

**United States Department of Labor
Employees' Compensation Appeals Board**

D.M., Appellant)	
)	
and)	Docket No. 13-1228
)	Issued: March 10, 2014
U.S. POSTAL SERVICE, POST OFFICE, Saint Louis, MO, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 24, 2013 appellant filed a timely appeal from a January 28, 2013 decision of the Office of Workers' Compensation Programs (OWCP) that denied her request for reconsideration because it was untimely filed and did not establish clear evidence of error. As there is no merit decision regarding the issue on appeal that was issued within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal appellant asserts that, based on the opinion of her attending physician, she is entitled to a schedule award for her left upper extremity greater than the 14 percent previously awarded.

¹ 20 C.F.R. § 501.3(e).

² 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On June 16, 2004 appellant, then a 44-year-old sales and service clerk, filed an occupational disease claim alleging that she had a second rotator cuff tear caused by employment duties. In decisions dated September 21, 2004 and February 7, 2005, OWCP denied the claim, but on September 1, 2005 it accepted that she sustained a full-thickness tear of the left rotator cuff. On November 16, 2006 Dr. Ken Yamaguchi, a Board-certified orthopedic surgeon, performed arthroscopic revision and repair of a left rotator cuff tear. Appellant returned to modified duty on January 30, 2007, and on August 29, 2007, Dr. Yamaguchi provided permanent physical restrictions.

The record indicates that appellant has additional FECA claims, including a prior claim, adjudicated by OWCP under file number xxxxxx814, accepted for a left rotator cuff tear with surgical repair. Under that claim, by decision dated July 9, 2003, appellant was granted a schedule award for 14 percent impairment of the left upper extremity.³

On November 7, 2007 appellant filed a schedule award claim, and submitted a November 28, 2007 report in which Dr. Yamaguchi indicated that appellant had 50 percent permanent impairment of the left shoulder due to persistent rotator cuff tear that severely affected her ability to use her arm over shoulder height. In a December 22, 2007 report, Dr. Daniel D. Zimmerman, a Board-certified internist and OWCP medical adviser, indicated that Dr. Yamaguchi's November 28, 2007 report offered no basis for the impairment rating. He recommended a second-opinion evaluation for an impairment rating in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁴

On January 9, 2008 OWCP referred appellant to Dr. Jack C. Tippett, a Board-certified orthopedic surgeon, for a second opinion. In a January 28, 2008 report, Dr. Tippett provided left arm range of motion findings and indicated that appellant had normal extension, adduction, internal and external rotation. Flexion was limited to 120 degrees which he advised yielded four percent impairment in accordance with Figure 16-40 of the fifth edition of the A.M.A., *Guides*, and abduction was limited to 80 degrees which yielded five percent impairment under Figure 16-43. Dr. Tippett concluded that appellant had a total left upper extremity impairment of nine percent, with a date of maximum medical improvement of August 29, 2007.

Dr. Zimmerman, OWCP's medical adviser, reviewed Dr. Tippett's report and agreed that appellant had nine percent impairment, based on loss of shoulder motion. He noted that, as appellant had previously received a schedule award for 14 percent left upper extremity impairment, she was not entitled to an additional schedule award.

³ Additional claims include file number xxxxxx744, accepted for a left arm cut, administratively closed; file number xxxxxx179, accepted for right shoulder strain; file number xxxxxx430, accepted for right carpal tunnel syndrome and right trigger finger; and file number xxxxxx538, accepted for left shoulder sprain and rotator cuff tear on the left. All claims have been combined, with file number xxxxxx814 as the master file. Under file number xxxxxx430, by decision dated November 5, 2008, the Board affirmed a December 19, 2006 decision finding that appellant did not establish a recurrence of disability commencing January 13, 2004.

⁴ A.M.A., *Guides* (5th ed. 2001).

By decision dated February 6, 2008, OWCP found that appellant was not entitled to an additional schedule award for her left upper extremity. The decision included appropriate appeal rights.

On March 24, 2010 appellant called OWCP and indicated that she had found a medical report that was not sent to OWCP regarding her schedule award. OWCP advised her to exercise her appeal rights.⁵

On October 17, 2012 appellant filed an occupational disease claim for a torn left rotator cuff. OWCP adjudicated this new claim under file number xxxxxx538, and it continues under development.

On December 15, 2012 appellant requested reconsideration of the schedule award under file number xxxxxx313 and submitted reports dated September 12 to December 7, 2012 regarding disability and physical restrictions. She also submitted an April 2, 2008 report in which Dr. Yamaguchi indicated that he had reviewed Dr. Zimmerman's report which suggested that appellant had only nine percent left upper extremity impairment. Dr. Yamaguchi stated:

“Having reviewed [appellant's] records, I believe that this impairment rating grossly underestimates the amount of disability and final impairment she has in that left shoulder. It should be noted that the goniometer readings and the [A.M.A., *Guides*] are based almost entirely on range of motion measurements which are arbitrarily given and not reflective of motions that are required for functional range of motion for activities of daily living. They do not weigh also the relative strength of her motions within the motion arc. The strength that she has while doing a certain range of motion is of course integral to assessing her functional impairment. Additionally, the [A.M.A., *Guides*] do not adequately make allowances for the effect of pain on a patient's quality of life and ability to use the shoulder. For these reasons, I usually do not refer to the [A.M.A., *Guides*] which are substantially flawed for impairment ratings in the shoulder.”

Dr. Yamaguchi provided range of motion findings for elevation, abduction external rotation and external rotation at the side. He concluded:

“Given the context of substantially reduced motion, and just as importantly substantially reduced strength to the rotator cuff, in the context of significant pain at the endpoints of these motions and the fact that she has had two rotator cuff repair surgeries without healing of the rotator cuff, I believe that a permanent impairment rating of a minimum of 40 percent is applicable to the shoulder. A standard impairment rating after one failed rotator cuff repair surgery would be 30 percent. I believe 40 percent is the minimum that should be given [appellant] considering she has had two failed procedures and has had residual deficit not only in range of motion but also in strength and has significant symptomatic difficulties with this shoulder. Again, none of these things are adequately assessed with the [A.M.A., *Guides*] and the range of motions addressed by the

⁵ Appellant also submitted medical evidence regarding a right shoulder condition. This claim is adjudicated by OWCP under file number xxxxxx179.

[A.M.A., *Guides*] are not necessarily those that are required for functional use of the shoulder for activities of daily living.”

By decision dated January 28, 2013, OWCP denied appellant’s reconsideration request on the grounds that her request was untimely filed and that she failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP procedures state, and the Board has held, that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.⁶

ANALYSIS

The Board finds this case is not in posture for decision. As noted above, where a claimant submits medical evidence regarding a permanent impairment at a date subsequent to a prior schedule award decision, he or she is entitled to a merit decision on the medical evidence.⁷ In the present appeal, appellant submitted an April 2, 2008 report in which Dr. Yamaguchi maintained that the A.M.A., *Guides* was substantially flawed for rating shoulder impairment. He provided an extensive explanation regarding his opinion that the A.M.A., *Guides* did not adequately make allowances for the effect of pain on a patient’s quality of life and ability to use the shoulder and concluded that appellant had greater impairment than previously awarded. This report therefore addressed the pertinent issue of this case, *i.e.*, whether appellant was entitled to additional schedule award compensation for a left upper extremity impairment. The Board finds that it is evident that she was not seeking reconsideration of the February 6, 2008 decision in her December 15, 2012 correspondence, but was seeking an increased schedule award based on new medical evidence. The case will therefore be remanded to OWCP for further development on the issue of whether appellant is entitled to an increased schedule award for the left upper extremity impairment.

The Board also notes that appellant has an additional occupational disease claim for a left rotator cuff tear, adjudicated under file number xxxxxx538. Subsequent to OWCP’s January 28, 2013 decision but prior to her appeal to the Board on March 21, 2013 OWCP accepted that she

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9.b (February 2013); *see Linda T. Brown*, 51 ECAB 115 (1999). *See also B.K.*, 59 ECAB 228 (2007) (a claimant may seek a schedule award if the evidence establishes that he or she sustained an impairment causally related to an employment injury; even if the term “reconsideration” is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award; OWCP should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration).

⁷ *Linda T. Brown, id.*

sustained a left rotator cuff tear under this file number. This indicates that appellant has had new exposure and/or a progression of her employment-related left rotator cuff tear. OWCP is continuing to develop this claim. As claim number xxxxxx538 is also a subsidiary of the master file, xxxxxx814,⁸ on remand this additional injury should be addressed and considered regarding appellant's left upper extremity impairment. Following this and such further developed deemed necessary, OWCP shall issue a *de novo* decision on her claim for an increased schedule award.

CONCLUSION

The Board finds this case is not in posture for decision regarding the degree of impairment of appellant's left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: March 10, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁸ *Supra* note 3.