

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

J.D., Appellant)
and) Docket No. 15-363
DEPARTMENT OF THE ARMY, TANK) Issued: April 1, 2015
AUTOMOTIVE & ARMAMENTS COMMAND,)
Anniston, AL, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2014 appellant filed a timely appeal from a November 20, 2014 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 more than 12 percent permanent impairment of his right arm, for which he received a schedule award.

FACTUAL HISTORY

OWCP accepted that on August 5, 2013 appellant, then a 60-year-old heavy mobile equipment mechanic inspector, sustained injury due to lifting a storage cart starter into a buggy

¹ 5 U.S.C. §§ 8101-8193.

cart at work. It initially accepted that he sustained a left inguinal hernia with obstruction (without gangrene); it later accepted that he sustained a rotator cuff tear of his right shoulder. Appellant stopped work on August 5, 2013 and received disability compensation on the daily rolls. On August 5, 2013 Dr. John Valente, an attending Board-certified orthopedic surgeon, performed left inguinal hernia repair surgery. On December 11, 2013 Dr. Gordon Hardy, an attending Board-certified orthopedic surgeon, performed arthroscopic surgery on appellant's right shoulder including rotator cuff debridement and lysis of adhesions. These procedures were authorized by OWCP.

OWCP previously accepted (under File No. xxxxxxx287) that on March 22, 2005 appellant sustained sprains of his right rotator cuff and upper arm.² In connection with this other claim, it had granted him a schedule award on April 6, 2006 for 12 percent permanent impairment of his right arm under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The award ran for 37.44 weeks from March 15 to December 2, 2006.

In a June 18, 2014 report, Dr. Hardy diagnosed several right shoulder conditions, including a tear and sprain of the rotator cuff. He indicated, without elaboration, that appellant had a five percent impairment of his right arm under the sixth edition of the A.M.A., *Guides* (6th ed. 2009).

On July 9, 2014 Dr. Hardy cosigned a June 4, 2014 report in which appellant's physical therapist provided an assessment of his right arm impairment. He added the word "agree" above his signature. The report indicated that the impairment evaluation was made under the sixth edition of the A.M.A., *Guides* and stated:

"Using Table 15-5 (page 402), the best fit for the examinee's diagnosis was 'Rotator cuff injury, partial-thickness tear,' [c]lass 1, second tier. Adjustments [for grade modifier functional history, grade modifier physical examination, and grade modifier clinical studies] were 3, 1, and 2, and resulted in a net adjustment of plus three, or [g]rade E, [c]lass. Grade E is five percent [upper extremity impairment]. If needed, the whole-person impairment conversion, using Table 15-11, page 420, is 3 percent. This examiner recommends a five percent right upper extremity impairment."³

On July 15, 2014 appellant filed a claim for a schedule award (Form CA-7) due to his August 5, 2013 employment injury.

On July 24, 2014 Dr. James W. Dyer, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, discussed appellant's medical history, including his history of surgery, and indicated that in 2006 he had received a schedule award for 12 percent permanent

² The record further reveals, that in 2005, appellant underwent OWCP-authorized right shoulder arthroscopy with intrasubstance rotator cuff repair, biceps debridement and acromioclavicular joint resection.

³ In a brief report dated July 9, 2014, Dr. Hardy reiterated that appellant had a five percent impairment of his right arm under the sixth edition of the A.M.A., *Guides*.

impairment of his right arm. He noted that Dr. Hardy had assigned five percent impairment based on Table 15-5 of the sixth edition of the A.M.A., *Guides*, a diagnosis-based evaluation related to the right rotator cuff tear. Dr. Dyer stated:

“I agree with Dr. Hardy. The previous 12 percent [schedule award] of right shoulder already paid in 2006 was for the same problem. Therefore, no additional [schedule award] can be assigned and paid for the ... surgery on December 11, 2013. The adjusted, additional impairment [for right upper extremity] is equal to [the schedule award]. [Right upper extremity] equals ... zero percent.

In a July 28, 2014 informational letter, OWCP advised appellant that his current right arm impairment rating was not in addition to his previous 12 percent right arm impairment rating and that he had 0 percent additional impairment of his right arm.

By decision dated September 4, 2014, OWCP denied appellant’s claim for additional schedule award compensation because he did not submit medical evidence showing that he has more than a 12 percent permanent impairment of his right arm. It noted that he had already been compensated for the five percent right arm impairment described by Dr. Hardy.

Appellant submitted an August 12, 2014 report in which Dr. Hardy noted that appellant was placed at maximal medical improvement with a five percent right arm impairment as previously detailed on July 9, 2014 based on the sixth edition of the A.M.A., *Guides*. Appellant brought a July 28, 2014 letter from the Department of Labor stating that he had previous impairment rating for his right arm, dated April 6, 2006, of “12 percent to the right arm.” It was noted that the letter stated that his current right arm impairment rating was not in addition to his previous right arm impairment rating and that he had zero percent additional impairment of his right arm. Dr. Hardy indicated that appellant was counseled that his current right arm impairment due to his current right shoulder condition stood as previously discussed on June 3, 2014. He stated, “The patient was counseled that he would have to discuss his concerns regarding the previous upper extremity impairment rating with [the] Department of Labor. Both ratings are correlated to the right upper extremity. There are not separate ratings for the shoulder and arm.”

On September 11, 2014 appellant added a handwritten notation to Dr. Dyer’s July 24, 2014 report and asserted that he was entitled to additional compensation for right arm impairment because Dr. Hardy’s rating was “not the same problem” as covered by the previous 12 percent impairment award.

In a November 20, 2014 decision, OWCP affirmed its September 4, 2014 decision finding that appellant failed to establish more than 12 percent permanent impairment of his right arm.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA 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.⁶ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

ANALYSIS

OWCP accepted that on August 5, 2013 appellant sustained a left inguinal hernia and rotator cuff tear of his right shoulder due to moving a storage cart starter. On December 11, 2013 Dr. Hardy, an attending Board-certified orthopedic surgeon, performed OWCP-authorized arthroscopic surgery on his right shoulder including rotator cuff debridement and lysis of adhesions. OWCP had previously accepted, under another claim, that on March 22, 2005 appellant sustained sprains of his right rotator cuff and upper arm. In connection with the previous claim, OWCP had awarded a schedule award for 12 percent permanent impairment of his right arm.

On July 15, 2014 appellant filed a claim for additional schedule award compensation due to his accepted August 5, 2013 employment injury. The Board finds that OWCP properly denied appellant's claim for additional schedule award compensation because he failed to establish more than 12 percent permanent impairment of his right arm, for which he had received a schedule award.

On July 9, 2014 Dr. Hardy provided an assessment of his right arm impairment under the sixth edition of A.M.A., *Guides* and found that, using Table 15-5 (Shoulder Regional Grid),⁸ appellant had total right arm impairment of five percent due to a partial-thickness tear of his right rotator cuff.⁹

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

⁷ Federal (FECA) Procedure Manual, Part 2 *id.* at Chapter 2.808.5a (February 2013).

⁸ A.M.A., *Guides* 401-05, Table 15-5.

⁹ The impairment rating included adjustments for a grade modifier functional history of three, grade modifier physical examination of one, and grade modifier clinical studies of two. *See id.* at 406-11, Table 15-6 through Table 15-9.

Dr. Hardy clarified that his five percent right arm rating was included in the 12 percent award that appellant had previously received in 2006.¹⁰ In addition, Dr. Dyer, an OWCP medical adviser, produced a report on July 24, 2014 in which he agreed with Dr. Hardy's assessment that appellant had five percent right arm impairment based on the sixth edition of the A.M.A., *Guides*. Dr. Dyer stated that the previous 12 percent schedule award paid in 2006 was "for the same problem." No additional schedule award could be paid as no additional right arm impairment was established.

Although appellant claimed that the April 6, 2006 schedule award was not for the same right arm problem evaluated by Dr. Hardy and Dr. Dyer, his own opinion regarding his right arm impairment would not supplant the opinions of these physicians. The record does not contain a rationalized medical report establishing more than 12 percent permanent impairment of his right arm, for which he already received a schedule award.

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

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish more than 12 percent permanent impairment of his right arm, for which he received a schedule award.

¹⁰ With respect to the rating for the April 6, 2006 schedule award and his current right arm impairment rating, Dr. Hardy stated, "Both ratings are correlated to the right upper extremity. There are not separate ratings for the shoulder and arm."

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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