United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 14-1861**
	)	**Issued: January 2, 2015**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, SAN DIEGO, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2014 appellant filed a timely appeal from a May 19, 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 established more than 13 percent permanent impairment of each upper extremity for which he received a schedule award.

FACTUAL HISTORY

OWCP accepted that on October 25, 1997 appellant, then a 41-year-old aircraft electrician, sustained multiple contusions, painful respiration, and cervical strain in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of duty as a result of falling off a platform. He stopped work. OWCP paid wage-loss compensation benefits. On February 28, 1998 appellant returned to full-time limited duty. He continued to receive medical benefits with intermittent time loss from work.

In a decision dated June 29, 1999, OWCP terminated appellant's entitlement to wage-loss and medical benefits effective June 25, 1999.[2] By decision dated February 24, 2000, an OWCP hearing representative affirmed the June 29, 1999 termination decision.

On March 5, 2004 appellant filed a recurrence claim alleging that he needed back and cervical surgery as a result of the October 25, 1997 employment injury. On October 27, 2004 OWCP accepted his recurrence claim for displacement of cervical intervertebral disc. On June 8 and 13, 2004 appellant underwent bilateral C6-7 medial fasciectomy and foraminotomy. He stopped work and was awarded leave buyback for the period June 4 to August 31, 2004. On June 8, 2005 appellant underwent cervical fusion of C2-7. He stopped work and requested disability compensation. On July 19, 2005 appellant was placed on the periodic rolls. On October 25, 2005 he was released to work full-time limited duty, but the employing establishment was unable to accommodate his work restrictions.

OWCP referred appellant to vocational rehabilitation. On March 15, 2010 appellant began work as a customer service representative at a private company. On June 21, 2010 OWCP determined that the actual wages he earned as a customer service representative, $340.00 weekly, fairly, and reasonably represented his wage-earning capacity which resulted in a 69 percent loss of wage-earning capacity.

On June 1, 2011 appellant elected to receive retirement benefits from the Office of Personnel Management.

On August 9, 2011 OWCP granted appellant a schedule award for 13 percent permanent impairment of each upper extremity. The award ran for 81.12 weeks from January 31, 2011 to February 17, 2013.

On October 8, 2013 appellant, through counsel, filed a claim for an increased schedule award. He submitted various medical reports previously of record dated February 3, April 9, and May 18, 1998 by Dr. Stanley G. Katz, a Board-certified orthopedic surgeon.

On November 7, 2013 OWCP referred appellant's claim, along with the medical record, and statement of accepted facts, to Dr. Steven Ma, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant continued to suffer residuals of his October 25, 1997 work-related injury and whether he sustained additional permanent impairment according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

[2] OWCP terminated appellant's entitlement to compensation and medical benefits based on the March 23, 1998 second opinion report of Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon, who determined that appellant's work-related injuries had resolved and that appellant's current degenerative cervical condition was unrelated to the October 25, 1997 employment injury.

In a December 18, 2013 report, Dr. Ma reviewed appellant's medical records and the statement of accepted facts. He related appellant's complaints of neck pain radiating down into both arms and fingers, mid-to-low back pain, and severe cramping in both legs. Appellant also reported numbness and tingling in his fingers when driving or writing. Upon examination of his neck, Dr. Ma observed limited range of motion but no asymmetry or spasm present. He stated that appellant was unable to bring his chin to his chest or to his left and right shoulders. Dr. Ma reported that range of motion of the shoulders, elbows, wrists, and hands were within normal limits bilaterally. Reflexes were two plus and symmetrical bilaterally over the biceps, triceps, and brachioradialis. Dr. Ma noted that x-rays of the cervical spine revealed anterior plating, and intervertebral fusion from C3-7. He diagnosed status post discectomy, intervertebral fusion, and anterior plating C3-7 for displacement of cervical intervertebral disc without myelopathy. Dr. Ma also stated that appellant had evidence of degenerative arthritis as evidenced by his magnetic resonance imaging scans and x-rays but explained that this condition was not contributing to his current symptoms. He opined that appellant's findings had not changed from his prior medical records when he was previously given a schedule award for his work-related injury. Dr. Ma concluded that none of the medical records or the physical examination demonstrated any change in appellant's medical condition. Thus, he concluded that appellant continued to have the same 13 percent impairment of each upper extremity as previously awarded.

On April 21, 2014 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence and provided an accurate history of injury. He noted that Dr. Ma provided findings on examination but did not calculate impairment based on the sixth edition of the A.M.A., *Guides.* Dr. Harris reported diagnoses of status post bilateral C6-7 medial facetectomies, and foraminotomies, status post revision of bilateral C6-7 foraminotomies, status post anterior cervical fusion, and chronic cervical radiculopathy. Referring to the sixth edition of the A.M.A., *Guides,* he explained that, although the A.M.A., *Guides* did not provide a method to calculate upper extremity impairment for cervical radiculopathy *The Guides Newsletter* July/August 2009 described an approach consistent with the sixth edition methodology. Dr. Harris opined that appellant had zero percent impairment of the right upper extremity and one percent impairment of the left upper extremity for residual problems with mild pain/impaired sensation from the left C6 cervical radiculopathy. Thus he found no increase in appellant's upper extremity impairments. Dr. Harris noted that the date of maximum medical improvement was December 18, 2013, the date of the second opinion examination.

By decision dated May 19, 2014, OWCP denied appellant's request for increased schedule award based on the April 21, 2014 report of Dr. Harris, the OWCP medical adviser. It determined that he had not established more than 13 percent permanent impairment of each upper extremity as a result of his accepted conditions.

LEGAL PRECEDENT

The schedule award provision of FECA and the implementing regulations 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in

making such a determination is a matter that rests within the sound discretion of OWCP. 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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[3]

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.[4] Under the sixth edition, the evaluator identifies the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[5] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids, and calculations of modifier scores.[6]

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 in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[7]

ANALYSIS

OWCP accepted that appellant sustained multiple contusions, painful respiration, cervical strain, and displacement of cervical intervertebral disc in the performance of duty. Appellant underwent various surgeries to his cervical spine. On August 9, 2011 OWCP granted him a schedule award for 13 percent permanent impairment of each upper extremity. On August 30, 2011 appellant, through counsel, requested an additional schedule award.

OWCP referred appellant's claim to Dr. Ma for a second opinion examination. In a December 18, 2013 report, Dr. Ma reviewed appellant's history and conducted an examination. He observed limited range of motion of appellant's neck with no asymmetry or spasm. Examination of the upper extremities revealed range of motion within normal limits bilaterally and reflexes of two plus. Dr. Ma reported that none of the medical records or the physical examination demonstrated any change in appellant's medical condition for which he was previously awarded 13 percent impairment of each upper extremity.

[3] 20 C.F.R. § 10.404; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[4] A.M.A., *Guides* 3, section 1.3 (6th ed. 2009).

[5] *Id.* at 494-531.

[6] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Payment of Compensation and Schedule Awards*, Chapter 2.808.6(e) (February 2013).

In an April 21, 2014 report, Dr. Harris reviewed the medical record, including Dr. Ma's December 18, 2013 report. He noted diagnoses of status post bilateral C6-7 medial facetectomies and foraminotomies, status post revision of bilateral C6-7 foraminotomies, status post anterior cervical fusion, and chronic cervical radiculopathy. Referring to *The Guides Newsletter* July/August 2009, Dr. Harris opined that appellant had zero percent impairment of the right upper extremity and one percent impairment of the left upper extremity for residual problems with mild pain/impaired sensation from the left C6 cervical radiculopathy. Thus, he determined that appellant did not warrant an increased schedule award.

The Board finds that this case is not in posture for decision because the opinions of Drs. Ma and Harris are insufficient to establish the degree of appellant's permanent impairment. The Board finds that neither Dr. Ma nor Dr. Harris sufficiently explained how appellant's impairment rating was determined according to the sixth edition of the A.M.A., *Guides.* Dr. Ma reviewed appellant's history and provided findings on examination. He did not, however, provide any calculations for an impairment rating of appellant's conditions under the sixth edition of the A.M.A., *Guides*. Dr. Ma merely reported that appellant's medical condition had not changed and thus, there was no evidence to support an increased schedule award of 13 percent impairment of each of appellant's upper extremities.

The Board also finds that Dr. Harris' April 21, 2014 report fails to provide sufficient explanation for his impairment rating. Although Dr. Harris properly references *The Guides Newsletter* July/August 2009 he does not discuss specific tables or procedures nor provide any explanation for his conclusion that appellant had zero percent impairment of the right upper extremity and one percent impairment of the left upper extremity. The Board has held that a medical report is of diminished probative value where the A.M.A., *Guides* are not properly followed.[8] Because Dr. Harris failed to properly follow the A.M.A., *Guides,* the Board finds that his impairment rating is an insufficient basis for the schedule award. OWCP should have sought clarification or a supplemental report from Dr. Harris regarding the medical rationale he used to calculate his impairment rating.[9] The Board has held that once OWCP begins development of the medical evidence, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[10]

The Board finds that this case is not in posture for decision. The Board will set aside the April 4, 2014 decision and remand the case for further development of the medical evidence and a proper evaluation of appellant's impairment under the sixth edition of the A.M.A., *Guides.* After such further development as may be necessary, OWCP shall issue a *de novo* decision on appellant's entitlement to a schedule award.

[8] *J.G.*, Docket No. 09-1128 (issued December 7, 2009).

[9] *Supra* note 7 at Chapter 2.808.6(f) (February 2013).

[10] *See F.B.*, Docket No. 10-1382 (issued April 13, 2011).

CONCLUSION

The Board finds that this case is not in posture for decision on the extent of permanent impairment to appellant's upper extremities.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: January 2, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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