

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

E.R., Appellant)	
)	
and)	Docket No. 15-1046
)	Issued: November 12, 2015
U.S. POSTAL SERVICE, BALCONES)	
STATION, Austin, TX, 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 April 7, 2015 appellant filed a timely appeal from December 10, 2014 and March 24, 2015 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant's May 27, 2009 injury disabled appellant for work from December 30, 2013 to June 10, 2014; and (2) whether OWCP properly assessed the extent of permanent impairment of his right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On May 27, 2009 appellant, a 43-year-old mail carrier, sustained a traumatic injury to his shoulder in the performance of duty when he caught a falling tray of mail. OWCP accepted his

¹ 5 U.S.C. § 8101 *et seq.*

claim for rotator cuff syndrome of the right shoulder and allied disorders, for which he underwent surgery on September 4, 2009. It later accepted appellant's claim for bilateral sprain of the shoulder and upper arm, acromioclavicular disorder of the bilateral bursae and tendons in the shoulder region, unspecified, and other affliction of the right shoulder region not elsewhere classified. Appellant received a schedule award for 10 percent impairment of the right upper extremity due to acromioclavicular joint injury or disease. He also received compensation for wage loss through December 27, 2013.

Appellant claimed compensation for wage loss from December 30, 2013 to June 10, 2014. On December 30, 2013 Dr. Helo Chen, the treating osteopath, noted that appellant had returned to work part time on modified duty. He detailed appellant's restrictions and indicated that they would apply for approximately three to six months.

On January 22, 2014 appellant formally accepted a part-time limited-duty assignment at retained pay.²

Dr. Chen completed duty status reports setting forth appellant's physical limitations while working four hours a day. He increased appellant's daily hours to six in February 2014 and to eight hours in March 2014. Appellant was allowed to reach above shoulder level an extra hour per day in April 2014.

On September 5, 2014 appellant advised that he tried to return to work under Dr. Chen's restrictions, but the employing establishment sent him home stating no work was available within those restrictions. OWCP asked the employing establishment whether this was the case. The employing establishment responded: "That is not correct. There were some administrative issues going on at that time. [Appellant] was never told there was no work available."

In a decision dated December 10, 2014, OWCP denied appellant's claim for wage-loss compensation from December 30, 2013 to June 10, 2014. It found that the medical evidence did not support an inability to work during the period claimed.

Appellant filed a claim for an increased schedule award. Dr. Philip E. Rosen, a Board-certified orthopedic surgeon and consultant to Dr. Chen, examined appellant on July 8, 2014. Dr. Rosen diagnosed a right rotator cuff tear with very mild acromioclavicular separation. Referring to Table 15-5, page 402, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), he noted that appellant had a partial thickness rotator cuff tear with a history of painful injury and residual symptoms without consistent objective findings. The default impairment value was one percent, and no adjustment was warranted for functional history, physical examination, or clinical studies. Dr. Rosen concluded that appellant had one percent impairment of his right upper extremity due to a partial rotator cuff tear.

An OWCP medical adviser reviewed Dr. Rosen's evaluation and confirmed his impairment rating. He noted, however, that appellant had previously received a schedule award for 10 percent impairment of the right upper extremity. Therefore, appellant had no additional impairment.

² On the date of injury appellant was a Grade 2, Step L employee earning \$53,637.00 per year. The modified part-time assignment he accepted on January 22, 2014 paid \$58,281.00.

On March 24, 2015 OWCP issued a schedule award for an additional one percent impairment of the right upper extremity.

On appeal, appellant argues that the employing establishment had been sending incorrect information to OWCP for the past two years. He further asserts that “I am hoping someone can launch an investigation on that office to prevent them from continuing to send incorrect information on their employees.”

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁵

The claimant must submit a rationalized medical opinion that supports a causal connection between the current disabling condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the employment injury, and must explain from a medical perspective how the current disabling condition is related to the injury.⁶

ANALYSIS -- ISSUE 1

Appellant claimed compensation for wage loss from December 30, 2013 to June 10, 2014. Dr. Chen, the treating osteopath, examined appellant that day and noted that he had returned to work part time on modified duty. Further, appellant formally accepted the part-time limited-duty assignment on January 22, 2014. Dr. Chen continued to complete duty status reports setting forth appellant’s restrictions, but at no point during the period of claimed disability did he advise that appellant was unable to continue his modified duty. The duty status reports showed a general lifting of restrictions. Appellant was essentially back to full-time work by March 2014.

Moreover, there is no evidence that appellant sustained wage loss during the period claimed. He earned more in his part-time modified-duty assignment than he did at the time of injury.⁷

³ 5 U.S.C. § 8102(a).

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

⁷ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f).

Appellant alleged that the employing establishment sent him home because there was no work available within his restrictions. A “recurrence of disability” includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee’s physical limitations due to his work injury or illness is withdrawn.⁸ The employing establishment advised that his work was never withdrawn. Apparently, there were some administrative issues going on at that time, but appellant was never told there was no work available.

In the absence of medical opinion evidence establishing that appellant’s May 27, 2009 employment injury disabled him for work from December 30, 2013 to June 10, 2014, the Board finds that appellant has not met his burden of proof to establish his claim for wage-loss compensation. The Board will therefore affirm OWCP’s December 10, 2014 decision.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA⁹ and the implementing regulations¹⁰ set forth the number of weeks of compensation payable for permanent impairment from loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.¹¹

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹² As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹³

ANALYSIS -- ISSUE 2

To support his claim for an increased schedule award, appellant submitted an evaluation from Dr. Rosen, an orthopedic surgeon and consultant to Dr. Chen. Dr. Rosen found that appellant had one percent impairment of the right upper extremity due to a partial thickness rotator cuff tear. Appellant, however, had already received a schedule award for 10 percent impairment of his right upper extremity based on an acromioclavicular joint injury or disease. As the A.M.A., *Guides* explains, it is not uncommon for rotator cuff tears, a superior labrum from anterior to posterior lesion or other labral lesions, and biceps tendon pathology to all be

⁸ *Id.* at § 10.5(x).

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

¹² 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

present simultaneously in the shoulder. The evaluator is expected to choose the most significant diagnosis and to rate only that diagnosis using the diagnosis-based impairment method.¹⁴

Thus, appellant may not receive two schedule awards based on different diagnoses of the same shoulder joint. As OWCP's medical adviser correctly noted, Dr. Rosen's evaluation did not establish that appellant was entitled to an additional schedule award. The Board reverses OWCP's March 24, 2015 decision awarding an additional one percent.

CONCLUSION

The Board finds that appellant has not met his burden to establish that his May 27, 2009 injury disabled him for work from December 30, 2013 to June 10, 2014. The Board also finds that appellant has no more than 10 percent impairment of his right upper extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2015 decision of the Office of Workers' Compensation Programs is reversed. The December 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 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

¹⁴ *Id.* at 390.