United States Department of Labor
Employees' Compensation Appeals Board

G.O., Appellant	)	
and	)	**Docket No. 13-1973**
	)	**Issued: March 11, 2014**
DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, Buffalo, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2013 appellant timely appealed the July 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed a schedule award. 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 schedule award claim.

ISSUE

The issue is whether appellant has greater than 12 percent impairment of the right arm.

FACTUAL HISTORY

Appellant, a 50-year-old criminal investigator, has an accepted claim for right rotator cuff tear which occurred on June 1, 2010. He injured his right shoulder using a bolt cutter on a padlock. On July 26, 2010 appellant underwent right shoulder surgery by Dr. Paul J. Mason, a

[1] 5 U.S.C. §§ 8101-8193 (2006).

Board-certified orthopedic surgeon. His postoperative diagnosis was right large rotator cuff tear. Appellant resumed his regular employment duties within four months of surgery.[2] On May 5, 2011 Dr. Mason advised him to return on an as needed basis. Appellant subsequently filed a claim for a schedule award (Form CA-7).

Dr. Mason provided a September 18, 2012 impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2008). He found 25 percent right upper extremity impairment due to a full-thickness rotator cuff tear (13 percent) and loss of shoulder motion (12 percent). Dr. Mason generally referenced Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 401, 403 (6th ed. 2008) as support for the diagnosis-based rotator cuff impairment. With respect to the range of motion (ROM) impairment, he cited Table 15-34, Shoulder Range of Motion, A.M.A., *Guides* 475 (6th ed. 2008). Dr. Mason's physical examination revealed forward elevation/flexion to 160 degrees (three percent), extension to 30 degrees (one percent), abduction to 150 degrees (three percent), external rotation to 45 degrees (two percent), and internal rotation to L2 (two percent). He also found impairment for loss of adduction (one percent). When added together, the shoulder ROM impairments totaled 12 percent of the right upper extremity.

In a December 13, 2012 report, Dr. Henry H. Magliato, the district medical adviser disagreed with Dr. Mason's rating under Table 15-5, A.M.A., *Guides* 403 (6th ed. 2008).[3] He explained that the highest rating available for a rotator cuff injury with full-thickness tear was seven percent impairment of the upper extremity. Thus, Dr. Mason's rating of 13 percent impairment for a class 1 rotator cuff injury was not supported by Table 15-5, A.M.A., *Guides* 403 (6th ed. 2008). Further, the A.M.A., *Guides* did not permit combining a diagnosis-based rotator cuff impairment rating with ROM impairment, which was a stand-alone impairment rating. Dr. Magliato concurred with Dr. Mason's 12 percent rating for loss of shoulder ROM, and found that appellant reached maximum medical improvement as of September 18, 2012.

On April 1, 2013 OWCP granted appellant a schedule award for 12 percent impairment of the right upper extremity. The award covered a period of 37.44 weeks beginning September 18, 2012.

Appellant requested an oral hearing which was held on June 17, 2013.

In a May 14, 2013 report, Dr. Mason noted that he reviewed Dr. Magliato's report. He disagreed with the ROM methodology because it did not account for loss of strength or permanent disfigurement due to surgical scarring. As such, ROM did not fairly represent the full extent of appellant's right upper extremity impairment. Dr. Mason reexamined appellant on June 25, 2013 and reiterated his concerns about the ROM methodology.

[2] During a December 2, 2010 follow-up examination, appellant advised Dr. Mason that he was performing full duty.

[3] The DMA, Dr. Henry H. Magliato, is a Board-certified orthopedic surgeon.

By decision dated July 23, 2013, the Branch of Hearings and Review affirmed the April 1, 2013 schedule award. The hearing representative noted that, under the sixth edition, the diagnosed based for rating impairment could not be combined with ROM.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[4] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[5] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[6]

ANALYSIS

On appeal appellant contends that OWCP should have based his schedule award on Dr. Mason's September 18, 2012 impairment rating of 25 percent to the right arm due to the rotator cuff injury with full-thickness tear (13 percent) and loss of shoulder ROM (12 percent). The Board finds, however, that Dr. Mason's impairment rating was only partially correct. Dr. Mason improperly combined a diagnosis-based impairment method with impairment for loss of shoulder range of motion. He identified Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 403 (6th ed. 2008) as the basis for 13 percent upper extremity impairment rating for full-thickness rotator cuff tear. Table 15-5 provides in relevant part: "If motion loss is present, this impairment may ***alternatively*** be assessed using Section 15.7, Range of Motion impairment. A ROM impairment ***stands alone*** and ***is not combined*** with diagnosis impairment."[7] (Emphasis added.) Dr. Magliato properly noted the diagnosis-based rotator cuff impairment and the shoulder ROM impairment are mutually exclusive. Notwithstanding Dr. Mason's belief that the ROM methodology does not fully reflect the extent of appellant's right upper extremity impairment, his combination of the two impairment methods is contrary to the text of the A.M.A., *Guides* (6th ed. 2008). Dr. Mason's 13 percent impairment rating for rotator cuff tear is also inconsistent with Table 15-5, A.M.A., *Guides* 403 (6th ed. 2008). The maximum rating for a full-thickness rotator cuff tear is seven percent. Dr. Mason provided no explanation for his rating of 13 percent upper extremity impairment under Table 15-5. As the ROM impairment value of 12 percent is greater than the diagnosis-based rating of 7 percent, Dr. Magliato agreed with Dr. Mason's finding of 12 percent impairment under Table 15-34, Shoulder Range of Motion, A.M.A., *Guides* 475 (6th ed.

[4] For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[5] 20 C.F.R. § 10.404 (2012).

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[7] A.M.A., *Guides* 405 (6th ed. 2008).

2008). There is no credible medical evidence demonstrating a greater impairment than the 12 percent previously awarded.

CONCLUSION

Appellant has not established that he has greater than 12 percent impairment of the right arm.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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