United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 14-432**
	)	**Issued: July 18, 2014**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Ayer, MA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the Director
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 December 18, 2013 appellant, through his attorney, filed a timely appeal from an August 22, 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 established that he sustained more than a five percent permanent impairment to the left arm, for which he received a schedule award.

On appeal, counsel contends that the Board should approve appellant's schedule award as rated by Dr. Gary Perlmutter, a Board-certified orthopedic surgeon, rather than the lower rating calculated by an OWCP medical adviser.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, then a 39-year-old correctional officer, sustained a left rotator cuff strain as a result of lifting a case of milk out of a food cart on December 11, 2010 while in the performance of duty. He was placed on the periodic rolls. Appellant underwent left shoulder rotator cuff surgery on July 12, 2011. He accepted a temporary alternative-duty assignment as a telephone monitor and returned to work on March 26, 2012.

On June 5, 2013 appellant, through his attorney, filed a claim for a schedule award. He submitted a December 11, 2010 computerized tomography (CT) scan of the cervical spine and a February 24, 2011 magnetic resonance imaging (MRI) scan of the left shoulder, which revealed partial thickness tears.

Appellant submitted reports dated March 23, 2011 through September 10, 2012 from Dr. Laurence Higgins, a Board-certified orthopedic surgeon, who diagnosed a high-grade partial thickness bursal-sided left rotator cuff tear for which surgery was performed on July 12, 2011. Appellant was released to work on March 26, 2012 without restrictions.

In a May 8, 2012 report, Dr. Perlmutter reviewed appellant's medical history and conducted a physical examination. He diagnosed left rotator cuff tear and status post rotator cuff repair. Dr. Perlmutter advised that appellant had reached maximum medical improvement and that no further medical treatment or diagnostic studies were indicated. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found that appellant had a six percent permanent impairment of the left upper extremity. Dr. Perlmutter stated that, although appellant had a high grade partial thickness rotator cuff tear, surgery required treatment similar to that seen with a full thickness tear because when high grade partial thickness tears are debrided they become full thickness tears. Furthermore, a suture anchor was utilized at the time of surgery in order to repair the rotator cuff which was typically seen with full thickness rotator cuff tears.

Using Table 15-5, page 403,[2] the Shoulder Regional Grid: Upper Extremity Impairments Table, diagnosis of rotator cuff injury, full thickness tear and per criteria of residual loss, functional with normal motion, a full thickness rotator cuff tear he assigned appellant to class 1 with a mild range default of a five percent upper extremity impairment. Dr. Perlmutter assigned a grade modifier 2 for Functional History (GMFH) due to pain with normal activity and a *Quick*DASH score of 43. He assigned a grade modifier 1 for Physical Examination (GMPE) due to minimal palpatory findings and mild decrease of range of motion from normal. Dr. Perlmutter found that a grade modifier for Clinical Studies (GMCS) was not applicable. Utilizing the net adjustment formula, he adjusted the default value C to grade D, which equaled a six percent permanent impairment of the left upper extremity.

On June 14, 2013 Dr. Morley Slutsky, an OWCP medical adviser and Board-certified occupational medicine specialist, reviewed the medical evidence of record. He determined that appellant had a five percent permanent impairment of the left upper extremity according to the

[2] Table 15-5, page 401-05, of the sixth edition of the A.M.A., *Guides* is entitled: *Shoulder Regional Grid: Upper Extremity Impairments*.

sixth edition of the A.M.A., *Guides*. Dr. Slutsky found that appellant reached maximum medical improvement on September 10, 2012. He stated that the impairing diagnosis was a partial thickness rotator cuff tear with residual dysfunction in the left shoulder. Dr. Slutsky placed appellant into class 1. He explained that Dr. Perlmutter had converted a partial thickness rotator cuff tear into a full thickness tear; however, this was not stated in the operative note. Soft tissue and synovitis was removed, the partial tear was not first converted to a full tear and then repaired.

Dr. Slutsky assigned a grade modifier 2 for functional history on the basis that appellant did not have to perform functional modifications in order to achieve self-care activities. He assigned a grade modifier 1 for physical examination due to a mild crepitus with motion under section 15.7, page 464, for measuring range of motion.[3] Dr. Slutsky disagreed with Dr. Perlmutter that a grade modifier for clinical studies was not applicable and assigned a grade modifier 2 for clinical studies based on a February 24, 2011 MRI scan of the left shoulder which demonstrated a partial thickness articular surface tear.[4] Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Slutsky found that (2-1) + (1-1) + (2-1) resulted in a net grade modifier 2, resulting in an impairment class 1, grade E, totaling a five percent permanent impairment of the left upper extremity.

By decision dated August 22, 2013, OWCP granted appellant a schedule award for five percent permanent impairment to the left upper extremity, to run for 15.6 weeks for the period September 10 through December 28, 2012.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] For schedule awards after

[3] Section 15.7a, page 461-64, of the sixth edition of the A.M.A., *Guides* is entitled: *Clinical Measurements of Motion.*

[4] The Board notes that the MRI scan was dated February 24, 2011, not December 24, 2011 as stated in OWCP's medical adviser's report, which constitutes a harmless error.

[5] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[6] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See also* 5 U.S.C. § 8107.

May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[7]

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).[8] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[10]

ANALYSIS

OWCP granted appellant a schedule award for a five percent permanent impairment to the left arm due to the accepted left rotator cuff partial thickness tear. Appellant has the burden to establish more than a five percent permanent impairment of the left arm due to his employment-related condition. It is his burden to submit sufficient evidence to establish the extent of permanent impairment.[11]

OWCP properly referred the medical evidence of record to its OWCP medical adviser, Dr. Slutsky, who reviewed the clinical findings of Dr. Perlmutter on June 14, 2013. Dr. Slutsky determined that appellant had a five percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. He found that the most impairing diagnosis was a partial thickness rotator cuff tear with residual dysfunction in the left shoulder and placed appellant into class 1. Dr. Slutsky noted that Dr. Perlmutter rated impairment based on a full thickness tear; however, this was not stated in the surgical note. Dr. Higgins noted that the soft tissue and synovitis was removed, the partial thickness tear was exposed. It was not first converted to a full tear and then repaired. Dr. Slutsky assigned a grade modifier 2 for functional history (GMFH) on the basis that appellant did not have to perform functional modifications in order to achieve self-care activities. He assigned a grade modifier 1 for physical examination (GMPE) due to a mild crepitus with motion under section 15.7, page 464,[12] for measuring range of motion. Dr. Slutsky disagreed with Dr. Perlmutter that a grade modifier for clinical studies was not applicable and assigned a grade modifier 2 for clinical studies based on a February 24, 2011 MRI scan of the left shoulder which demonstrated a partial thickness articular surface tear.

[7] *See D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

[9] *Id.* at 494-531.

[10] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[11] *See Annette M. Dent*, 44 ECAB 403 (1993).

[12] *See supra* note 3.

Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Slutsky found that (2-1) + (1-1) + (2-1) resulted in a net grade modifier of 2, resulting in an impairment class 1, grade E, equaling a five percent permanent impairment of the left upper extremity.

The Board finds that the medical adviser applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to the clinical findings of Dr. Perlmutter. The medical adviser's calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. Dr. Slutsky explained that Dr. Perlmutter's six percent impairment rating for the left arm was erroneous as it was based on an inappropriate diagnosis that was not supported by the surgical records. Dr. Perlmutter did not provide sufficient explanation for why he was departing from Dr. Higgins' diagnosis of a partial thickness tear. As the A.M.A., *Guides* note, the reliability of the diagnosis is essential and must be consistent with the clinical history and findings at the time of the impairment assessment.[13]

Dr. Higgins did not provide an impairment rating based on the sixth edition of the A.M.A., *Guides.* Therefore, the Board finds that they lack probative value and are insufficient to establish greater impairment. The CT and MRI scans of record are diagnostic in nature and do not provide any impairment rating. These reports are of no probative value regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides.*[14]

On appeal, counsel contends that the Board should accept the impairment rating as calculated by Dr. Perlmutter rather than the lower rating of Dr. Slutsky. For the reasons stated, the Board finds that Dr. Perlmutter did not provide sufficient reasons for departing from the diagnosis of a partial rotator cuff tear. Accordingly, the Board finds that appellant has not established that he is entitled to a schedule award greater than that previously received and the attorney's arguments are not substantiated.

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 not established that he sustained more than a five percent permanent impairment to the left upper extremity, for which he received a schedule award.

[13] *See supra* note 3 at 15.2a, page 389-90.

[14] *See Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 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