United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 14-1950**
	)	**Issued: March 23, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Milwaukee, WI, 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
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2014 appellant filed a timely appeal from an April 1, 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 has more than 4 percent permanent impairment of the left arm, 3 percent permanent impairment of the right leg, 12 percent permanent impairment of the left leg, and 3 percent permanent impairment of the right arm, for which he received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY -- xxxxxx676

OWCP accepted that on September 14, 1998 appellant, then a 37-year-old laundry worker, sustained lumbar strain and a permanent aggravation of a preexisting herniated disc at L5-S1 under claim file number xxxxxx676 when he moved the sheet machine to install new ribbon. On January 5, 1999 he underwent an anterior and posterior decompression and fusion at L4-S1.

On June 26, 2000 an OWCP medical adviser, utilizing the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (A.M.A., *Guides*), determined that appellant had three percent impairment of each lower extremity due to radicular pain from S1. By decision dated October 10, 2000, OWCP granted appellant schedule awards for three percent permanent impairment of each lower extremity. On January 10, 2001 it denied his request for reconsideration of its October 10, 2000 decision under 5 U.S.C. § 8128.

FACTUAL HISTORY -- File No. xxxxxx568

On September 25, 2006 appellant filed an occupational disease claim alleging that he sustained a neck and bilateral shoulder condition while rapidly feeding the small pieces and towel machines in the performance of duty. Under claim file number xxxxxx568, OWCP accepted the claim for a sprain of the left shoulder, upper arm, and rotator cuff.[2]

In a report dated July 24, 2007, Dr. Theodore H. Gertel, a Board-certified orthopedic surgeon, discussed appellant's history of a subacromial decompression and debridgement of the left shoulder in October 2006. On examination, he measured active forward flexion of 130 degrees and passive external rotation of 60 degrees and found a mildly positive impingement sign. Dr. Gertel diagnosed subacromial bursitis, anterior labral tears, articular cartilage damage, a partial thickness tear of the anterior supraspinatus tendon, and probably ulnar nerve irritation.

On November 9, 2009 the medical adviser reviewed Dr. Gertel's report. He utilized Figure 15-34 on page 475 of the sixth edition of the A.M.A., *Guides* to find that appellant had three percent impairment of the left arm due to decreased flexion and external rotation. The medical adviser further found a one percent impairment of the left arm as a result of impingement under Table 15-5 on page 402, for a total left upper extremity impairment of four percent.

By decision dated December 15, 2009, OWCP granted appellant a schedule award for four percent permanent impairment of the left upper extremity. The period of the award ran from July 24 to October 19, 2007.

[2] In a decision dated March 3, 2008, OWCP denied appellant's claim for compensation from September 27, 2006 through January 3, 2007 based on its termination of his compensation for refusing suitable work in claim file number xxxxxx089. On June 25, 2008 it denied merit review of its March 3, 2008 decision. By order dated April 14, 2009, the Board set aside the March 3 and June 25, 2008 decisions. *Order Remanding Case*, Docket No. 08-1997 (issued April 14, 2009). The Board noted that a termination for refusing suitable work barred the receipt of further compensation for the same injury and not for a separate injury. The Board remanded the case for OWCP to adjudicate appellant's claim for disability compensation.

On January 15, 2010 appellant requested reconsideration. He noted that he had not seen Dr. Gertel in over three years.

In a decision dated March 29, 2010, OWCP denied modification of its December 15, 2009 decision. It noted that the medical adviser advised that appellant also had a permanent impairment of the right upper extremity. OWCP indicated that it would issue a new schedule award determination as the prior award only related to his left upper extremity impairment.

In a second decision dated March 29, 2010, OWCP granted appellant a schedule award for three percent permanent impairment of the right upper extremity. The period of the award ran from October 22 to December 26, 2009.

On May 5, 2010 appellant requested reconsideration. In a report dated May 12, 2010, Dr. Spencer J. Block, a Board-certified neurosurgeon, discussed appellant's complaints of neck and upper extremity pain subsequent to a fusion at C3-4 and low back pain with left radiculopathy.

On August 2, 2010 the medical adviser found no basis to alter the finding of four percent left upper extremity impairment.

By decision dated August 18, 2010, OWCP denied modification of its March 29, 2010 decisions. On August 24, 2010 appellant again requested reconsideration. In a decision dated November 12, 2010, OWCP denied modification of its August 18, 2010 decision.

Appellant appealed to the Board. In an order dated December 19, 2011, the Board set aside the August 18 and November 10, 2010 schedule award decisions.[3] The Board found that OWCP had referenced medical evidence in two other file numbers that were not available for review. The Board remanded the case for OWCP to combine the file numbers and issue an appropriate decision.

FACTUAL HISTORY -- File No. xxxxxx089

This case has also previously been before the Board under file number xxxxxx089. OWCP accepted that on August 27, 2002 appellant, then a 41-year-old laundry worker, sustained left-sided sciatica as a result of bending down to place a stack of towels in a cart while in the performance of duty. By decision dated April 10, 2009, the Board reversed September 19, 2007 and June 3, 2008 decisions terminating appellant's compensation effective May 14, 2005 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c).[4] The Board found that the opinion of the impartial medical examiner, Dr. James B. Stiehl, a Board-certified orthopedic surgeon, was insufficient to resolve the issue of whether he had the capacity to perform the offered position. The facts and circumstances as set forth in the Board's prior decision are hereby incorporated by reference.

[3] *Order Remanding Case*, Docket No. 11-811 (issued December 19, 2011).

[4] Docket No. 08-1996 (issued April 10, 2009).

In an impairment evaluation dated October 22, 2009, Dr. Scott T. Hardin, a Board-certified physiatrist, discussed appellant's complaints of pain in his left lower extremity. He measured range of motion for the right and left upper and lower extremities. On examination, Dr. Hardin found abnormal two-point discrimination of both lower extremities. He identified a class 1 impairment of the left sural nerve according to Table 16-12 on page 534 of the sixth edition of the A.M.A., *Guides*. Dr. Hardin applied grade modifiers and concluded that appellant had a seven percent left lower extremity impairment.

In a report dated January 21, 2010, Dr. Rudolf Teschan, Board-certified in family medicine, discussed appellant's history of an August 27, 2002 work injury. He diagnosed low back pain and sciatica.

On March 17, 2010 the medical adviser opined that appellant had six percent permanent impairment of the left lower extremity due to sciatica pursuant to Table 16-12 on page 535 of the sixth edition of the A.M.A., *Guides*.[5] He further found three percent right upper extremity impairment due to loss of range of motion.

In a decision dated May 10, 2010, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the left lower extremity. It noted that he had previously received a schedule award for three percent impairment of each leg under file number xxxxxx676. Appellant requested reconsideration. By decision dated September 17, 2010, OWCP denied modification of its May 10, 2010 decision.

Appellant appealed to the Board. On October 25, 2011 the Board set aside the September 17, 2010 decision.[6] The Board found that OWCP had referred to evidence from file number xxxxxx676 in its schedule award decision, but that record was not available for its review. The Board remanded the case to combine the current claim with file number xxxxxx676.

FACTUAL HISTORY -- COMBINED CASES Master File No. xxxxxx089

By decision dated May 24, 2012, OWCP denied modification of its March 29, 2010 decisions in claim file number xxxxxx568 and its September 17, 2010 decision in the subsidiary claim file number xxxxxx089. It indicated that it had combined claim file numbers xxxxxx676, xxxxxx089, and xxxxxx568 to create master file number xxxxxx089.

On June 18, 2012 appellant appealed to the Board. In a decision dated October 3, 2012, the Board set aside the May 24, 2012 decision.[7] The Board found that neither Dr. Hardin nor the medical adviser evaluated appellant's lower extremity impairment due to radiculopathy using

[5] On March 3, 2010 the medical adviser determined that appellant had one percent impairment due to radiculopathy of the S1 sural nerve, in addition to the previously awarded three percent impairment. He further found three percent impairment of the right shoulder due to loss of range of motion.

[6] *Order Remanding Case*, Docket No. 11-570 (issued October 25, 2011).

[7] Docket No. 12-1418 (issued October 3, 2012).

The Guides Newsletter.[8] The Board further found that Dr. Gertel did not provide sufficient range of motion measurements to rate appellant's left upper extremity impairment using range of motion. The Board additionally noted that OWCP granted appellant a schedule award for right upper extremity impairment even though it did not appear that it had accepted any condition that could cause an impairment of the right upper extremity. The Board remanded the case for it to properly apply the A.M.A., *Guides* in rating appellant's lower extremity impairment, left upper extremity impairment, and also to determine whether he was entitled to a schedule award for right upper extremity impairment.

In a report dated January 14, 2013, the medical adviser, found that, according to *The Guides Newsletter*, a single-level disc herniation constituted a class 2 impairment, or 5 percent whole person impairment and 12 percent left lower extremity impairment. He found that it was more appropriate to use a diagnosed-based impairment rating for the left upper extremity. The medical adviser identified the diagnosis as impingement syndrome of the left upper extremity using Table 15-5 on page 402 of the A.M.A., *Guides*, which yielded a default value of three percent. He found a grade modifier of one for functional history, physical examination, and clinical studies, which after applying the net adjustment formula yielded an impairment rating of three percent. The medical adviser determined that there was no accepted condition that would result in right upper extremity impairment. He concluded that appellant had 12 percent left lower extremity impairment, 3 percent left upper extremity impairment and no right upper extremity impairment.

By decision dated February 8, 2013, OWCP granted appellant a schedule award for an additional six percent impairment of the left lower extremity. The period of the award ran for 17.28 weeks from December 27, 2009 to April 26, 2010.

On March 19, 2013 appellant requested reconsideration of all schedule award decisions.[9]

On February 4, 2014 OWCP referred appellant to Dr. Mysore S. Shivaram, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that Dr. Shivaram determine whether appellant had a right upper extremity condition as a result of his work injury and provide an impairment calculation for the upper and lower extremities.

In a report dated February 17, 2014, Dr. Shivaram diagnosed degenerative arthritis of the cervical spine following a fusion from C3 to C7, low back pain after a fusion at L4-5 and L5-S1, left radiculopathy at S1 with foot drop, left shoulder pain following a subacromial decompression, and right shoulder pain not due to an employment injury. On examination, he found slightly reduced motion of the shoulders without evidence of impingement syndrome. Dr. Shivaram further found a loss of sensation of the left foot with weakness of dorsiflexion. He opined that appellant's "cervical spine problem has not resulted in any impairment to his left or

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[9] On April 29, 2013 the employing establishment noted that it had removed appellant from employment on June 7, 2005 due to disciplinary problems but that he continued to receive schedule awards. It questioned the appropriateness of his pain medication.

right shoulders or to his left or right arm. There is no history of radiculopathy. Dr. Shivaram has intact reflexes and intact sensation in both upper extremities." He found that, for the left shoulder, appellant had class 1 impingement syndrome using Table 15-5 on page 402. Dr. Shivaram applied grade modifiers of one for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS), for a net adjustment of zero and a total left upper extremity impairment of three percent. Citing *The Guides Newsletter*, he found no impairment due to upper extremity radiculopathy. For the lumbar spine, Dr. Shivaram found left-sided radiculopathy with weakness in dorsiflexion of the left foot and a loss of sensation.[10] Using *The Guides Newsletter*, he found appellant had a class 1 impairment of the S1 nerve root with no adjustment, which yielded one percent impairment due to his L4 through S1 lumbar fusion.

On March 17, 2014 the medical adviser found that, according to Dr. Shivaram's opinion, appellant was not entitled to an increased rating for the left upper extremity. He noted that the evidence did not support any accepted right upper extremity condition and there was no evidence of a ratable right lower extremity impairment. For the left lower extremity, the medical adviser discussed Dr. Shivaram's finding of weakness and loss of sensation on the left at S1. He identified the diagnosis as grade 1 radiculopathy at S1 with mild sensory and motor loss. The medical adviser noted that Dr. Shivaram rated only an impairment for loss of sensation. He applied a grade 1 modifier for mild loss of function and found that clinical studies were not available and that physical examination was used to determine the impairment class. Applying the net adjustment formula, the medical adviser found one percent impairment for loss of sensation of the left lower extremity and a three percent impairment for loss of motor strength, for a total left lower extremity impairment of four percent. He concluded that appellant had no impairment of the right upper or lower extremity, a four percent permanent impairment of the left lower extremity and three percent permanent impairment of the left upper extremity.

By decision dated April 1, 2014, OWCP denied modification of its October 10, 2000, December 15, 2009, March 29 and May 10, 2010 and February 8, 2013 decisions.

On appeal, appellant disagrees with Dr. Shivaram's finding that his work duties did not cause his right shoulder or cervical spine condition. He contends that Dr. Shivaram did not determine whether he had a motor impairment and mistakenly found that his pain did not radiate into his shoulder and arms. Appellant maintains that his work duties required two and a half to three hours of feeding a bath towel machine and that it was not possible that this work did not affect his shoulder and neck.

LEGAL PRECEDENT

The schedule award provision of FECA[11] and its implementing federal regulations[12] set forth the number of weeks of compensation payable to employees sustaining permanent

[10] Dr. Shivaram noted that there was "some discrepancy in his clinical complaints and examination findings" as appellant complained of right radiculopathy."

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

impairment from 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 ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[13] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[14]

The sixth edition requires identifying the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.[16] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[17]

ANALYSIS

OWCP accepted that appellant sustained lumbar strain and a permanent aggravation of a preexisting herniated disc at L4-S1 under claim file number xxxxxx676. It further accepted that he sustained a left shoulder, upper arm, and rotator cuff sprain under claim file number xxxxxx568 and left-sided sciatica under claim file number xxxxxx089. By decision dated June 26, 2000, OWCP granted appellant a schedule award for three percent permanent impairment of each lower extremity. On December 15, 2009 it granted him a schedule award for four percent left upper extremity impairment and on March 29, 2010, it granted him a schedule award for a three percent right upper extremity impairment. In a decision dated May 10, 2010, OWCP found that appellant had an additional three percent permanent impairment of the left upper extremity. On September 17, 2010 it denied modification of its May 10, 2010 decision. By decision dated May 24, 2012, OWCP denied modification of its March 29, 2010 decisions in claim file number xxxxxx568 and its September 17, 2010 decision in claim file number xxxxxx089.

On prior appeal, the Board had set aside the May 24, 2012 decision. The Board found that there was no medical opinion that applied *The Guides Newsletter*, to determine appellant's

[13] *Id.* at § 10.404(a).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 203); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[15] A.M.A., *Guides* 494-531.

[16] *See L.J.*, Docket No. 10-1263 (issued March 3, 2011).

[17] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

lower extremity impairment. The Board further found that Dr. Gertel did not provide sufficient measurements to evaluate the extent of appellant's left upper extremity impairment using range of motion. The Board also questioned why OWCP granted appellant a schedule award for right upper extremity impairment given that it had not accepted that he sustained an employment injury to the right upper extremity. The Board remanded the case for further development. Following referral of the case record to the medical adviser, on February 8, 2013, the Board granted appellant a schedule award for an additional six percent permanent impairment of the left lower extremity.[18]

On March 19, 2013 appellant requested reconsideration. OWCP referred him to Dr. Shivaram for a second opinion examination. On February 17, 2014 Dr. Shivaram diagnosed degenerative arthritis of the cervical spine following a fusion from C3 to C7, low back pain after a fusion at L4-5 and L5-S1, left radiculopathy at S1 with foot drop, left shoulder pain following a subacromial decompression, and right shoulder pain unrelated to employment. For the left shoulder, he identified the diagnosis as class 1 impingement syndrome using Table 15-5 on page 402, for a default impairment value of three percent. Dr. Shivaram applied grade modifiers of one for physical examination, functional history, and clinical studies, which yielded no adjustment from the default value.[19] He further determined that appellant had no impairment of either the right or left upper extremity due to a cervical problem as he did not have radiculopathy. Dr. Shivaram found that appellant's pain in the right shoulder was not work related. For the lumbar spine, he found weakness and a loss of sensation of the left foot, though he noted that appellant complained of radiculopathy on the right side. Applying *The Guides Newsletter*, Dr. Shivaram determined that appellant had a class 1 impairment of the S1 nerve root, which yielded one percent lower extremity impairment.[20]

The medical adviser reviewed Dr. Shivaram's report and determined that appellant did not have an employment-related impairment of the right upper extremity. He further found that appellant had no additional impairment of the left upper extremity, as Dr. Shivaram found three percent left upper extremity impairment, and OWCP had previously paid appellant for four percent left upper extremity impairment. The medical adviser noted that examination findings did not support a right lower extremity finding. He concurred with Dr. Shivaram's finding of one percent impairment due to a sensory loss for the left lower extremity but found that he also had weakness at S1 with a minimal loss of function. The medical adviser identified the diagnosis as S1 radiculopathy with a mild loss of sensation, which yielded a default value of one, and a mild motor deficit, which yielded a default value of three. He found a grade one modifier for functional history and no modifier for physical examination or clinical studies, for no adjustment. The medical adviser concluded that appellant had a four percent permanent impairment of the left lower extremity. There is no current medical evidence of record in

[18] On January 14, 2013 the medical adviser found that appellant had a class 2 impairment, or a 12 percent left lower extremity impairment due to radiculopathy at S1. *The Guides Newsletter*, however, does not provide a class 2 diagnosis for S1 radiculopathy.

[19] Utilizing the net adjustment formula discussed above, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (1-1) + (1-1) + (1-1) = 0, yielded a zero adjustment.

[20] It is apparent from a review of the entirety of Dr. Shivaram's report that the impairment rating is for the left lower extremity.

accordance with the A.M.A., *Guides* establishing a greater percentage of impairment. Consequently, the Board finds that appellant is not entitled to additional schedule awards.

On appeal, appellant discusses his work duties and challenges Dr. Shivaram's finding that he did not sustain an impairment of the right shoulder or cervical condition due to his work duties. He has the burden, however, to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[21] Appellant also maintains that Dr. Shivaram did not rate his motor impairment. As discussed, however, the medical adviser determined the extent of his left lower extremity impairment based on both sensory and motor loss.

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 more than 4 percent permanent impairment of the left arm, 3 percent permanent impairment of the right leg, 12 percent permanent impairment of the left leg, and 3 percent permanent impairment of the right arm.

[21] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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