United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 14-436**
	)	**Issued: July 21, 2014**
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTE, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 20, 2013 appellant, through his attorney, filed a timely appeal from a September 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his schedule award claim. 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 is entitled to a schedule award for a permanent impairment of the upper extremities.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 1, 2004 appellant, then a 54-year-old fabric worker supervisor, filed a traumatic injury claim alleging that on June 30, 2004 he injured his upper back and both shoulders in the performance of duty. OWCP accepted the claim for a temporary aggravation of cervical radiculitis and paid him compensation for total disability beginning September 26, 2004.

Appellant elected to receive retirement benefits from the Office of Personnel Management effective November 1, 2007. On June 19, 2008 he filed a claim for a schedule award. Appellant submitted a December 18, 2007 report from Dr. Steven M. Allon, an orthopedic surgeon, who found that appellant had a 19 percent right upper extremity impairment and a 14 percent left upper extremity impairment using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). On June 23, 2008 Dr. Brian K. Zell, a Board-certified orthopedic surgeon, concurred with Dr. Allon's findings of a 19 percent right upper extremity impairment and a 14 percent left upper extremity impairment.[2]

On June 22, 2009 OWCP requested that Dr. Zell provide an impairment evaluation using the sixth edition of the A.M.A., *Guides*.

In a report dated October 7, 2009, Dr. Allon applied the sixth edition of the A.M.A., *Guides* to his prior examination findings. He identified the diagnoses as class 1 degenerative joint disease of the right shoulder, class 1 severe sensory deficit of the right ulnar nerve and entrapment neuropathy of the right median nerve. Dr. Allon applied grade modifiers and concluded that appellant had a total right upper extremity impairment of 19 percent. He further found a 29 percent left upper extremity impairment due to a sensory deficit of the left ulnar nerve and left median nerve.

In a report dated January 5, 2010, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, disagreed with Dr. Allon's finding of a sensory deficit of the right ulnar nerve and left median nerve.[3] He advised that appellant had a 15 percent permanent impairment of the right upper extremity due to entrapment neuropathy using Table 15-23 on page 449 and a 4 percent permanent impairment of the left upper extremity due to a sensory deficit of the ulnar nerve using Table 15-21 on page 443.

On January 26, 2010 OWCP determined that a conflict existed between Dr. Allon and Dr. Magliato regarding the extent of appellant's upper extremity impairment. On February 17, 2010 it referred appellant to Dr. Ronald L. Gerson, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated May 28, 2010, Dr. Gerson determined that appellant had a 15 percent impairment of the cervical spine using the cervical spine regional grid

[2] On September 27, 2008 Dr. Andrew A. Merola, a Board-certified orthopedic surgeon and OWCP medical adviser, disagreed with Dr. Allon's finding of an impairment of the C7 and C8 nerve roots based on the lack of objective corroboration. He opined that appellant had a 12 percent right upper extremity impairment and a 6 percent left upper extremity impairment.

[3] Dr. Magliato originally provided a report dated December 21, 2009; however, he provided a corrected version on January 7, 2010.

on page 564 of the A.M.A., *Guides*. He further found that appellant had a five percent permanent impairment of the right shoulder due to acromioclavicular joint arthritis and a two percent permanent impairment of the left shoulder due to impingement syndrome.

On June 21, 2010 OWCP informed Dr. Gerson that it did not provide awards for the cervical spine. In a July 12, 2010 response, Dr. Gerson stated that OWCP should ignore the part of his examination "concerning the impairment rating of the cervical spine."[4] By letter dated September 3, 2010, OWCP requested that he properly apply the A.M.A., *Guides* to his findings. On November 12, 2010 Dr. Gerson indicated that he used the diagnosis of cervical radiculopathy set forth in Table 17-2 of the cervical spine regional grid in reaching his impairment rating. He found that appellant had 15 percent impairment due to "cervical radiculopathy of the left arm."[5]

On April 28, 2011 OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. George Glenn, a Board-certified orthopedic surgeon, for an impartial medical examination. The statement of accepted facts did not list the accepted condition.

In a report dated May 16, 2011, Dr. Glenn discussed the history of injury and reviewed the medical reports of record. On examination he found generalized tenderness of the cervical spine without cervical or trapezial muscle spasms and a negative Spurling's maneuver. Dr. Glenn measured range of motion of the shoulders and determined that appellant had inconsistent results on sensory testing which were not supported by a loss of motor function. He found C8 radiculopathy demonstrated by electrodiagnostic testing unsupported by complaints on clinical evaluation. Dr. Glenn stated:

> "The medical probability would dictate that the incident of June 30, 2004 caused some compromise of the C8 nerve root which was already compromised with the preexisting degenerative changes and that [appellant] did indeed develop pain in his neck with now pain in his right shoulder and arm, as well as a recurrence of his preexisting problems previously noted to involve the left upper extremity."

Dr. Glenn opined that appellant's arthritis and loss of shoulder motion was not due to his work injury. He identified the diagnosis of class 1 shoulder pain using Table 15-5 on page 401. After applying grade modifiers, Dr. Glenn found an adjustment of -1 and a zero percent permanent impairment of the bilateral upper extremities.

On June 21, 2012 Dr. Magliato reviewed Dr. Glenn's opinion and noted that he attributed appellant's loss of range of motion of the spine and right shoulder to preexisting degeneration

[4] On August 10, 2010 Dr. Merola reviewed Dr. Gerson's opinion and found that he did not utilize the sixth edition of the A.M.A., *Guides* in reaching his impairment determination.

[5] By letter dated February 5, 2011, Dr. Merola indicated that Dr. Gerson should not have used the cervical regional grid in rating the extent of appellant's impairment.

but further found that the June 30, 2004 injury caused an aggravation of the C8 nerve root deficit.[6] He stated:

> "I tend to doubt that this claimant after so many years and so many examinations and so much testing has no residuals at all from his accident even if it is a small percentage and merely represents some aggravation of the preexisting conditions or caused even some mild acceleration of these conditions.
>
> "If an accident causes even a small percentage of the disability, whatever residuals are present from preexisting conditions must be added into the total impairment."

Dr. Magliato recommended that OWCP obtain clarification from Dr. Glenn of his findings.

On September 7, 2012 OWCP requested that Dr. Glenn review the June 21, 2011 report from Dr. Magliato and discuss whether it changed his rating. On October 3, 2012 Dr. Glenn opined that the work-related aggravation of the C8 radiculopathy had resolved. He asserted that appellant's continued symptoms were not related to his June 30, 2004 employment injury.

On October 23, 2012 Dr. Magliato found that based on Dr. Glenn's reports appellant had no impairment of either upper extremity.

By decision dated March 12, 2013, OWCP denied appellant's claim for a schedule award.

On March 18, 2013 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In a report dated July 9, 2013, Dr. David Weiss, an osteopath, questioned why Dr. Glenn found no impairment of the upper extremities when objective tests revealed abnormalities and clinical examination showed positive findings. Applying the sixth edition of the A.M.A., *Guides*, he opined that appellant had a 17 percent permanent impairment of the right upper extremity and a 7 percent permanent impairment of the left upper extremity.

At the hearing, held on July 15, 2013, appellant's attorney noted that appellant had a military injury to his left shoulder and prior injuries to his cervical spine. He asserted that Dr. Glenn failed to use the July/August 2009 *The Guides Newsletter* and A.M.A., *Guides* in rating appellant's impairment and ignored the positive diagnostic findings. Attorney also noted that the statement of accepted facts did not identify the accepted conditions and that OWCP did not instruct Dr. Glenn to include preexisting impairments in his rating.

In a decision dated September 18, 2013, an OWCP hearing representative affirmed the March 12, 2013 decision. She found that Dr. Glenn's report constituted the weight of the

[6] On February 9, 2012 appellant's attorney questioned whether Dr. Glenn was properly selected as an impartial medical examiner in accordance with OWCP's procedures. He also indicated that the physician failed to consider his preexisting conditions.

medical evidence and established that appellant had no ratable impairment due to his accepted employment injury.

On appeal, appellant's attorney argues that Dr. Glenn's report could not constitute the weight of the evidence as he failed to apply the July/August 2009 *The Guides Newsletter* and A.M.A., *Guides* and failed to rely on a statement of accepted facts that set forth the accepted conditions and preexisting conditions. He notes that Dr. Glenn found that appellant had reduced motion and a Semmes Weinstein test showed neurological defects. Appellant also maintains that Dr. Magliato inappropriately reviewed Dr. Glenn's report as he was on one side of the conflict in medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing federal regulations[8] 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.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

When an OWCP medical adviser, a second opinion specialist or a referee physician renders a medical opinion based on an incomplete or inaccurate statement of accepted facts or that does not use the statement of accepted facts as the framework in forming the opinion, the probative value is diminished or negated altogether.[12]

OWCP's procedures provide that if a case has been referred to a referee evaluation to resolve the issue of permanent impairment based on a conflict between appellant's physician and

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[12] *See A.R.*, Docket No. 11-692 (issued November 18, 2011); *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3(a) (October 1990).

an OWCP medical adviser, it is necessary to route the file to a different OWCP medical adviser for review.[13]

ANALYSIS

OWCP accepted that appellant sustained a temporary aggravation of cervical radiculitis due to a June 30, 2004 traumatic injury. It determined that a conflict existed between Dr. Allon, who found that appellant had a 19 percent permanent impairment of the right upper extremity and a 29 percent permanent impairment of the left upper extremity and Dr. Magliato, an OWCP medical adviser, who found that appellant had a 15 percent permanent impairment of the right upper extremity and a 4 percent permanent impairment of the left upper extremity. OWCP referred appellant to Dr. Gerson for an impartial medical examination.

As Dr. Gerson failed to provide an impairment evaluation in accordance with the A.M.A., *Guides*, OWCP properly referred the case record to Dr. Glenn for a second impartial medical opinion.[14] However, it provided Dr. Glenn with a statement of accepted facts that did not include the accepted condition of brachial neuritis or radiculitis. Dr. Glenn diagnosed a neck strain and a resolved aggravation of C8 radiculopathy. He found that appellant did not have a ratable permanent impairment as a result of his work injury. OWCP's procedures, however, specify that the statement of accepted facts must include all accepted conditions.[15] Dr. Glenn's opinion is thus of diminished probative value as it was not based on an accurate factual framework. Consequently, his opinion is insufficient to resolve the conflict in medical opinion.

Dr. Magliato, the medical adviser who reviewed Dr. Glenn's reports, was on one side of the conflict in medical evidence. OWCP's procedures and Board precedent support that where a referee examination is arranged to resolve a conflict created between a claimant's physician and an OWCP medical adviser with respect to a schedule award issue, the same medical adviser should not review the referee's report. Rather, a different OWCP medical adviser or consultant should review the file.[16]

The case will be remanded for OWCP to prepare a new statement of accepted facts and to obtain a rationalized medical opinion based on a complete and accurate factual background regarding whether appellant has a permanent impairment due to his accepted employment injury. After such further development as deemed necessary, it shall issue a *de novo* decision.

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

[14] In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist. *See Guiseppe Aversa*, 55 ECAB 164 (2003).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3(a) (October 1990).

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

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 21, 2014
Washington, DC

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

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

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