

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

N.D., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DELIVERY CENTER, Southeastern, PA,
Employer**)

**Docket No. 15-1392
Issued: December 9, 2015**

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 H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 8, 2015 appellant, through counsel, filed a timely appeal from the January 29, 2015 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 sustained greater than two percent impairment of her left upper extremity for which she previously received a schedule award.

On appeal, appellant's counsel argues that the report of the impartial medical examiner cannot carry the weight of the medical evidence because he did not measure range of motion in the left shoulder. He further contends that the impartial medical examiner did not give an award for a preexisting cervical condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are incorporated herein by reference.² Briefly, on September 9, 1997 appellant, then a 31-year-old part-time flexible mail handler, filed an occupational disease claim (Form CA-2) alleging that she suffered from a left shoulder strain caused by repeatedly lifting heavy bags and parcels. OWCP accepted appellant's claim for tendinitis of the left shoulder. On July 25, 2012 it issued a schedule award for one percent impairment of appellant's left upper extremity. Appellant requested a hearing. On February 19, 2013 the hearing representative affirmed the July 25, 2012 decision. However, appellant appealed to the Board and in a December 20, 2013 decision, the Board set aside the hearing representative's decision and remanded the case for further consideration. The Board noted that there was an unresolved conflict between appellant's treating orthopedic surgeon, Dr. Arthur Becan, who determined that appellant had four percent impairment of the left upper extremity, and the opinion of an OWCP medical adviser, Dr. Arnold D. Berman, a Board-certified orthopedic surgeon, who determined that appellant had one percent impairment of the left upper extremity.³

On January 8, 2014 OWCP referred appellant to Dr. Evan Kovalsky, a Board-certified orthopedic surgeon, for an impartial medical examination. In his January 30, 2014 opinion, Dr. Kovalsky noted findings on physical examination and reviewed appellant's medical history. He noted that while appellant did have some subjective complaints and symptoms in her shoulder, she did not appear to have any objective findings on her physical examination. Dr. Kovalsky noted very minimal functional limitations and restrictions. Appellant demonstrated full, painless range of motion in the shoulder, which included abduction to at least 0 to 170 degrees symmetric with her right. Dr. Kovalsky also noted she had forward elevation to the same extent and that external rotation with her arms at her side was 0 to 80 degrees and 0 to 90 degrees with her arms abducted. He noted internal rotation as to T5 with a negative lift-off. Dr. Kovalsky noted good strength without any pain or weakness on resisted external rotation and abduction.

Dr. Kovalsky utilized Table 15-5 of the sixth edition of the A.M.A., *Guides* and for the diagnosis of tendinitis he placed appellant in class 1. He agreed with appellant's treating physician, Dr. Becan, that the base percentage would be consistent with a class 1 diagnosis and a class C rating of three percent. Dr. Kovalsky found no significant abnormal findings on her physical examination and there were some inconsistencies noted in the history and in her Jamar grip testing. He assigned a grade modifier of 1 for Functional History (GMFH) based on her functional history adjustment, a grade modifier of 0 for Physical Examination (GMPE) based on no objective or consistent findings, and a grade modifier of 1 for Clinical Studies (GMCS), based on a magnetic resonance imaging (MRI) scan study which showed very minimal abnormalities, although there was no significant signal change with the supraspinatus. Using the formula set forth in the A.M.A., *Guides* with Class of Diagnosis (CDX) represented by 1, *i.e.*, (GMFH-CDX) + (GMPE-CDX) = (GMCS-CDX), he found that (1-1) plus (0-1) plus (1-1) equaled a net

² Docket No. 13-1314 (issued December 20, 2013).

³ *Id.*

adjustment of -1, which would move the impairment rating one place to the left to equal a total impairment of two percent of the left upper extremity.

On March 19, 2014 OWCP referred Dr. Kovalsky's impairment rating to the OWCP medical adviser. In a report dated March 31, 2014, the medical adviser, Dr. Berman, agreed with Dr. Kovalsky that appellant had two percent impairment of the left upper extremity. He noted that this indicated an increase of one percent impairment of the left upper extremity over the prior award.

By decision dated April 7, 2014, OWCP issued an additional schedule award of one percent to the left upper extremity for a total of two percent of the left upper extremity.

By letter dated April 10, 2014, appellant, through counsel, requested a hearing.

At the hearing held on August 15, 2014, counsel argued that Dr. Berman was prohibited from reviewing the report of Dr. Kovalsky on behalf of OWCP because his original opinion created the conflict that required referral to the impartial medical examiner in the first place.

In a November 5, 2014 decision, the hearing representative determined that the case should be forwarded to a new OWCP medical adviser, noting that where a referee examination is arranged with respect to a schedule award issue, the same medical adviser should not review the referee's report for proper application of the A.M.A., *Guides*.⁴

On November 20, 2014 OWCP referred the case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser. In a January 22, 2015 report, Dr. Slutsky agreed with Dr. Kovalsky that appellant sustained an impairment of two percent of her left upper extremity. He also found the CDX of 1, class 3 equaled three percent impairment which was modified by 1 for GMFH, 0 for GMPE, and 1 for GMCS. Dr. Slutsky then applied the formula and found a net adjustment of negative 1, for a final grade of B, or a final left upper extremity impairment of two percent.

By decision dated January 29, 2015, OWCP determined that the evidence of record did not establish more than the two percent award of the left upper extremity already received.

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 for 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 insure equal justice under the law to all claimants, good administrative practice

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(k) (February 2013).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

necessitates the use of 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 The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁸

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.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 the 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

Section 8123(a) provides that, if there is a 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.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant had two percent impairment of the left upper extremity based on the calculations provided by the impartial medical examiner, Dr. Kovalsky. Dr. Kovalsky's calculations were verified by Dr. Slutsky, a medical adviser not involved in the creation of the initial conflict.

All physicians of record, including appellant's treating physician, Dr. Becan, both of the OWCP medical advisers, and Dr. Kovalsky, found that appellant's impairment class was determined by Table 15-5 on page 402 of the A.M.A., *Guides*. Appellant had a diagnosis of tendinitis, with residual loss, functional with normal motion, which placed appellant into class 1 impairment with a default grade of C, equal to three percent impairment. However, there was a conflict between appellant's treating physician, Dr. Becan, and the initial OWCP medical adviser, Dr. Berman, with regard to how the grade modifiers affected appellant's impairment ratings. Accordingly, OWCP referred appellant to Dr. Kovalsky for an impartial medical examination. In situations where there exist opposing medical reports of virtually equal weight

⁷ *Id.*

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* 494-531.

¹⁰ *Id.* at 521.

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.8(i) (February 2013).

¹² *R.C.*, Docket No. 12-437 (issued October 23, 2012).

and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

Dr. Kovalsky determined that appellant had a grade modifier of 1 for functional history and 1 for clinical studies. Dr. Becan, appellant's physician, also found grade modifiers of 1 for functional history and 1 for clinical studies. However, the impartial medical examiner, Dr. Kovalsky, and the OWCP medical adviser, Dr. Slutsky, found a grade modifier of 0 for physical examination whereas Dr. Becan found a grade modifier of 1. Dr. Kovalsky found no objective or consistent findings and had a full, painless range of motion of her shoulder. Thus the physical examination modifier of 0 was appropriate. Dr. Kovalsky then properly applied the formula and determined that appellant's grade modifiers moved her classification to a grade B class 1 impairment, which equaled two percent impairment of the left upper extremity.

The Board finds that Dr. Kovalsky properly applied the A.M.A., *Guides*, as was confirmed by Dr. Slutsky, and properly determined that appellant had two percent impairment of her left upper extremity based on Table 15-5 of the A.M.A., *Guides*, and the proper grade modifiers.

On appeal, appellant's counsel contends that Dr. Kovalsky's report is not entitled to the weight of the evidence as he did not measure range of motion in the left shoulder in accordance with the A.M.A, *Guides*, which requires three separate measurements in degrees in all planes of motion. He also contends that Dr. Kovalsky did not discuss active vs. passive range of motion. Dr. Kovalsky found, however, that appellant had full, painless range of motion of her shoulder when considering abduction, external rotation, and internal rotation.¹⁴ His conclusion is supported by his findings on physical examination. Accordingly, Dr. Kovalsky found appellant had no impairment due to loss of motion. Counsel also argues that appellant had preexisting neck conditions of cervical radiculopathy and brachial plexus involvement. None of these conditions have been accepted as work related. A schedule award can only be paid for a preexisting condition related to the accepted employment injury.¹⁵

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 has not established greater than two percent impairment of her left upper extremity for which she previously received a schedule award.

¹³ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹⁴ *K.F.*, Docket No. 15-0569 (issued August 14, 2015).

¹⁵ *Veronica Williams*, 56 ECAB 367, 370 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2015 is affirmed.

Issued: December 9, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board