United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 14-1021**
	)	**Issued: July 1, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Jackson, MS, 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 March 31, 2014 appellant timely appealed a February 25, 2014 nonmerit decision and an October 16, 2013 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.[2]

ISSUES

The issues are: (1) whether appellant has greater than 11 percent impairment of her right lower extremity, greater than 14 percent impairment of her left lower extremity, and greater than 2 percent impairment of the left upper extremity; and (2) whether OWCP properly denied further merit review pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal contains evidence received after OWCP issued its February 25, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 57-year-old former sales and service associate, has an employment-related bilateral foot condition and consequential left shoulder injury.[3] Under claim number xxxxxx163, OWCP accepted bilateral plantar fasciitis which arose on or about May 1, 2004. Appellant also has an accepted occupational disease claim (xxxxxx970) for chronic pain syndrome and bilateral plantar fasciitis with a March 30, 2009 date of injury.[4] She last worked in May 2009. On January 1, 2010 appellant fell at home injuring her left shoulder. She attributed the fall to left foot discomfort and pain. OWCP accepted left rotator cuff tear as a consequential injury under claim number xxxxxx970.

Appellant has undergone multiple surgical procedures involving her feet, which includes bilateral plantar fasciotomy and Topaz ablation. She has also undergone left shoulder arthroscopic decompression, which OWCP authorized. Dr. Stefanie M. Thomas, D.P.M., treated appellant's bilateral foot condition. Dr. William B. Geissler, a Board-certified orthopedic surgeon, treated appellant's left shoulder condition.

On June 27, 2008 OWCP granted a schedule award (xxxxxx163) for two percent impairment of the left leg. The award was based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). OWCP relied on the June 19, 2008 report of its district medical adviser (DMA), Dr. Howard "H.P." Hogshead, an a Board-certified orthopedic surgeon, who found left lower extremity impairment due to loss of inversion under Table 17-12, Hindfoot Impairment Estimates, A.M.A., *Guides* 537 (2001). Dr. Hogshead found that appellant had reached maximum medical improvement (MMI) on June 16, 2008.

Appellant requested reconsideration and OWCP referred her for a second opinion evaluation.[5] Dr. B. Thomas Jeffcoat, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on July 9, 2009. Dr. Jeffcoat found two percent bilateral lower extremity impairment under Table 16-2, Foot and Ankle Regional Grid (LEI), A.M.A., *Guides* 501 (6th ed. 2008).

In a report dated September 4, 2009, Dr. Guillermo M. Pujadas, a Board-certified orthopedic surgeon and DMA, found 11 percent right lower extremity impairment and 14 percent left lower extremity impairment. He did not rely on Dr. Jeffcoat's July 9, 2009 findings, but

[3] Appellant received a disability retirement effective July 13, 2009.

[4] OWCP doubled appellant's lower extremity occupational disease claims, and designated claim number xxxxxx163 as the master file.

[5] Appellant's podiatrist, Dr. Thomas, was unfamiliar with rating impairment under the latest version of the A.M.A., *Guides* (6th ed. 2008).

instead based his rating on previous range of motion (ROM) measurements provided by appellant's podiatrist, Dr. Thomas.[6]

By decision dated September 16, 2009, OWCP granted a schedule award for 11 percent impairment of the right lower extremity (RLE) and an additional 12 percent impairment of the left lower extremity (LLE).[7] The decision incorrectly noted that the latest award was based on Dr. Jeffcoat's July 9, 2009 report.

On March 3, 2012 appellant filed a Form CA-7 for a schedule award under claim number xxxxxx970. Dr. Thomas had recently advised that appellant had reached MMI following her latest surgery, which was a Topaz procedure performed on May 17, 2010.

In a May 15, 2012 schedule award development letter, OWCP asked Dr. Thomas to submit an impairment rating under the A.M.A., *Guides* (6th ed. 2008). Appellant had previously advised OWCP that Dr. Thomas was unfamiliar with the impairment rating process. On May 23, 2012 Dr. Thomas referred appellant for an impairment rating for her accepted conditions of plantar fasciitis, chronic pain syndrome and left rotator cuff tear. OWCP authorized the requested impairment rating.

On June 12, 2012 Robyn Roberts, a registered occupational therapist (OTR), evaluated appellant and found two percent impairment of the left upper extremity based on a diagnosis of acromioclavicular (AC) joint disease.[8] She also found one percent bilateral lower extremity impairment based on a diagnosis of plantar fasciitis. Although Ms. Roberts reportedly rated appellant under the A.M.A., *Guides* (6th ed. 2008), she did not identify any of the specific rating criteria she had used. When OWCP subsequently forwarded the record to a new DMA, James W. Dyer, for review, it incorrectly identified the June 12, 2012 impairment rating as having been provided by "Dr. Robyn Roberts."[9]

[6] Dr. Thomas' undated report was received by OWCP on June 23, 2008. She provided various ROM measurements and noted that appellant had reached MMI on June 16, 2008. This was the same information the previous DMA had used to calculate a two percent left lower extremity impairment under the Table 17-12, A.M.A., *Guides* 537 (5th ed. 2001). *See supra* note 5. Whereas Dr. Hogshead's rating was limited to hind foot ROM impairment, Dr. Pujadas' bilateral lower extremity rating included both hindfoot and ankle motion impairments under Table 16-20, Table 16-22 and Table 16-25, A.M.A., *Guides* 549-50 (6th ed. 2008). Dr. Pujadas similarly found that appellant had reached MMI as of June 16, 2008.

[7] Although the DMA found 14 percent LLE impairment, appellant had already received compensation for 2 percent impairment. Therefore, OWCP paid an additional 12 percent for the left lower extremity. It subsequently approved a lump-sum payout on appellant's schedule award, which covered the period August 30, 2009 through December 6, 2010.

[8] Ms. Roberts is also a physical therapist (PT) and certified hand therapist (CHT).

[9] Prior to the claims examiner's September 19, 2012 referral to the DMA, appellant had complained to OWCP about Ms. Roberts' evaluation, noting that she was not a doctor and was reportedly unfamiliar with some parts of her rating. Appellant also complained to her U.S. Senator, who in turn passed her concerns along to OWCP.

In a report dated September 20, 2012, Dr. Dyer, noted that the "AP" assigned one percent for each lower extremity based on the A.M.A., *Guides* (6th ed. 2008).[10] He did not specifically comment on whether the "AP's" rating accurately reflected the extent of any bilateral lower extremity impairment, but merely noted that appellant had already been paid a schedule award for 11 percent RLE impairment and 14 percent LLE impairment for the same problem of both feet. Therefore, no additional schedule award for plantar fasciitis was indicated. With respect to appellant's left upper extremity (LUE), Dr. Dyer noted impairment due to shoulder surgical decompression for impingement syndrome.[11] He expressed his agreement with the AP's June 12, 2012 rating of two percent LUE impairment. Dr. Dyer rated appellant based on a diagnosis of impingement syndrome under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2008). He explained that appellant had class 1 Classs of Diagnosis (CDX-1) impairment, with a default grade (C) upper extremity impairment of three percent. After adjustments for Functional History (GMFH-2), Physical Examination (GMPE-0) and Clinical Studies (GMCS-0), Dr. Dyer calculated a net adjustment of -1.[12] As such, he adjusted appellant's rating from grade C to B, which corresponded to two percent upper extremity impairment. Dr. Dyer found that appellant reached MMI on June 12, 2012.

On October 25, 2012 OWCP granted a schedule award for two percent impairment of the left upper extremity under claim number xxxxxx970. It also found that appellant was not entitled to additional impairment of the lower extremities. The October 25, 2012 decision noted she had already been compensated for a combined "23" percent impairment of the lower extremities under claim number xxxxxx163.[13] OWCP noted that the current rating was based on the medical findings and report of "Dr. Robyn Roberts" dated June 12, 2012, as well as the September 20, 2012 report of Dr. Dyer, the DMA.

On February 4, 2013 appellant requested reconsideration. She reiterated earlier complaints about Ms. Roberts' June 12, 2012 impairment rating. Appellant argued that Ms. Roberts was a physical therapist who seemed not to have sufficient knowledge of the impairment rating process with respect to feet. She believed a certified physician was going to provide a rating. Appellant also noted that Ms. Roberts had not consulted with Dr. Thomas despite having stated she would.

OWCP acknowledged its mistake in identifying Ms. Roberts as a physician. Consequently, it prepared an August 5, 2013 statement of accepted facts and referred appellant for another second opinion evaluation with Dr. Jeffcoat.

[10] Dr. Dyer is a Board-certified orthopedic surgeon. "AP" was most likely referring to Ms. Roberts as an attending physician.

[11] As previously noted, Dr. Geissler performed left shoulder arthroscopic decompression on March 25, 2011.

[12] Net Adjustment (-1) = (GMFH 2-CDX 1) + (GMPE 0-CDX 1) + (GMCS 0-CDX 1). *See* Section 15.3d, A.M.A, *Guides* 411 (6th ed. 2008).

[13] Actually, OWCP previously compensated appellant for a combined 25 percent bilateral lower extremity impairment, not 23 percent.

Dr. Jeffcoat reexamined appellant on September 26, 2013. He currently found one percent bilateral lower extremity impairment and no ratable (zero) impairment of the left upper extremity. However, Dr. Jeffcoat did not provide a basis for his impairment rating in accordance with the A.M.A., *Guides* (6th ed. 2008).[14]

In an October 4, 2013 supplemental report, Dr. Jeffcoat indicated appellant had no ratable (zero) lower extremity impairment under Table 16-2, Foot and Ankle Regional Grid (LEI), A.M.A., *Guides* 501 (6th ed. 2008). This was a departure from his September 26, 2013 finding of one percent bilateral lower extremity impairment. Dr. Jeffcoat also indicated that appellant had no impairment (zero) of the left upper extremity under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2008).

On October 8, 2013 OWCP sought additional clarification regarding the date of MMI. Dr. Jeffcoat subsequently identified May 11, 2011 as the date of MMI.

On October 11, 2013 OWCP referred Dr. Jeffcoat's impairment rating to Dr. Hogshead, as the DMA. Dr. Hogshead reviewed Dr. Jeffcoat's recent reports and concurred with his finding of no ratable (zero) impairment of the upper and lower extremities under the A.M.A., *Guides* (6th ed. 2008).

In an October 16, 2013 merit decision, OWCP modified the October 25, 2012 schedule award to reflect no ratable (zero) impairment of the upper and lower extremities under the A.M.A., *Guides* (6th ed. 2008).

On October 22, 2013 appellant requested reconsideration. She challenged the accuracy of Dr. Jeffcoat's opinion and accused him of lying.

On October 25, 2013 OWCP issued a preliminary determination that appellant received an overpayment in the amount of $49,304.05. The overpayment was based on the October 16, 2013 decision finding no ratable (zero) impairment under the A.M.A., *Guides* (6th ed. 2008). Consequently, OWCP sought to recover schedule award benefits previously paid for two percent LUE impairment, 11 percent RLE impairment, and 12 percent LLE impairment under the A.M.A., *Guides* (6th ed. 2008).[15]

By decision dated February 25, 2014, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[16] FECA,

[14] He also did not mention his prior two percent bilateral lower extremity impairment rating.

[15] The preliminary overpayment determination excluded the June 27, 2008 schedule award for two percent impairment of the left leg under the fifth edition of the A.M.A., *Guides* (2001).

[16] For total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1). For a 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. *Id.* at § 8107(c)(2).

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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[17] Effective May 1, 2009, schedule awards are determined in accordance with the 6th edition of the A.M.A., *Guides* (2008).[18]

When determining entitlement to a schedule award, preexisting impairment to the schedule member should be included.[19] Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.[20] If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.[21] There are no provisions for apportionment under FECA.[22] However, when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.[23]

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists and social workers are not considered "physician[s]" as defined under FECA.[24] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[25]

ANALYSIS

The Board finds that the case is not in posture for decision.

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[17] 20 C.F.R. § 10.404.

[18] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[19] *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5d (February 2013).

[21] *Id.*

[22] *Id.*

[23] *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

[24] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[25] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

OWCP's October 16, 2013 decision purports to modify a September 16, 2009 bilateral lower extremity schedule award that was not the subject of appellant's February 4, 2013 request for reconsideration. On reconsideration, appellant challenged OWCP's October 25, 2012 schedule award, which granted two percent impairment of the left upper extremity under claim number xxxxxx970. The October 25, 2012 decision did not question the validity of the September 16, 2009 bilateral lower extremity award, but merely noted appellant was not entitled to additional impairment of the lower extremities.[26]

Having realized that the October 25, 2012 decision was based on a physical therapist's June 2012 findings, OWCP referred appellant to Dr. Jeffcoat for another second opinion evaluation. Dr. Jeffcoat initially found one percent bilateral lower extremity impairment, but later changed his rating to zero impairment. He also found zero impairment of appellant's left upper extremity. OWCP's October 16, 2013 decision concluded, without explanation, that Dr. Jeffcoat's latest findings represent the "correct impairment ratings" under the A.M.A., *Guides* (6th ed. 2008). Therefore, OWCP modified all prior awards under the sixth edition to reflect zero impairment, and then initiated overpayment proceedings.

Its reliance on Dr. Jeffcoat's latest opinion is misplaced. This was his second OWCP-directed examination of appellant, but there was no reference to his July 9, 2009 evaluation. Also, Dr. Jeffcoat's September and October 2013 reports do not adequately explain how he arrived at his upper and lower extremity impairment ratings. Although his October 4, 2013 supplemental report identified various tables, Dr. Jeffcoat's explanation for how he arrived at his ratings is unclear. Specifically, it is unclear which diagnosis and/or diagnostic criteria he applied. Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that resolves the relevant issues in the case.[27]

Regarding the lower extremities, Dr. Jeffcoat claimed to have initially rated appellant class 2 impairment. But if his diagnosis was plantar fasciitis/soft tissue, Table 16-2, Foot and Ankle Regional Grid (LEI), A.M.A., *Guides* 501 (6th ed. 2008) does not provide an impairment rating for class 2 plantar fasciitis. Also, without explanation, Dr. Jeffcoat changed the lower extremity grade modifiers he initially reported on September 26, 2013. He reduced GMFH from 2 to 1 and GMPE from 1 to 0. Again, this change in his October 4, 2013 supplemental report occurred without any apparent explanation. Dr. Jeffcoat also neglected to provide ROM measurements to support his assessment of full range of motion in both upper and lower extremities. He did not explain how he arrived at May 11, 2011 as the date of MMI, and it is unclear whether this date pertained to appellant's bilateral foot condition and/or her left shoulder condition.

Because of the above-noted deficiencies in Dr. Jeffcoat's September and October 2013 reports, OWCP's October 16, 2013 decision is set aside, and the case remanded for further

[26] In fact, Dr. Dyer, the DMA whose September 20, 2012 report formed the basis of the October 25, 2012 award, did not comment on whether Ms. Robert's one percent rating for plantar fasciitis accurately reflected the extent of any bilateral lower extremity impairment.

[27] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

medical development. After OWCP has developed the record to the extent it deems necessary, a *de novo* decision shall be issued.[28]

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: July 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

[28] In view of the Board's disposition on the merits of the case, the propriety of OWCP's February 25, 2014 nonmerit decision is moot.