

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

J.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 14-1113
Issued: October 2, 2014**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 14, 2014 appellant, through his attorney, filed a timely appeal from the October 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 met his burden of proof to establish that he has more than three percent permanent impairment of his left arm, for which he received a schedule award.

FACTUAL HISTORY

OWCP initially accepted that on August 7, 2007 appellant, then a 47-year-old clerk, sustained a right shoulder sprain and a right rotator cuff tear due to moving a heavy mail container. He received compensation on the daily rolls. On March 17, 2008 appellant

¹ 5 U.S.C. §§ 8101-8193.

underwent OWCP-authorized arthroscopic repair surgery of his right shoulder condition.² OWCP later expanded his claim to accept a temporary aggravation of left shoulder tendinitis, resolved.

In an October 27, 2009 report, Dr. David Weiss, an attending osteopath, provided a description of appellant's medical history and detailed the results of his examination of appellant. On examination, the right shoulder revealed well-healed portal arthroscopy scars. There was anterior cuff tenderness and range of motion revealed restriction involving crossover adduction and external rotation. Examination of the left shoulder revealed a well-healed anterior surgical scar and there was anterior cuff tenderness. Dr. Weiss indicated that range of motion testing revealed restriction involving forward elevation, abduction, crossover adduction and internal rotation. Circumduction produced crepitus within the acromioclavicular joint and the Hawkins impingement sign and O'Brien test were positive. Dr. Weiss concluded that appellant had five percent permanent impairment of his right arm and five percent permanent impairment of his left arm under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). For the left arm, appellant fell under a three percent default value for his grade 1 left shoulder impingement syndrome. He had a grade modifier 2 for functional history, grade modifier 2 for physical examination and grade modifier 2 for clinical studies and application of the Net Adjustment Formula meant that appellant moved from the three percent default value to the five percent rating on Table 15-5.

On September 9, 2010 appellant was examined by Dr. Stuart L. Gordon, a Board-certified orthopedic surgeon.³ In a September 9, 2010 report, Dr. Gordon stated that appellant's shoulders had full range of motion overhead and that there was good rotator cuff strength. He noted that there was mild trapezius soreness, more on the right than on the left and that the Spurling's test was negative. Labral testing, O'Brien testing and apprehension testing were all noted to be negative. In an addendum report dated December 10, 2010, Dr. Gordon discussed why he felt that appellant's left shoulder condition was consequential to his August 7, 2007 right shoulder injury. His opinion formed the basis for OWCP's acceptance on January 4, 2011 of appellant's claim for temporary aggravation of left shoulder tendinitis, resolved.

On July 2, 2012 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, provided an opinion on the permanent impairment of appellant's arms. He reviewed the medical evidence of record, including the examinations of Dr. Weiss and Dr. Gordon and concluded that appellant had five percent permanent impairment of his right arm and three percent permanent impairment of his left arm under the sixth edition of the A.M.A., *Guides*. Dr. Berman indicated that he derived grade modifiers from Dr. Gordon's examination rather than from Dr. Weiss' examination because Dr. Gordon was a Board-certified orthopedic surgeon and Dr. Weiss was not. For the left arm, appellant fell under a three percent default value for his grade 1 left shoulder impingement syndrome. He had a grade modifier 1 for functional history, grade modifier 1 for physical examination and grade modifier 1 for clinical

² Appellant previously underwent left shoulder surgery in 1995.

³ Dr. Gordon performed the examination as an impartial medical specialist who was asked to resolve a conflict in the medical opinion evidence regarding whether appellant had developed a left shoulder condition consequential to his August 7, 2007 right shoulder injury.

studies and application of the Net Adjustment Formula meant that he did not move from the three percent default value on Table 15-5 on page 402. Dr. Berman indicated that the date of maximum medical improvement was October 27, 2009, the date of Dr. Weiss' examination.

In a January 4, 2013 decision, OWCP granted appellant schedule awards for five percent permanent impairment of his right arm and three percent permanent impairment of his left arm. The awards ran for 24.96 weeks based on the impairment rating of Dr. Berman.⁴

Appellant requested a hearing with an OWCP hearing representative. During the April 11, 2013 hearing, counsel argued that OWCP should have accepted Dr. Weiss' assessment that appellant has five percent impairment of his left arm or at least found that there was a conflict in the medical evidence regarding his left arm impairment.

In a June 20, 2013 decision, the hearing representative set aside OWCP's January 4, 2013 schedule award decision and remanded the case for further development. He indicated that additional explanation was required regarding Dr. Berman's choice of October 27, 2009, the date of Dr. Weiss' examination, as the date of maximum medical improvement for appellant's left arm.

In an October 16, 2013 report, Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, determined that it was appropriate to use October 27, 2009 as the date of maximum medical improvement for appellant's left arm. Dr. Slutsky stated:

“The date of [maximum medical improvement] is October 27, 2009 (date of examination by Dr. Weiss). The shoulder conditions had stabilized on this date, there was no further treatment planned and the shoulder conditions did not change significantly (clinically) between the period of time between Dr. Weiss' exam[ination] on October 27, 2009 and the exam[ination] performed by Dr. Gordon (September 9, 2010).”

In an October 18, 2013 decision, OWCP found that appellant did not meet his burden of proof to establish that he has more than three percent permanent impairment of his left arm. It found that Dr. Berman's impairment rating together with the report of Dr. Slutsky regarding the date of maximum medical improvement, established that appellant had three percent permanent impairment of his left arm.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

⁴ The award indicated that appellant had a total arm impairment of eight percent, but the basis of the award makes it clear that the award was for a five percent permanent impairment of the right arm and a three percent permanent impairment of the left arm. The Board notes that he is not currently contesting the amount of the schedule award compensation for his right arm and the matter of his right arm impairment is not presently before the Board.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

loss or loss of use, of scheduled members or functions of the body. However, it does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.⁸

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder and the elbow, the relevant portions of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the Class of Diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”¹⁰ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹¹

ANALYSIS

OWCP accepted that on August 7, 2007 appellant sustained a right shoulder sprain and a right rotator cuff tear due to moving a heavy mail container and a temporary aggravation of left shoulder tendinitis, resolved, which was sustained as a consequence of his accepted right shoulder conditions.¹²

⁷ *Id.*

⁸ See FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

⁹ See A.M.A., *Guides* (6th ed. 2009) 401-11. Table 15-5 also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, 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. *Id.* at 405, 475-78.

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹² Appellant previously underwent left shoulder surgery in 1995.

In a January 4, 2013 decision, OWCP granted appellant schedule awards for five percent permanent impairment of his right arm and three percent permanent impairment of his left arm. Appellant did not contest the schedule award for his right arm and it is not before the Board. In an October 18, 2013 decision, OWCP found that he did not meet his burden of proof to establish that he has more than three percent permanent impairment of his left arm. It based its decision on a July 2, 2012 impairment rating of Dr. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, together with the October 16, 2013 report of Dr. Slutsky, a Board-certified occupational disease physician serving as an OWCP medical adviser, who determined that Dr. Berman appropriately used October 27, 2009 as the date of maximum medical improvement.

The Board finds that there is a conflict in the medical opinion evidence regarding appellant's left arm impairment which requires that the case be further developed.¹³

On July 2, 2012 Dr. Berman found that appellant had three percent permanent impairment of his left arm under the sixth edition of the A.M.A., *Guides*. He indicated that appellant fell under a three percent default value for his grade 1 left shoulder impingement syndrome. Dr. Berman had a grade modifier 1 for functional history, grade modifier 1 for physical examination and grade modifier 1 for clinical studies and application of the Net Adjustment Formula meant that appellant did not move from the three percent default value on Table 15-5 on page 402. He indicated that the date of maximum medical improvement was October 27, 2009, the date of Dr. Weiss' examination.¹⁴

In contrast, Dr. Weiss determined on October 27, 2009 that appellant had five percent permanent impairment of his left arm under the sixth edition of the A.M.A., *Guides*. Appellant fell under a three percent default value for his grade 1 left shoulder impingement syndrome. He had a grade modifier 2 for functional history, grade modifier 2 for physical examination and grade modifier 2 for clinical studies and application of the Net Adjustment Formula meant that he moved from the three percent default value to the five percent rating on Table 15-5.¹⁵

In order to resolve the outstanding conflict regarding appellant's left arm impairment, the case shall be remanded to OWCP for referral of him to an impartial medical specialist for an examination and opinion on this matter. After such further development, OWCP shall issue an appropriate decision regarding his left arm impairment.

¹³ See *supra* notes 10 and 11.

¹⁴ The Board notes that Dr. Slutsky correctly indicated that it was appropriate for Dr. Berman to use this date of maximum medical improvement as appellant's left arm condition did not change greatly thereafter.

¹⁵ The Board notes that Dr. Berman chose to base his grade modifiers on the September 9, 2010 evaluation of Dr. Gordon, a Board-certified orthopedic surgeon who served as an impartial medical specialist with respect to a nonschedule award matter. The Board notes that the findings of Dr. Weiss could also be referenced in evaluating schedule award impairment.

CONCLUSION

The Board finds that, due to a conflict in the medical opinion evidence, the case is not in posture for decision regarding whether appellant has more than three percent permanent impairment of his left arm, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 2, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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