United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 14-1508**
	)	**Issued: November 5, 2014**
SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY ADJUDICATION & REVIEW, Falls Church, VA, 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
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2014 appellant filed a timely appeal from a May 30, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained a ratable impairment of his left upper extremity due to his accepted left shoulder injury.

FACTUAL HISTORY

On February 19, 2013 appellant, then a 65-year-old administrative law judge, filed a traumatic injury claim (Form CA-1) alleging that on February 14, 2013 he dislocated his left

[1] 5 U.S.C. § 8101 *et seq.*

shoulder after slipping and falling towards an elevator door at an employee entrance. By decision dated May 2, 2013, OWCP accepted his claim for a left shoulder dislocation.

In a February 19, 2013 diagnostic report, Dr. Steven Kuchta, a Board-certified radiologist, examined the results of a magnetic resonance imaging (MRI) scan test of appellant's left shoulder. He noted an old Hill-Sachs lesion involving the posterior-superior aspect of the humeral neck and humeral head, with a heterogenous edema or reactive changes in the adjacent bone marrow; a large ill-defined Bankart lesion with irregular tears of the anterior and inferior glenoid labrum and glenohumeral joint capsule with the adjacent soft tissues extending medially; effusions of the glenohumeral joint and subacromial-subdeltoid bursa; supraspinatus and infraspinatus tendinosis with irregular partial thickness articular surface tears and probable small full thickness components in the distal supraspinatus tendon; a subscapularis tendinosis and partial thickness longitudinal intrasubstance tear; and degenerative osteoarthritis affecting the acromioclavicular joint.

In a note dated June 20, 2013, Dr. Joshua S. Dines, a Board-certified orthopedic surgeon, stated that appellant had significant partial thickness tears of the supraspinatus, infraspinatus and possibly the subscapularis. He stated that these injuries were consistent with a 15 percent loss of use. Dr. Dines further noted that appellant had a mild defect in the posterior extension consistent with a 10 percent loss of use, as well as a mild defect in internal and external rotation consistent with an additional 10 percent loss of use. He totaled these percentages and stated that appellant had a 35 percent loss of use of the right shoulder.

On July 30, 2013 appellant requested a schedule award.

By letter dated August 22, 2013, OWCP requested that appellant's physician respond to inquiries regarding the date of maximum medical improvement, restrictions of movement, objective findings, subjective complaints, and an impairment rating rendered according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant resubmitted Dr. Dines' June 20, 2013 note regarding the permanent impairment of his left shoulder along with a permanent impairment worksheet dated August 29, 2013. Dr. Dines calculated that based on appellant's reduced range of motion and defects in posterior, internal and external rotation, he had a class 2 grade C upper extremity impairment of 20 percent of the right shoulder. Based on his rotator cuff tear, he calculated that appellant had a class 2 grade A upper extremity impairment of 15 percent of the right shoulder. Totaling these figures, Dr. Dines arrived at a final impairment rating of 35 percent of the right shoulder.

In a record of a telephone conversation dated September 17, 2013, a claims examiner noted that she left a voice message for appellant informing him that Dr. Dines' report contained an error, in that he referred to appellant's right shoulder instead of his left shoulder. She noted that appellant had until September 23, 2013 to submit a corrected report.

Appellant submitted a corrected report from Dr. Dines referencing his left shoulder on September 18, 2013. The report was dated June 20, 2013 and was otherwise identical to Dr. Dines' earlier report.

On November 22, 2013 OWCP referred the case, together with a statement of accepted facts, to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and medical adviser, who was asked to review the medical evidence and provide a calculation of appellant's permanent percentage of loss of use of the left upper extremity along with a date of maximum medical improvement, in accordance with the sixth edition of the A.M.A., *Guides*.

In a December 2, 2013 report, Dr. Magliato stated that Dr. Dines' August 29, 2013 impairment rating was obviously incorrect, as he performed both the range of motion method of calculation permanent impairment and the diagnosis-related method, then combined those ratings to arrive at a final impairment rating of 35 percent. He recommended a second opinion evaluation or the submission of a new report from Dr. Dines in conformance with the sixth edition of the A.M.A., *Guides*.

In a supplementary report dated January 17, 2014, Dr. Dines examined appellant and calculated his scheduled loss of use. On examination of the left shoulder, he noted abduction of 105 to 110 degrees with passive motion to approximately 115 degrees. Anterior flexion and elevation was 120 to 125 degrees actively and passively. Internal rotation was complete, while external rotation was approximately 60 degrees with a positive apprehension test. Dr. Dines noted that he could sublux the shoulder but not dislocate the joint. Abduction and external rotation were weak against resistance. Dr. Dines referenced several tables and pages from the A.M.A., *Guides*, but did not show his calculations. He stated that appellant had reached maximum medical improvement as of the time of his report and that he had lost approximately 35 percent of the range of motion from a functional point of view. Dr. Dines stated that his calculations were self-explanatory and based on the sixth edition of the A.M.A., *Guides*.

On January 31, 2014 OWCP referred Dr. Dines' supplementary report to Dr. Magliato for issuance of an updated report.

In a February 7, 2014 report, Dr. Magliato stated that Dr. Dines' supplementary report was of no value. He noted that Dr. Dines referenced many pages and tables from the sixth edition of the A.M.A., *Guides*, but that he had chosen no particular method and had given no actual calculations. Dr. Magliato stated that Dr. Dines' best reference was to Table 15-34 on page 475, but that he did not understand the notation of a "30 percent section" in reference to this table. He explained that, since this table related to the range of motion method, each shoulder motion must be listed separately and the impairment corresponding to each lost motion listed next to it, and each of the individual impairments added and modified by a functional grade modifier to arrive at final percentage impairment. Dr. Magliato concluded that a second opinion examination with a physician familiar with the sixth edition of the A.M.A., *Guides* was necessary.

On March 6, 2014 OWCP referred the case to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant sustained

any permanent impairment as a result of his accepted injury and the extent of any permanent impairment in accordance with the A.M.A., *Guides*.

In a March 20, 2014 report, Dr. Sultan accurately described the February 14, 2013 employment injury and reviewed appellant's medical history. On examination of the left shoulder, he noted abduction and forward elevation of 175 degrees; complete internal rotation and external rotation of 40 degrees; adduction of 45 degrees and posterior extension of 40 degrees. Dr. Sultan noted a negative shoulder impingement test, Hawkin's test and drop arm test. He reviewed appellant's MRI scan of February 19, 2014, which confirmed reduction of his left shoulder dislocation. Dr. Sultan stated that appellant's date of maximum medical improvement was three months from appellant's date of injury. He calculated appellant's percentage of impairment using the Shoulder Regional Grid on page 201 of the sixth edition of the A.M.A., *Guides*. After noting a functional history grade modifier of 1 and physical examination and clinical studies modifiers of zero and applying the net adjustment formula, Dr. Sultan calculated that appellant had a zero percent impairment of the upper left shoulder.

OWCP referred Dr. Sultan's March 20, 2014 report to Dr. Andrew A. Merola, a Board-certified orthopedic surgeon and medical adviser, for review on April 9, 2014.

In an April 24, 2014 report, Dr. Merola reviewed Dr. Sultan's report and stated that the date of maximum medical improvement was April 7, 2014, which was the date of Dr. Sultan's examination. He noted that there was a class 1 left total shoulder dislocation, referencing Table 15-5. Appellant's functional history modifier was 1 whereas his physical examination and clinical study modifiers were zero. Dr. Merola concluded that this was a grade A impairment whereby the left shoulder dislocation's percentage of permanent impairment was zero percent.

By decision dated May 30, 2014, OWCP denied appellant's claim for a schedule award, finding that the medical evidence failed to establish that he had sustained a ratable permanent impairment to his left upper extremity as a result of his accepted work-related injury.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and its implementing federal regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[4] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5] For decisions issued after

[2] *Id*. at § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[5] *Id.*

May 1, 2009, the sixth edition is used to calculate schedule awards.[6] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[7]

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).[8] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS

OWCP accepted appellant's claim for a left shoulder dislocation. On July 30, 2013 appellant requested a schedule award.

Following clearly erroneous reports of impairment submitted by appellant from his treating physician, OWCP referred him for a second opinion evaluation with Dr. Sultan, who provided a March 20, 2014 report. In accordance with Table 15-5, shoulder regional grid, Dr. Sultan rated appellant's impairment as class 1C. He applied the modifiers for functional history, physical examination, and clinical studies found in Table 15-7, Table 15-8 and Table 15-9, respectively. Appellant's functional history modifier was one, denoting a mild problem with pain or symptoms on strenuous activity and the ability to perform self-care independently. His physical examination indicated a grade modifier of zero based on a normal range of motion. Clinical studies indicated a grade modifier of zero based on an MRI scan confirming reduction of

[6] FECA Bulletin No. 09-03 (issued March 15, 2009).

[7] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a.3 (January 2010). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[8] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id*. at 383-419.

[10] *Id*. at 411.

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

the left shoulder dislocation. Using the net adjustment formula and applying the grade modifiers, Dr. Sultan calculated a final impairment rating of zero percent.

Dr. Sultan properly explained his calculations under the sixth edition of the A.M.A., *Guides*. Dr. Merola, OWCP's medical adviser, reviewed Dr. Sultan's report and agreed with his impairment rating. There is no other medical evidence of record in accordance with the sixth edition of the A.M.A., *Guides* supporting a higher impairment rating. In particular, Dr. Dines' January 17, 2014 report did not contain any actual calculations of an impairment rating, but instead merely referenced various sections of the A.M.A., *Guides* and stated that his calculations were self-explanatory. As Dr. Dines' report is the only contemporaneous impairment rating of record other than that of the second opinion physician and medical adviser, and as his rating of 35 percent does not comport with the sixth edition of the A.M.A., *Guides*, the Board finds that the weight of the medical evidence establishes that appellant had a zero percent left shoulder impairment.

On appeal, appellant contends that Dr. Dines' report should be given greater weight, and that he sustained a permanent impairment such that it impacted his ability to swim. For the reasons stated above, the weight of the medical evidence rests with Drs. Sultan and Merola.

The Board notes that appellant submitted evidence after the issuance of the May 30, 2014 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.[12]

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established that he has a ratable impairment of his left arm.

[12] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 30, 2014 is affirmed.

Issued: November 5, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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