United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 15-626**
	)	**Issued: June 16, 2015**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 27, 2015 appellant filed a timely appeal from a November 12, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) and a January 12, 2015 nonmerit decision denying her request for further merit review. 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.

ISSUES

The issues are: (1) whether appellant has established more than 17 percent impairment to her right arm for which she received a schedule award; and (2) whether OWCP properly denied her request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101-8193.

FACTUAL HISTORY

On October 18, 2005 appellant, then a 50-year-old mail handler, filed an occupational disease claim alleging that her carpal tunnel disorder and shoulder pain were related to her work duties. OWCP accepted the claim for left side carpal tunnel syndrome and supraspinatus tendinitis of the right shoulder and paid compensation benefits. The record indicates that appellant sustained an occupational right wrist strain on November 3, 2003; occupational right carpal tunnel syndrome in 2004 with right carpal tunnel release in August 2004;[2] right cubital syndrome in 2009; and a minor left arm injury in 2010. These workers' compensation claims were combined in the instant claim.[3]

On June 3, 2008 appellant filed a claim for a schedule award. By decision dated November 7, 2008, OWCP awarded her a schedule award for 13 percent permanent impairment of the right shoulder, 5 percent for right carpal tunnel syndrome for a combined total of 17 percent of the right arm, and 1 percent permanent impairment of the left arm. As appellant had previously received a 5 percent schedule award for loss of use of the right arm, but was determined to be entitled to a 17 percent award, she received an additional 12 percent schedule award for the right arm. The award ran for 40.56 weeks of compensation for the period July 16, 2008 to April 25, 2009.

On February 20, 2012 appellant underwent right shoulder arthroscopy and subacromial decompression, right distal clavicle excision, and rotator cuff repair. On January 30, 2013 she had additional right shoulder surgery. OWCP approved these procedures. By decision dated May 29, 2013, it updated appellant's case to note her claim was accepted for the following conditions: left carpal tunnel syndrome; disorder of bursae and tendons in right shoulder; right rotator cuff sprain; other affections of right shoulder; and ankyloses of right shoulder joint.

On December 13, 2013 appellant filed a claim for an additional schedule award for her right arm. In a January 7, 2014 report, Dr. Richard C. Lehman, a Board-certified orthopedic surgeon, who performed the January 2013 surgery, reported that she had ongoing weakness referable to her right shoulder. He opined that appellant reached maximum medical improvement and had 16 percent impairment at the level of the shoulder. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] (hereinafter A.M.A., *Guides)*, Dr. Lehman provided the following ratings under Table 15-5, page 401: "three percent for pain of the right shoulder tissue; three percent for muscle tendon impairment; three percent for tendinitis; three percent for impingement syndrome; and four percent for rotator cuff partial thickness tear."

[2] Appellant received a schedule award for five percent permanent impairment of the right arm.

[3] On July 26, 2006 OWCP issued a zero percent loss of wage-earning capacity decision as it found appellant's employment as a modified mail handler effective on March 31, 2006 fairly and reasonably represented her wage-earning capacity and her actual earnings met or exceeded the current wages of the job held when injured. By decision dated February 9, 2010, it denied modification of the July 26, 2006 decision. However, by decision dated August 12, 2010, an OWCP hearing representative reversed the February 9, 2010 decision and ordered OWCP to process appellant's claims for compensation effective December 5, 2009.

[4] A.M.A., *Guides* (6th ed. 2008).

In a January 24, 2014 report, an OWCP medical adviser indicated that Dr. Lehman's impairment rating was not in conformance with the A.M.A., *Guides.* He noted that page 387 of the A.M.A., *Guides* precluded a rating for more than one grid diagnosis. Furthermore, whenever a grid diagnosis or range of motion was used, the rating could not be augmented by the pain impairment unless every requirement of Chapter 3 had properly been considered. The medical adviser stated that Dr. Lehman offered no consideration of the factors that must be considered and did not even suggest that the rating for pain was from Chapter 3.

In a March 17, 2014 note, Dr. Lehman responded that he was unable to comment on OWCP's note regarding appellant's carpal tunnel syndrome condition as he was not treating her for that condition.

OWCP referred appellant for an impairment evaluation with Dr. Richard T. Katz, a Board-certified physiatrist. In an April 7, 2014 report, Dr. Katz noted the history of injury, his review of the statement of accepted facts and the medical record. He presented right upper extremity examination findings and opined that maximum medical improvement was reached by December 3, 2013. In explaining how he calculated appellant's permanent impairment, Dr. Katz noted that under the sixth edition of the A.M.A., *Guides* on page 387, the work-related shoulder condition yielding the greater impairment rating should be utilized for calculation of the permanent impairment. He rated appellant's full thickness tear with residual loss on page 403 of Table 15-5. Dr. Katz found that condition was class 1, her physical examination was grade 2, her *Quick*DASH score was grade 3. He opined that appellant therefore had a seven percent permanent impairment due to right shoulder pathology.

In an April 11, 2014 report, an OWCP medical adviser reviewed the medical record and accepted that appellant reached maximum medical improvement on December 3, 2013 as it was consistent with the evaluation offered on that date. He reviewed Dr. Katz's impairment rating of seven percent impairment of the right arm and found it acceptable under the A.M.A., *Guides.* The medical adviser noted, however, that Dr. Katz's impairment rating of 7 percent was a decrease in impairment from the previous shoulder rating of 13 percent, which had been combined with a carpal tunnel rating of 5 percent, to yield the 17 percent impairment rating of the right arm. Thus, appellant had not established an increase in impairment to the right upper extremity.

By decision dated April 22, 2014, OWCP denied appellant's claim for an additional schedule award.

On May 6, 2014 OWCP received appellant's request to review the written record. In an April 30, 2014 statement, appellant argued that her impairment rating was wrong as she had constant pain in her right shoulder, both hands tingled and had numbness, and she could no longer do the things she used to do. She asserted that Dr. Katz was not "honest" in his rating. No new evidence pertaining to appellant's schedule award was received.

By decision dated November 12, 2014, an OWCP hearing representative affirmed the prior decision finding that there was no probative evidence of any impairment greater than the 17 percent right upper extremity impairment previously awarded.

On November 25, 2014 OWCP received appellant's request for reconsideration. In a November 24, 2014 statement, appellant reiterated that she did not get a fair impairment rating from Dr. Katz. In support of her request for reconsideration, she submitted a November 17, 2014 magnetic resonance imaging (MRI) scan; a notice of appointment of January 5, 2015 with Dr. Charles Grimshaw, an orthopedic surgeon; a physical therapy referral from Dr. Grimshaw dated November 24, 2014; her formal complaint against Dr. Katz; and congressional correspondence between her congressman and OWCP.

By decision dated January 12, 2015, OWCP denied reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body.[5] 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]

A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury.[7]

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 (ICF). For upper and lower extremity impairments, 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).[8] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[9]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the percentage of impairment

[5] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[6] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M*., Docket No. 09-2231 (issued May 14, 2010).

[7] *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

[8] *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

[9] *J.W.*, Docket No. 11-289 (issued September 12, 2011).

using the A.M.A., *Guides*.[10] In some instances, the medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an attending physician indicates maximum medical improvement has been reached and described the permanent impairment of the affected member, but does not offer an impairment rating. In this instance, a detailed opinion by OWCP medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.[11]

ANALYSIS -- ISSUE 1

OWCP has accepted the conditions of right wrist strain, right carpal tunnel syndrome, right cubital syndrome, disorder of bursae and tendons in right shoulder, right rotator cuff sprain; other affections of right shoulder; and ankyloses of right shoulder joint, in this consolidated case record. By decision dated November 7, 2008, appellant received a schedule award for a total of 17 percent impairment of the right upper extremity and 1 percent impairment of the left upper extremity. A left carpal tunnel syndrome has also been accepted by OWCP. However, the degree of impairment of the left upper extremity is not before the Board at this time. Appellant underwent additional surgery on her right upper extremity on February 20, 2012 and January 30, 2013 and requested an increased schedule award, which OWCP denied.

In his January 7, 2014 report, Dr. Lehman reported that appellant had ongoing weakness in her right shoulder. He opined that she had reached maximum medical improvement and had 16 percent impairment under Table 15-5 at the level of the shoulder. Dr. Lehman attributed three percent due to pain of the right shoulder tissue; three percent for muscle tendon; three percent for tendinitis; three percent for impingement syndrome; and four percent for rotator cuff partial thickness tear. However, as properly noted by the medical adviser, this is contrary to specific instructions in the A.M.A., *Guides* regarding diagnosis-based impairments. When there are two diagnoses evaluated under the same table, the examiner should use the diagnosis which would yield the highest related impairment rating.[12] Furthermore, Dr. Lehman provided no explanation as to how he arrived at his impairment calculations. As his impairment rating was not in conformance of the A.M.A., *Guides*, it is of limited probative value.

In an April 7, 2014 report, Dr. Katz opined maximum medical improvement was reached by December 3, 2013. As to an impairment to the right shoulder, he identified Table 15-5 and rated appellant's rotator cuff injury, full thickness tear with residual loss as seven percent impairment. For rotator cuff injury, full thickness tear with residual loss, the default (grade C) impairment for class of diagnosis of 1 is five percent. In this case, Dr. Katz adjusted the impairment to a grade E impairment of seven percent, using a grade modifier of two for physical

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *see also L.R.*, Docket No. 14-674 (issued August 13, 2014); *D.H.*, Docket No. 12-1857 (issued February 26, 2013).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(1) (September 2010).

[12] A.M.A., *Guides* 387; *see also C.P.*, Docket No. 11-117 (issued August 10, 2011).

examination and grade modifier of three for functional history adjustment.[13] The medical adviser agreed that Dr. Katz's impairment calculation conformed to the A.M.A., *Guides*.

The Board finds that OWCP properly relied on the impairment rating provided by Dr. Katz. The opinion was based on the complete record. As noted, Dr. Katz's seven percent impairment calculation conformed to the A.M.A., *Guides*. The medical adviser also properly noted that Dr. Katz's impairment rating of 7 percent was a decrease in impairment from the previous shoulder rating of 13 percent, which had been combined with a carpal tunnel rating of 5 percent, to yield the total 17 percent impairment. Thus, appellant had not established an increase in impairment to the right upper extremity.

Appellant previously received a schedule award for 17 percent impairment to her right upper extremity, of which 13 percent impairment was attributed to her shoulder condition. Dr. Katz properly calculated a seven percent impairment of the right shoulder conformed with the A.M.A., *Guides*, but as she had already received a 13 percent impairment rating for the right shoulder there was no evidence demonstrating a higher percentage of impairment pursuant to the A.M.A., *Guides*. Therefore, OWCP properly denied appellant's claim for an increased 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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[14] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[15] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[16] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[17]

[13] *Id.* at 406-10, Tables 15-7, 15-8.

[14] Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b)(2).

[16] *Id.* at § 10.607(a).

[17] *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by OWCP. In support of her request for reconsideration, she submitted a November 17, 2014 MRI scan; a notice of appointment of January 5, 2015 with Dr. Grimshaw; a physical therapy referral from Dr. Grimshaw dated November 24, 2014; her formal complaint against Dr. Katz; and congressional correspondence between her congressman and OWCP. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[18] The evidence appellant submitted in connection with her November 24, 2014 reconsideration request, however, is not pertinent to the issue on appeal; *i.e.*, whether she had any permanent impairment for the right upper extremity from her accepted conditions entitling her to an additional schedule award. The MRI scan report is not accompanied by a medical report discussing how it supported additional impairment. Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen her claim for a review on the merits in its January 12, 2015 decision.

On appeal, appellant contends her injuries are worsening and the case left out a lot of information. However, as noted above, she submitted no medical evidence to support an increased impairment to her right upper extremity. Appellant may submit the additional evidence to OWCP with a formal, written request for reconsideration under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.[19]

CONCLUSION

The Board finds that appellant did not sustain greater than 17 percent impairment to the right upper extremity, for which she received a schedule award. The Board further finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

[18] *See David J. McDonald*, 50 ECAB 185 (1998).

[19] *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2015 and November 12, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 16, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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