United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 14-794**
	)	**Issued: November 12, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Mt. Shasta, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 22, 2014 appellant filed a timely appeal from an August 27, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Appellant's request for appeal was postmarked on February 22, 2014 and received by the Clerk of the Board on February 25, 2014. Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of OWCP's decision. *See* 20 C.F.R. § 501.3(e). The 180th day after the August 27, 2013 decision was Saturday, February 22, 2014. In computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or Federal holiday. 20 C.F.R. § 501.2(f)(2). *See also John B. Montoya*, 43 ECAB 1148 (1992). The next business day after February 22, 2014 was Monday, February 24, 2014. The Clerk of the Board did not receive appellant's request for appeal until Tuesday, February 25, 2014, which would render the appeal untimely. However, under 20 C.F.R. § 501(f)(1), "[i]f the notice of appeal is sent by United States Mail or commercial carrier and the use of the date of delivery as the date of filing would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of the postmark…." Therefore, the Board will use the date of the postmark, February 22, 2014, as the date of filing in this case.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established more than 17 percent permanent impairment of the right arm and 5 percent permanent impairment of the left arm, for which she received schedule awards.

On appeal, appellant contends that OWCP mishandled her claim, mischaracterized the evidence and denied her due process by issuing a retroactive schedule award.

FACTUAL HISTORY

OWCP accepted that on or before December 1, 1994 appellant, then a 43-year-old rural mail carrier, sustained bilateral carpal tunnel syndrome, right lateral epicondylitis and calcific tendinitis of the right shoulder in the performance of duty. Appellant underwent right carpal tunnel release on March 17, 1995 and left carpal tunnel release on April 7, 1995, performed by Dr. Stephen O. Berthelsen, an attending Board-certified orthopedic surgeon. OWCP approved the procedures. In a March 26, 2007 report, Dr. Berthelsen diagnosed mild residual right carpal tunnel syndrome and ulnar nerve entrapment bilaterally at the elbows and wrists. Appellant retired from the employing establishment effective May 11, 2007.

On April 4, 2008 Dr. Todd B. Guthrie, an attending orthopedic surgeon, performed arthroscopic rotator cuff repair of the right shoulder, arthroscopic distal clavicle excision and a biceps tenotomy, approved by OWCP.

On December 1, 2008 appellant claimed a schedule award for impairment of the left hand and wrist.

In a March 12, 2009 report, Dr. Guthrie found 11 percent impairment of the right upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (hereinafter).[3]

On August 17, 2009 OWCP obtained a second opinion regarding permanent impairment of the upper extremities from Dr. Moola P. Reddy, a Board-certified physiatrist, who obtained August 17, 2009 electromyogram and nerve conduction velocity showing that the median and ulnar nerves bilaterally were within normal limits in both arms. Dr. Reddy explained that the range of motion impairment rating method under the sixth edition of the A.M.A., *Guides* provided a clearer assessment of appellant's specific deficits than the diagnosis-based model. Referring to Table 15-34,[4] she found that the following impairments of the right arm were due to restricted shoulder motion: three percent for flexion at 150 degrees; three percent for abduction at 130 degrees and two percent for internal rotation at 60 degrees. Dr. Reddy totaled these

[3] On March 18, 2009 OWCP obtained a second opinion from Dr. Philip Z. Wirganowicz, a Board-certified orthopedic surgeon, regarding the nature and extent of appellant's injury-related conditions. On examination, Dr. Wirganowicz found full motion of the shoulders, elbows and wrists bilaterally. He observed sensory changes indicative of bilateral "[u]lnar nerve entrapment consistent with cubital tunnel syndrome" and status post bilateral carpal tunnel release.

[4] Table 15-34, page 475 of the sixth edition of the A.M.A., *Guides* is entitled "Shoulder Range of Motion."

impairments to equal eight percent. She noted that appellant had no grade modifiers that would alter the eight percent assessment. Dr. Reddy found a zero percent impairment for the right elbow as there were no significant objective findings. She also found no impairment for carpal tunnel syndrome based on negative electrodiagnostic studies and no objective findings on examination. An OWCP medical adviser concurred with her assessment.

By decision issued October 8, 2009, OWCP granted appellant a schedule award for eight percent impairment of the right upper extremity and a zero percent impairment of the left upper extremity, based on Dr. Reddy's opinion as the weight of the evidence.

On October 7, 2010 appellant claimed additional schedule awards for impairment of the right elbow, right wrist and left wrist. She also requested reconsideration of the October 8, 2009 schedule award, based on subsequently submitted medical evidence.

By decision dated October 15, 2010, OWCP denied reconsideration on the grounds that she submitted insufficient evidence to warrant a review of the October 8, 2009 schedule award.[5]

On May 2, 2012 appellant filed a claim for compensation (Form CA-7) asserting that she had additional upper extremity impairment. By decision dated May 15, 2012, OWCP denied reconsideration and advised appellant that it would not consider her request for an additional schedule award as she had already received a schedule award. Appellant appealed to the Board. In a February 12, 2013 order remanding case, the Board set aside OWCP's May 15, 2012 decision, finding that OWCP erroneously refused to address appellant's request for an increased schedule award.[6] The Board remanded the case to OWCP for appropriate development and a decision on appellant's schedule award claim.[7]

On remand of the case, OWCP obtained a second opinion on April 22, 2013 from Dr. Charles Xeller, a Board-certified orthopedic surgeon, who opined that appellant had reached maximum medical improvement. Dr. Xeller reviewed the medical record and a statement of accepted facts. On examination, he found signs of moderate residual carpal tunnel syndrome bilaterally and moderate right lateral epicondylitis. Dr. Xeller recorded the following ranges of motion of the right shoulder: flexion at 150 degrees; abduction at 120/180 degrees; external rotation at 30/90 degrees; internal rotation at 40/90 degrees and full adduction and extension. The right elbow had full range of motion, with tenderness over the right lateral epicondyle. Dr. Xeller observed weakness and impaired sensation in both wrists. He opined that appellant had 23 percent impairment for combined deficits in both arms.

In an August 15, 2013 report, an OWCP medical adviser reviewed the medical record and applied the criteria of the sixth edition of the A.M.A., *Guides* to Dr. Xeller's findings. He found

[5] Appellant appealed this decision to the Board but she later requested that the appeal be dismissed. On December 21, 2011 the Board dismissed the appeal. Docket No. 11-1195.

[6] Docket No. 12-1781 (issued February 12, 2013).

[7] During the pendency of the prior appeal, appellant submitted a September 18, 2012 report from Dr. James H. Parker, an attending Board-certified family practitioner, finding a 15 percent impairment of the right upper extremity and 8 percent impairment of the left upper extremity according to the fifth edition of the A.M.A., *Guides*.

that appellant reached maximum medical improvement as of April 22, 2013, the date of Dr. Xeller's examination. The medical adviser diagnosed status post bilateral carpal tunnel releases, status post right shoulder arthroscopy with rotator cuff repair, distal clavicle excision and biceps tenotomy and right lateral epicondylitis of the elbow. He opined that, according to Table 15-23,[8] appellant had five percent impairment of each arm with grade 2C modifier for "residual problems with moderate carpal tunnel symptoms status post carpal tunnel release." The medical adviser also noted one percent impairment for residual problems with right lateral epicondylitis, a diagnosis-based impairment of 1C according to Table 15-4.[9] Regarding the right arm, he found the following impairments for restricted shoulder motion according to Table 15-34: three percent impairment for flexion at 150 degrees; three percent for abduction at 120 degrees; two percent for internal rotation at 40 degrees; and four percent for external rotation at 30 degrees. The medical adviser added these impairments to total 12 percent impairment of the right upper extremity. He then combined the 1 percent diagnosis-based impairment for residual right lateral epicondylitis, 5 percent diagnosis-based impairment for carpal tunnel syndrome and the 12 percent impairment for restricted right shoulder motion to result in 17 percent impairment of the right arm. Regarding the left arm, the medical adviser found five percent impairment due to moderate residual carpal tunnel syndrome.

By decision dated August 27, 2013, OWCP granted appellant an additional schedule award for 9 percent right arm impairment, in addition to the 8 percent previously awarded, for a total 17 percent impairment of the right arm and 5 percent impairment of the left arm. The period of the award ran from April 22, 2013 to February 21, 2014.

LEGAL PRECEDENT

The schedule award provisions of FECA[10] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. It, 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 mater 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.[11] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[12]

[8] Table 15-23, page 449 of the sixth edition of the A.M.A., *Guides* is entitled "Entrapment/Compression Neuropathy Impairment."

[9] Table 15-4, page 398-99 of the sixth edition of the A.M.A., *Guides* is entitled "Elbow Regional Grid: Upper Extremity Impairments."

[10] 5 U.S.C. § 8107.

[11] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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).[13] Under the sixth edition, the evaluator identifies the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

In addressing upper extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[15] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[16]

While section 15.2 of the sixth edition of the A.M.A., *Guides* provides that "[d]iagnosis-based impairment is the primary method of evaluation for the upper limb," Table 15-5 also provides that, if motion loss is present for a claimant who has a rotator cuff injury, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis impairment.[17]

Section 15.7 of the sixth edition of the A.M.A., *Guides* provides:

> "Range of motion should be measured after a 'warm up,' in which the individual moves the joint through its maximum range of motion at least [three] times. The range of motion examination is then performed by recording the active measurements from [three] separate range of motion efforts. Measurements should be rounded up or down to the nearest number ending in zero…. All measurements should fall within 10 [degrees] of the mean of these three measurements. The maximum observed measurement is used to determine the range of motion impairment."[18]

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[19]

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[13] A.M.A., *Guides*, at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement" (6th ed. 2008).

[14] *Id.* at 494-531 (6th ed. 2008).

[15] *Id.* at 385-419; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[16] *Id.* at 411.

[17] *Id*. at 387, 405, 475-78.

[18] *Id*. at 464.

[19] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, right lateral epicondylitis and calcific tendinitis of the right shoulder in the performance of duty. Appellant underwent bilateral carpal tunnel releases in 1995 and arthroscopic right rotator cuff repair and distal clavicle resection in 2008. On October 8, 2009 OWCP granted her a schedule award for eight percent impairment of the right upper extremity, based on the August 17, 2009 opinion of Dr. Reddy who found deficits related to loss of right shoulder motion.

Appellant claimed augmented schedule awards on October 7, 2010 and May 2, 2012. OWCP obtained a second opinion on April 22, 2013 from Dr. Xeller, a Board-certified orthopedic surgeon, who provided measurements and clinical findings showing restricted right shoulder motion and right lateral epicondylitis. Dr. Xeller also found moderate residual carpal tunnel syndrome bilaterally. An OWCP medical adviser reviewed Dr. Xeller's report and concurred with his clinical assessment. He then applied the sixth edition of the A.M.A., *Guides* to Dr. Xeller's clinical findings. The medical adviser found five percent impairment of each arm due to residual carpal tunnel syndrome with moderate residual symptoms under Table 15-23.[20] He also found that appellant had 17 percent total impairment of the right arm. OWCP then issued the August 27, 2013 schedule award for five percent impairment of the left arm and an additional nine percent impairment of the right arm.

Regarding the left upper extremity, the Board finds that OWCP properly relied on Dr. Xeller's opinion as interpreted by the medical adviser. Dr. Xeller based his opinion on the medical record and statement of accepted facts and obtained the necessary clinical findings for a diagnosis-based impairment rating. The medical adviser applied the proper tables and grading schemes to Dr. Xeller's findings regarding the left upper extremity. His mathematical calculations are also correct. The Board notes that appellant did not provide a medical report from any of her attending physicians finding a greater percentage of impairment of the left upper extremity according to the sixth edition of the A.M.A., *Guides*. Therefore, the Board finds that the August 27, 2013 schedule award decision finding five percent impairment of the left arm was proper under the law and facts of this case.

The Board further finds that the case is not in posture for a decision regarding the appropriate percentage of impairment to the right upper extremity. In his August 15, 2013 report, the medical adviser found two diagnosis-based impairments based on Dr. Xeller's clinical findings. He assessed five percent impairment due to residual carpal tunnel syndrome with moderate symptoms according to Table 15-23 and one percent impairment for residual right lateral epicondylitis according to Table 15-4. The medical adviser then combined these diagnosis-based impairments with range of motion impairments, assessing an additional 12 percent impairment for restricted right shoulder flexion, abduction, internal and external rotation according to Table 15-34. He combined these to equal 17 percent right arm impairment. As noted, the A.M.A., *Guides* do not permit range of motion impairments to be combined with diagnosis-based impairments.[21]

[20] A.M.A., *Guides* 449.

[21] *Supra* note 10.

On appeal, appellant contends that OWCP mishandled her claim, mischaracterized the evidence and denied her due process by issuing a retroactive schedule award. The Board's February 12, 2013 order addressed OWCP's irregularities in the processing of appellant's claim. However, there is no indication that OWCP erred regarding the date on which the August 27, 2013 schedule award began to run. The case is not in posture for a decision regarding the right upper extremity.

CONCLUSION

The Board finds that appellant has not established that she sustained more than five percent impairment of the left upper extremity, for which she received a schedule award. The Board further finds that the case is not in posture for a decision regarding whether appellant has established that she sustained more than 17 percent impairment of the right upper extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2013 is affirmed in part regarding the percentage of left upper extremity impairment, and set aside in part regarding the appropriate percentage of right upper extremity impairment. The case remanded for further development consistent with this decision and order.

Issued: November 12, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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