

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

N.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Salisbury, NC, Employer)

Docket No. 14-1895
Issued: March 4, 2015

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 25, 2014 appellant filed a timely appeal from a June 19, 2014 decision of the Office of Workers' Compensation Programs (OWCP) and a July 28, 2014 nonmerit decision denying reconsideration. 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.

ISSUES

The issues are: (1) whether appellant has established that he sustained greater than a 34 percent impairment of the left upper extremity, for which he received schedule awards; and (2) whether OWCP properly denied his request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on November 29, 1979 appellant, then a 31-year-old nurse, dislocated his right shoulder when struck by a sliding door. Appellant initially underwent a September 4, 1980 anterior reconstruction of the right shoulder with removal of loose bodies. Following 1980 and 1983 arthroscopies, appellant underwent a total arthroplasty of the right shoulder on January 12, 1999. He required open subscapularis repairs on April 2, 1999 and April 11, 2000, and a revision hemiarthroplasty performed on July 30, 2003. By decision dated January 24, 2002, appellant received schedule awards totaling 65 percent impairment of the right upper extremity.

In a September 19, 2003 report, Dr. Surendrapal Singh Mac, an attending orthopedic surgeon, noted appellant's complaints of pain and stiffness in his left shoulder due to overcompensation for the dysfunction of his right arm. On examination, he observed crepitus with range of motion, a positive impingement test, mild restriction of motion due to pain, and tenderness over the anterior aspect. Dr. Mac diagnosed subacromial bursitis with impingement syndrome of the left shoulder. In reports through January 2005, he provided the following ranges of motion for the left shoulder: forward elevation at 85 degrees; back ward elevation at 40 degrees; 90 degrees abduction; 30 degrees adduction; 25 degrees internal rotation; 25 degrees external rotation.

On March 28, 2005 appellant claimed an additional schedule award. In a January 25, 2006 report, an OWCP medical adviser reviewed Dr. Mac's reports. He opined that according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*") then in effect, the limitations of motion equaled a total 18 percent impairment of the left upper extremity.

By decision dated February 7, 2006, OWCP granted appellant a schedule award for 18 percent impairment of the left arm and an additional 53 percent impairment of the right arm, for a total 100 percent impairment of the right arm. In July 2008, it expanded the claim to include a left rotator cuff sprain with impingement syndrome.

On August 5, 2009 Dr. Mac completed an upper extremity impairment worksheet excerpted from the sixth edition of the A.M.A., *Guides*, based on the rating methodology of Table 15-34.² He opined that appellant reached maximum medical improvement. Dr. Mac obtained the following ranges of motion for the left shoulder on July 24, 2009: 80 degrees flexion equaling 9 percent impairment; 20 degrees extension equaling 2 percent impairment; 80 degrees abduction equaling 16 percent impairment; 30 degrees adduction equaling 2 percent impairment; 40 degrees internal rotation equaling 4 percent impairment; 30 degrees external rotation equaling 2 percent impairment. Dr. Mac added these percentages to equal 23 percent impairment of the left upper extremity. In a November 11, 2009 report, an OWCP medical adviser concurred with Dr. Mac's calculation of a 23 percent impairment of the left arm according to Table 15-34.

² A.M.A., *Guides* 475, Table 15-34, is entitled "Shoulder Range of Motion."

By decision dated January 25, 2010, OWCP issued a schedule award for an additional 5 percent impairment of the left upper extremity, for a total of 23 percent.

In an April 13, 2012 report, Dr. Nady Hamid, an attending orthopedic surgeon, related appellant's history of bilateral shoulder conditions and right total shoulder arthroplasty. He obtained x-rays showing end stage glenohumeral arthritis of the left shoulder. On examination, Dr. Hamid noted limited left shoulder range of motion.³ On July 5, 2012 he performed a total left shoulder arthroplasty, approved by OWCP.⁴ Dr. Hamid released appellant from care on August 2, 2013, finding that his left shoulder had stabilized.

On June 3, 2014 an OWCP medical adviser reviewed the medical record and provided an impairment rating. He found that appellant reached maximum medical improvement as of August 2, 2013. The medical adviser found that, according to Table 15-5,⁵ appellant had a class 3 diagnosis-based impairment, Class of Diagnosis (CDX) for a total shoulder arthroplasty complicated by loss of range of motion. The default, class C, impairment for this condition is 40 percent impairment. The medical adviser found a grade modifier for Functional History (GMFH) findings of 1 according to Table 15-7,⁶ and a grade modifier for Physical Examination (GMPE) of 1 according to Table 15-8.⁷ He explained that as clinical studies were included in the CDX, a separate grade modifier for Clinical Studies (GMCS) was not appropriate. The medical adviser applied the net adjustment formula of (GMFH-CDX) + (GMPE-CDX), resulting in a net adjustment of -4, reducing the default CDX grade from C to A, equaling a 34 percent impairment of the left upper extremity.⁸ In a June 11, 2014 report, he clarified that appellant had an 11 percent impairment of the left arm in addition to the 23 percent previously awarded, for a total of 34 percent.

By decision dated June 19, 2014, OWCP granted appellant a schedule award for an additional 11 percent impairment of the left upper extremity, for a total of 34 percent.

³ An April 30, 2012 magnetic resonance imaging (MRI) scan of the left shoulder showed advanced glenohumeral arthritis with subchondral degenerative cyst formation, a partial thickness supraspinatus tendon tear, degenerative glenoid labrum tear, and moderately advanced acromioclavicular osteoarthritis with narrowing of the coracoacromial arch.

⁴ During his treatment with Dr. Hamid, appellant also consulted Dr. Mac. In April 18 and August 19, 2013 reports, Dr. Mac related appellant's complaints of chronic left shoulder pain. On examination, he found mildly limited ranges of left shoulder motion without laxity or instability.

⁵ A.M.A., *Guides* 401 (sixth edition) Table 15-5 is entitled "Shoulder Regional Grid: Upper Extremity Impairments."

⁶ A.M.A., *Guides* 406 (sixth edition) Table 15-7 is entitled "Functional History Adjustment: Upper Extremities"

⁷ A.M.A., *Guides* (sixth edition) Table 15-8 is entitled "Physical Examination Adjustment: Upper Extremities."

⁸ The Board notes that in his report, the medical adviser calculated a grade modifier of negative six instead of negative four. This is harmless error, as the application of a grade modifier of negative four or negative six would result in the same reduction of the impairment class from C downward to A.

In a July 18, 2014 letter, appellant requested reconsideration. He asked that OWCP consider a June 5, 2014 report from Dr. Mac in calculating the schedule award. Appellant did not submit additional evidence.

By decision dated July 28, 2014, OWCP denied reconsideration on the grounds that appellant's July 18, 2014 letter was irrelevant to the claim. It noted that it did not receive the June 5, 2014 report mentioned by appellant.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body.⁹ FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.¹⁰ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.¹¹

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 (ICF).¹² Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical studies.¹³ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical studies. The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹⁴ In some instances, an OWCP's medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases

⁹ 5 U.S.C. § 8107.

¹⁰ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹² A.M.A., *Guides* (6th ed. 2008), page 3, Section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

¹³ A.M.A., *Guides* 494-531 (6th ed. 2008).

¹⁴ 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).

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.¹⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained left shoulder conditions as a consequence of a right shoulder injury and total joint arthroplasty. On February 7, 2006 it granted him a schedule award for an 18 percent impairment of the left arm. OWCP granted a second schedule award on January 25, 2010 for an additional five percent impairment of the left arm. Dr. Hamid, an attending orthopedic surgeon, performed a total arthroplasty of the left shoulder on July 5, 2012, authorized by OWCP.

An OWCP medical adviser provided an impairment rating on June 3, 2014. He found a class 3 diagnosis-based impairment according to Table 15-5, a grade modifier for functional history of 1 according to Table 15-7, and a grade modifier for physical examination findings of 1 according to Table 15-8. There was no applicable modifier for clinical studies. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (1-3) + (1-3), the medical adviser calculated a grade modifier of -4, reducing the default CDX grade from C, equaling 40 percent, to A, equaling 34 percent. On June 19, 2014 OWCP issued a schedule award for an additional 11 percent impairment of the left upper extremity, for a total of 34 percent.

The Board finds that OWCP properly relied on an OWCP medical adviser's June 3, 2014 impairment rating. The medical adviser's opinion was based on the complete record. He properly applied the appropriate portions of the A.M.A., *Guides* to Dr. Hamid's clinical findings.¹⁶ The medical adviser provided detailed explanations and calculations for each rating element. Therefore, OWCP's June 19, 2014 decision finding a 34 percent impairment of the left upper extremity was proper under the facts and circumstances of this case. There is no probative medical evidence establishing a greater percentage of impairment.

Appellant may request a schedule award or increased schedule award regarding the left upper extremity at any time, 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,¹⁷ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must:

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(i) (September 2010).

¹⁶ See *id.* at *Schedule Awards and Permanent Disability Claims*, Chapter 2.810.8(j) (January 2010).

¹⁷ 5 U.S.C. § 8128(a).

(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.¹⁸ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁹

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.²⁰ He need only submit relevant, pertinent evidence not previously considered by OWCP.²¹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.²²

ANALYSIS -- ISSUE 2

OWCP issued a schedule award on June 19, 2014. On July 18, 2014 appellant requested reconsideration. He asked that OWCP consider a June 5, 2014 report from Dr. Mac, an attending orthopedic surgeon, in calculating the schedule award. Appellant did not submit the June 5, 2014 report or additional medical evidence. By decision dated July 28, 2014, OWCP denied reconsideration on the grounds that his July 18, 2014 letter was irrelevant to the claim. It noted that it did not receive the June 5, 2014 report.

The Board finds that OWCP properly denied appellant's request for reconsideration. Appellant's July 18, 2014 letter asking that OWCP consider a medical report not of record is irrelevant to the schedule award issue. It is not a basis for reopening the case.²³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any in this case. He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review. Its July 28, 2014 decision denying reconsideration was proper under the law and facts of the case.

On appeal, appellant asserts that OWCP wrongly failed to consider Dr. Mac's June 5, 2014 report prior to calculating the June 19, 2014 schedule award. As noted, this report was not

¹⁸ 20 C.F.R. § 10.606(b)(2).

¹⁹ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

²⁰ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

²¹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

²² *Annette Louise*, 54 ECAB 783 (2003).

²³ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

of record as of June 19, 2014. Therefore, OWCP did not err by failing to consider evidence that was not of record in the case.

CONCLUSION

The Board finds that OWCP properly found that appellant did not sustained more than a 34 percent impairment of the left upper extremity, for which he received schedule awards. The Board further finds that OWCP properly denied reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 28 and June 19, 2014 are affirmed.

Issued: March 4, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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