indicated that Dr. Grant's impairment rating summaries were not clear and did not comport with all the requirements required by OWCP. Dr. Angley indicated that it would be appropriate to refer appellant for a second-opinion evaluation.

[2] Docket No. 10-249 (issued October 8, 2010). On January 5, 2003 appellant, a transportation security screener, injured her back and right shoulder lifting luggage. She stopped work that day. OWCP accepted that appellant sustained employment-related right shoulder sprain and impingement, right rotator cuff tendinitis, and back sprain and she was placed on the periodic compensation rolls. On November 4, 2003 appellant underwent arthroscopic repair of labral and rotator cuff tears. The claim was later expanded to include aggravation of lumbar degenerative disc disease and mood disorder.

[3] A.M.A., *Guides* (6th ed. 2008).

In December 2011, OWCP referred appellant to Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon, for a second opinion evaluation and impairment calculation. In a December 14, 2011 report, Dr. Obianwu noted his review of the statement of accepted facts and medical record, and appellant's complaints of incapacitating problems and constant pain in the right shoulder and lower back. He provided physical examination findings, noting complaints of pain on range of motion testing of the right shoulder and a vaguely positive straight leg raising test on the left. Dr. Obianwu diagnosed mild impingement syndrome with labral tear of the right shoulder; status post arthroscopy with repair of anterior labral tear and arthroscopic debridement of partial surface tearing, status post subacromial decompression; and lumbar spondylosis with involvement, especially of the lower two levels of the lumbar spine. He reviewed the 2003 operative report and objective testing including magnetic resonance imaging (MRI) scan studies of the right shoulder and lumbar spine. Dr. Obianwu indicated that, based on his findings, appellant had no residuals remaining in the right shoulder or lower back attributable to the accepted conditions, noting that she had no neurologic deficits in the lower extremities, and only degenerative changes on objective studies. He concluded that, because of this, appellant had no permanent impairment due to the right shoulder and lower back conditions.

In a March 15, 2012 report, Dr. Angley reviewed Dr. Obianwu's December 14, 2012 report. He advised that, based on Dr. Obianwu's findings, appellant had no residuals due to the January 5, 2003 employment injury that would entitle her to a schedule award.

In a May 29, 2013 decision, OWCP denied appellant's claim for a schedule award finding that the medical evidence did not show a measurable impairment. Appellant, through her attorney, timely requested a hearing, that was held on October 25, 2013. Appellant's attorney indicated that a new medical report was forthcoming.

In a September 27, 2013 report, Dr. Jessica Glazer Volsky, an osteopath, noted appellant's history of injury and her complaint of constant right shoulder and lower back pain with weakness and numbness of all extremities that limited her activities of daily living. Examination of the right shoulder demonstrated tenderness to palpation and decreased range of motion with forward flexion to 100 degrees, extension to 35 degrees, abduction to 80 degrees, internal rotation to 50 degrees and supination to 40 degrees. Dr. Volsky diagnosed right sprain of shoulder and upper arm, right disorder of bursae and tendons and other affections of the shoulder region. She advised that, in accordance with section 15.7 and Table 15-34 of the A.M.A., *Guides*, based on range of motion deficits, appellant had 12 percent impairment of the right upper extremity. Dr. Volsky provided no lower extremity impairment rating.[4]

In a January 15, 2014 decision, an OWCP hearing representative indicated that Dr. Volsky did not provide an opinion on causal relationship regarding her findings. She affirmed the May 20, 2013 decision on the grounds that appellant had not presented evidence demonstrating that her work injury resulted in a permanent impairment.

[4] Appellant submitted additional medical evidence that did not include an impairment rating.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.[8]

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).[9] Under the sixth edition, for upper extremity impairments 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).[10] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11] The sixth edition of the A.M.A., *Guides* also provides that under certain circumstances, range of motion may be selected as an alternative approach in rating impairment. An impairment rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[12]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.[13] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[10] *Id*. at 385-419.

[11] *Id*. at 411.

[12] *Id*. at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

[13] *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[14]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[15] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009 *The Guides Newsletter*.[16]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to 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.[17] In determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[18]

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish a ratable impairment. The accepted conditions are right shoulder sprain and impingement, right rotator cuff tendinitis and back sprain. Appellant's wage-loss compensation and medical benefits for the orthopedic conditions were terminated on August 1, 2008, and affirmed by the Board on October 8, 2010.[19] The determination that appellant no longer had residuals of the accepted orthopedic conditions as of August 1, 2008 does not preclude consideration of a schedule award for any impairment related to her accepted conditions discovered or realized at a later date.[20]

The record contains three impairment evaluations, one by Dr. Grant, an attending internist, who concluded that appellant had a total 17 percent right upper extremity impairment under Table 15-5, for diagnoses of right shoulder sprain, right rotator cuff syndrome, right shoulder disorder, and peripheral nerve impairment. Section 15.2e of the A.M.A., *Guides* indicates that in rating the shoulder under Table 15-5, the evaluator is to choose the most significant diagnosis and rate only that diagnosis, and use the modifiers for increasing impairment.[21] Dr. Grant did not follow these instructions but rather found impairments due to

[14] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[15] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[16] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[18] *Peter C. Belkind*, 56 ECAB 580 (2005).

[19] *Supra* note 2.

[20] *B.S.*, Docket No. 09-195 (issued October 9, 2009).

[21] A.M.A., *Guides*, *supra* note 3 at 390.

right shoulder sprain, right rotator cuff syndrome, and right shoulder region disorder for two percent, one percent and one percent respectively which he added for a four percent impairment. He additionally found 13 percent impairment for peripheral nerve impairment under Table 15-20. Under the A.M.A., *Guides*, peripheral nerve impairments may be combined with diagnosis-based impairments as long as the diagnosis-based impairment does not encompass the nerve impairment.[22] Dr. Grant did not provide an explanation as to why appellant was entitled to a peripheral nerve impairment for the diagnosed conditions, merely noting on right upper extremity examination that there was tenderness to palpation of the right deltoid and limited range of motion. Thus, his report is of limited probative value regarding appellant's right arm impairment. Dr. Grant further concluded that under Table 16-12 appellant had 25 percent impairment of each leg due to a moderate motor deficit caused by sciatic nerve injury. In this case, however, as noted above, in rating lower extremity impairment caused by a spinal injury, section 3.700 of OWCP procedures indicate that the proposed tables outlined in a July/August 2009 *The Guides Newsletter* are to be used.[23] Dr. Grant did not follow guidelines for determining lower extremity peripheral nerve impairment. He did not utilize the proposed tables with regard to appellant's lower extremities. Moreover, Dr. Grant did not provide medical rationale explaining how the accepted soft tissue injury, lumbar sprain, resulted in bilateral impairment to the lower extremities.[24] His opinion is therefore of diminished probative value regarding his lower extremity impairment ratings.[25]

In a September 27, 2013 report, Dr. Volsky, an attending osteopath, rated appellant's right upper extremity utilizing the range of motion method. The A.M.A., *Guides* provides that, under certain circumstances, range of motion may be selected as an alternative approach in rating impairment. An impairment rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[26] Dr. Volsky, who did not provide an impairment rating for appellant's lower extremities, indicated that appellant had three percent impairment due to loss of right shoulder forward flexion, one percent impairment due to loss of extension, six percent impairment due to loss of abduction, and two percent impairment due to loss of internal rotation, for a total 12 percent right arm impairment. Section 15.7 of the A.M.A., *Guides* provides that diagnosis-based impairment is the method of choice for calculating impairments, and the range of motion method is to be used principally as a factor in the adjustment grid modifiers.[27] Section 15.7a describes the methodology to be used in assessing motion and explains that both active and passive measurements are to be provided after a warm-up period and that three separate measurements are to be done.[28] Dr. Volsky included only one

[22] *Id*. at 419; *see C.K.*, Docket No. 09-2371 (issued August 18, 2010).

[23] *Supra* note 16.

[24] *See Lela M. Shaw*, 51 ECAB 372 (2000).

[25] *M.W.*, Docket No. 13-928 (August 15, 2013).

[26] A.M.A., *Guides*, *supra* note 3 at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

[27] *Id*. at 461.

[28] *Id*. at 461-64.

measurement which she did not identify as active or passive. She also did not provide medical reasoning to explain why any permanent impairment was causally related to the resolved accepted conditions.[29] Thus, her report is of diminished probative value regarding whether appellant has a work-related right arm impairment.

Dr. Obianwu, who reviewed the medical record including diagnostic studies, provided a comprehensive second-opinion evaluation for OWCP. He advised that based on his findings, appellant had no residuals remaining in the right shoulder or lower back attributable to the accepted conditions, noting that she had no neurologic deficits in the lower extremities, and only degenerative changes on objective studies. He concluded that, because appellant had no measurable residual of the accepted conditions, she had no impairment of the right shoulder or lower back.

As the reports of Dr. Grant and Dr. Volsky do not comport with the A.M.A., *Guides*, they are of diminished probative value and insufficient to establish appellant's right arm or bilateral lower extremity impairment causally related to her employment conditions.[30] The Board finds that OWCP was proper in placing the weight of evidence on Dr. Obianwu.

CONCLUSION

The Board finds that appellant did not establish a permanent impairment due to the accepted right shoulder and back conditions.

[29] *See Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to her employment).

[30] *See M.P.*, Docket No. 13-2087 (issued April 8, 2014).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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