United States Department of Labor
Employees' Compensation Appeals Board

A.D., Appellant	)	
and	)	**Docket No. 14-477**
	)	**Issued: July 10, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Hanover, MD, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 26, 2013 appellant, through his representative, filed a timely appeal from the December 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation. 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 review the merits of this case.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 7, 2013 appellant, then a 50-year-old supervisory federal air marshal, sustained a traumatic injury in the performance of duty while participating in defensive measures training. OWCP accepted his claim for sprain of the left elbow and forearm, radial collateral ligament.

Dr. Robert W. Macht, a general surgeon, evaluated appellant's impairment on August 15, 2013. He related appellant's history and complaints. On physical examination, appellant lacked 30 degrees of extension at the left elbow. Flexion was limited to 135 degrees. Supination and pronation were intact. No atrophy was noted. Dr. Macht stated: "[Appellant's] range of motion is passive range of motion repeated at least three times for accuracy per the Guide Lines." There was a negative Tinel's sign at the elbow, but there was slight pain with motion and resistance against active motion of his elbow. Sensation was intact. There was no atrophy. An imaging study showed evidence of mild triceps tendinitis and degenerative changes.

Dr. Macht diagnosed traumatic injury to the left elbow with triceps tendinitis. Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), he found a four percent impairment of the left upper extremity based on loss of flexion and extension. Dr. Macht further found that no adjustment was warranted for functional history.

On November 5, 2013 Dr. Morley Slutsky, an OWCP medical adviser, reviewed Dr. Macht's evaluation. Using the diagnosis-based method of evaluating impairment, he identified appellant's diagnosis as left elbow muscle/tendon sprain, with a default impairment value of one percent. Given appellant's *Quick*DASH score of 41 percent, which showed a moderate functional history, Dr. Slutsky adjusted the default impairment rating to 2 percent. He noted that valid range of motion measurements required three active range of motion measurements rounded up or down to the nearest 10 degrees, with each measurement falling within 10 degrees of the average. The maximum observed measurement for each joint motion was then used to determine the final range of motion impairment. Dr. Slutsky noted that range of motion was used primarily as a physical examination adjustment factor.

In a decision dated December 18, 2013, OWCP issued a schedule award for a two percent impairment of appellant's left upper extremity.

Appellant's representative argues that OWCP improperly excluded range of motion from the impairment evaluation.

LEGAL PRECEDENT

The schedule award provision of FECA and the implementing regulations 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.

ANALYSIS

Diagnosis-based impairment is the primary method of evaluation for the upper extremities. The first step is to choose the diagnosis that is most applicable for the region being assessed. Selection of the optimal diagnosis requires judgment and experience. If more than one diagnosis can be used, the highest causally-related impairment rating should be used; this will generally be the more specific diagnosis. Typically, one diagnosis will adequately characterize the impairment and its impact on activities of daily living.

Specific criteria for that diagnosis determine which class is appropriate: no objective problem, mild problem, moderate problem, severe problem, very severe problem approaching total function loss. The A.M.A., *Guides* assigns a default impairment rating for each class, which may be slightly adjusted using such grade modifiers or nonkey factors as functional history, physical examination and clinical studies.

Dr. Macht, the general surgeon and evaluating physician, did not use the diagnosis-based method of evaluation. He opted instead to evaluate impairment based on range of motion. Table 15-4, page 398, allows this alternative stand-alone method of evaluation for every diagnosis listed in the grid.

Dr. Macht's report did not provide enough information to confirm that he followed the procedures set out in Chapter 15.7 of the A.M.A., *Guides*. It does not appear that he used active range of motion, as there was slight pain with motion and resistance against active motion. Dr. Macht advised that appellant's range of motion was passive range of motion repeated at least three times. He did not disclose each measurement, so it is unclear whether each fell within 10 degrees of the average or whether he used the maximum observed measurement for determining impairment to each joint motion. It also appears that Dr. Macht did not use the opposite extremity to define normal. For these reasons, the Board finds that his evaluation of impairment is of diminished probative value.

Dr. Slutsky correctly noted the deficiencies in Dr. Macht's impairment rating and evaluated impairment using the diagnosis-based method, which is the method of choice under the A.M.A., *Guides*. The diagnosis he chose, however, was left elbow muscle/tendon sprain, which can have no more than a two percent rating under Table 15-4, page 398. OWCP accepted appellant's claim for sprain of the left elbow and forearm, radial collateral ligament. Collateral ligament injuries, on page 399, can have a rating of 3 to 7 percent if recurrent instability is occasional, and 8 to 12 percent if it is frequent, resulting in functional limitation. Dr. Slutsky did not adequately explain the reason he selected a muscle/tendon injury instead of a collateral ligament injury for his diagnosis-based impairment evaluation.

The Board finds that this case is not in posture for decision. The Board will set aside the December 18, 2013 schedule award and remand the case for further development of the medical evidence and a proper evaluation of impairment under the sixth edition of the A.M.A., *Guides*. After such further development as may be necessary, OWCP shall issue a *de novo* decision on appellant's entitlement to a schedule award.

Appellant's representative argues that OWCP improperly excluded range of motion from the impairment evaluation. As noted, Dr. Macht provided insufficient information to allow an evaluation using range of motion as a stand-alone method. Under the diagnosis-based method, range of motion may still be used as a factor in the adjustment grid for physical examination, which can modify the default impairment rating.

CONCLUSION

The Board finds this case is not in posture for decision. Further development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: July 10, 2014
Washington, DC

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

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

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