United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 14-2038**
	)	**Issued: May 5, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Chesapeake, VA, 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 September 23, 2014 appellant filed a timely appeal from the September 5, 2014 Office of Workers' Compensation Programs' (OWCP) schedule award decision. 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 met his burden of proof to establish more than 12 percent permanent impairment of his right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[2] In a February 21, 2013 decision, the Board set aside a July 20, 2012 OWCP decision with regard to whether appellant

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 12-1669 (issued February 21, 2013).

had established more than 12 percent impairment of his right arm for which he had previously received a schedule award. The Board noted that, in a May 5, 2012 report, an OWCP medical adviser had used findings from an August 9, 2010 functional capacity evaluation (FCE) and had found that appellant had 22 percent permanent impairment of the right arm with maximum medical improvement (MMI) reached on August 3, 2010. However, when OWCP requested clarification, the medical adviser stated that the August 9, 2010 findings from the FCE were not reliable. He utilized January 26, 2010 FCE findings to determine that appellant had no more than 12 percent impairment of the right arm with MMI reached on August 3, 2010. The Board found that as the January 26, 2010 FCE was prior to the date of MMI, the medical adviser had not adequately explained this apparent inconsistency and requested clarification on the date of MMI and whether appellant had more than 12 percent impairment of the right arm. The Board remanded the case for further medical development. The facts and history contained in the prior decision are incorporated by reference.[3]

On February 25, 2014 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Edward W. Gold, a Board-certified orthopedic surgeon.

In a March 12, 2014 report, Dr. Gold described appellant's history and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (6th ed. 2009). He explained that a December 3, 2008 magnetic resonance imaging (MRI) scan of the right shoulder revealed a near full thickness tear of the supraspinatus tendon of the rotator cuff. Dr. Gold noted a history of open repair of the torn rotator cuff tear and an acromioplasty on April 6, 2009, followed by physical therapy and surgery for a revision of the prior tendon repair on August 3, 2009. Appellant continued to have shoulder discomfort and Dr. Gold noted results from the January 25 and August 9, 2010 FCEs. Dr. Gold noted a positive impingement test in the right shoulder and listed range of motion findings. Appellant had tenderness to palpation at the subacromial space, biceps tendon, and supraspinatus tendon. Dr. Gold diagnosed status post repair of the right shoulder supraspinatus tendon. He opined that the accepted conditions had not completely resolved, but that he could not recommend any further treatment that would resolve the condition. Dr. Gold found that appellant had reached maximum medical improvement on December 9, 2010 after his last impairment rating. He opined that appellant had a class 1 full thickness tear of the right rotator cuff. Dr. Gold explained that he would place appellant in grade D due to the residual loss of function, which would account for his loss of motion and found a 12 percent impairment of the right arm. He referred to Table 15-5,[4] and noted that the maximum allowable impairment for the injury was 13 percent.

On April 29, 2014 OWCP forwarded Dr. Gold's report to an OWCP medical adviser.

In a May 17, 2014 report, OWCP medical adviser determined that appellant had no more than six percent impairment of the right arm. He explained that Dr. Gold had rated appellant for a right shoulder full thickness rotator cuff tear but did not document the grade modifiers that

[3] OWCP accepted appellant's claim for other specified disorder of bursae and tendons in the right shoulder region, right shoulder joint pain, and sprain of the right shoulder, upper arm, and rotator cuff.

[4] A.M.A., *Guides* 403.

brought the rating to a 12 percent right arm impairment. The medical adviser related that it was not possible, for the full thickness rotator cuff tear with residual dysfunction under Table 15-5 (the shoulder impairment grid) to reach a 12 percent rating.[5] As a result, he found Dr. Gold's rating inconsistent with the A.M.A., *Guides*.

OWCP medical adviser found a grade modifier 1 for functional history under Table 15-7 as the right shoulder was still symptomatic but there was no documentation that appellant had to perform functional modifications for self-care activities.[6] Using Table 15-8, he found a grade modifier of 1 for physical examination due to tenderness to palpation and positive impingement signs.[7] The medical adviser found a grade modifier of 2 for clinical studies based on the results of appellant's 2008 and 2009 MRI scan studies. Utilizing the net adjustment formula, the grade moved from the default C to grade D. This resulted in six percent impairment of the right arm for a full thickness rotator cuff tear with residual loss.

In considering impairment due to loss of range of motion (ROM), OWCP medical adviser explained that the ROM measurements in the record were inconsistent. He also explained that the reports noting ROM measurements, including the FCEs, only documented performing one ROM per joint motion, which was inconsistent with the validity criteria in the A.M.A., *Guides*, section 15.7, which required three separate ROM efforts.[8] The medical adviser opined that the most impairing diagnosis in the right shoulder region was a full thickness rotator cuff tear with residual dysfunction. He opined that appellant reached MMI on March 12, 2014 the date of Dr. Gold's examination.

By decision dated September 5, 2014, OWCP found that appellant had failed to establish more than 12 percent permanent impairment.

LEGAL PRECEDENT

The schedule award provision of FECA,[9] and its implementing federal regulations,[10] 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. 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

[5] *Id*. The maximum rating is three to seven percent for a class 1.

[6] *Id*. at 406

[7] *Id*. at 408.

[8] *Id*. at 464.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] For decisions issued after May 1, 2009, the sixth edition will be used.[12]

In addressing upper extremity impairments, the sixth edition requires identifying the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[13] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[14]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with the medical adviser providing rationale for the percentage of impairment specified.[15]

ANALYSIS

OWCP previously issued appellant a schedule award for 12 percent impairment of his right arm due to his accepted right shoulder condition. Following the Board's previous decision, it referred appellant for a second opinion examination with Dr. Gold.

In a March 12, 2014 report, Dr. Gold described appellant's history, noted findings, and opined that, under the A.M.A., *Guides*, appellant had 12 percent impairment of the right arm for a full thickness rotator cuff tear. He noted that appellant had a class 1 impairment for the full thickness tear of the rotator cuff. Dr. Gold explained that he assigned a grade D impairment due to his residual loss of function, taking into account his loss of motion. He determined that the calculated impairment of the right upper extremity would be 12 percent. Dr. Gold referred to Table 15-5,[16] and noted that the maximum allowable impairment for the injury was 13 percent. The Board notes that, while he referenced the A.M.A., *Guides*, his impairment finding does not correlate with the impairment values in the A.M.A., *Guides*. Dr. Gold rated 12 percent impairment for a class 1 grade D full thickness rotator cuff tear, noting that the maximum rating was 13 percent. However, page 403 of the A.M.A., *Guides* provides that the maximum arm impairment for a class 1 full thickness rotator cuff tear with residual loss is seven percent. Thus, Dr. Gold's opinion was not based upon a correct application of the A.M.A., *Guides.* He also did

[11] *Id*. at § 10.404(a).

[12] FECA Bulletin No. 09-03 (issued March 15, 2009).

[13] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[14] *Id*. at 521.

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[16] *Supra* note 3.

not clearly explain how he applied grade modifiers. Thus, Dr. Gold's rating is of diminished probative value as he did not properly follow the A.M.A., *Guides*.[17]

OWCP properly referred the case to OWCP medical adviser who on May 17, 2013 utilized the findings provided by Dr. Gold and determined that appellant had no more than six percent impairment of the right upper extremity. The medical adviser, as noted, explained the deficiencies in Dr. Gold's rating under Table 15-5. He explained that a proper application of grade modifiers and the net adjustment formula for a full thickness rotator cuff tear under Table 15-5 yielded a class 1 grade D rating of six percent impairment of the arm.[18] Furthermore, the medical adviser also explained why the ROM method of calculating impairment was not applicable, noting that there was no indication that the ROM measurements of record met the validity criteria in the A.M.A., *Guides*, section 15.7, which requires three separate range of motion efforts.[19]

The Board finds that OWCP medical adviser correctly utilized the A.M.A., *Guides* and determined that appellant had an impairment of six percent of the right upper extremity due to his right shoulder condition. As appellant has already received an award for 12 percent to the right arm that was also attributable to his right shoulder condition, he is not entitled to an additional award. He has not submitted any current medical evidence, conforming with the A.M.A., *Guides*, establishing a greater impairment.

On appeal, appellant argued that the August 9, 2010 FCE should be used to rate his impairment. He asserted that he performed to the best of his ability during his functional capacity evaluations and that he continues to suffer from his condition. However, as noted, OWCP medical adviser explained why ROM measurements in that FCE were not valid under the A.M.A., *Guides*. 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 met his burden of proof to establish more than 12 percent permanent impairment of his right upper extremity, for which he received a schedule award.

[17] *See Carl J. Cleary*, 57 ECAB 563, 568 n.14 (2006) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

[18] *See infra*. The medical adviser referred to Table 15-5, page 403, and found that appellant had a class 1 full thickness rotator cuff tear, for a grade C default impairment of five percent. He applied grade modifiers to the net adjustment formula to arrive at a net adjustment of one which moved the grade one place to the right, for grade D, which yields six percent right arm impairment.

[19] *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 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