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

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| **R.H., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1512** |
| | ) | **Issued: October 22, 2015** |
| **U.S. POSTAL SERVICE, POST OFFICE, Palatine, IL, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On July 6, 2015 appellant filed a timely appeal from a March 30, 2015 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 met his burden of proof to establish that he sustained a permanent impairment to his right upper extremity causally related to his accepted October 7, 1991 employment injury.

### ***FACTUAL HISTORY***

On October 8, 1991 appellant, then a 28-year-old part-time, flexible distribution clerk, filed a traumatic injury claim alleging that on October 7, 1991 he dislocated his right shoulder

[1] 5 U.S.C. § 8101 *et seq.*

when he slipped and fell on a puddle of water at work. He continued to work light duty. OWCP accepted appellant's claim for right shoulder dislocation. On October 29, 1991 appellant stopped work and underwent authorized right shoulder surgery for reconstruction of the right shoulder. Hospital records pertaining to this surgery are not of record. OWCP paid benefits. Appellant returned to full duty a few months later.[2]

On February 3, 2012 appellant filed a claim for a schedule award.

By letter dated February 27, 2012, OWCP requested that appellant provide a medical report from his treating physician with an opinion on whether he had reached maximum medical improvement (MMI) and whether he had an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (A.M.A., *Guides*).

Appellant was treated by Dr. James Judge, a Board-certified family practitioner. In reports dated March 9 and 27, 2012, Dr. Judge stated that appellant sustained a work-related injury in 1991 when he fell on his right shoulder and never regained full mobility. He related appellant's complaints of pain at the top and front of the shoulder and numbness and tingling in the arms and hands. Upon examination, Dr. Judge observed that appellant's right shoulder had front range of motion with no tenderness. Deep tendon reflexes were positive bilaterally. Dr. Judge diagnosed shoulder pain and arm numbness.

In a March 9, 2012 electromyography (EMG) and nerve conduction velocity report, Dr. Michael Merchut, a Board-certified psychiatrist and neurologist specializing in clinical neurophysiology, stated that appellant experienced some tingling along the radial right forearm and thumb and some pain at the right anterior right shoulder. He noted that appellant underwent right shoulder joint reconstruction in late 1991. Upon examination, Dr. Merchut observed no compression at the wrist or elbow areas, muscular habitus, and intact sensation. He opined that appellant had normal test without EMG evidence for a nerve or root lesion in the upper limbs.

Appellant was again examined by Dr. Judge who stated in a May 11, 2012 report that appellant had not yet achieved maximum improvement. Dr. Judge explained that appellant's current symptoms were ongoing and may possibly intensify in the future. He diagnosed superficial antebrachial neuritis. Dr. Judge reported that appellant had been evaluated by his physical medicine and rehabilitation (PMR) department chair and was found to have 10 percent permanent impairment of the right shoulder according to the sixth edition of the A.M.A., *Guides.*

OWCP referred appellant to a district medical adviser to review Dr. Judge's impairment rating and to opine on whether appellant attained MMI and sustained a permanent impairment according to the sixth edition of the A.M.A., *Guides.*

In a June 4, 2012 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon specializing in orthopedic sports medicine, described appellant's history and related his current complaints of anterior shoulder pain and numbness and tingling in the right arm and hands. He stated that Dr. Judge mentioned in a May 11, 2012 report that appellant had a 10 percent

[2] The record is devoid of medical evidence from 1992 until 2012.

permanent impairment to the right upper extremity according to their PMR department. Dr. Garelick noted that the report was not available for review. He reported that, pursuant to Dr. Judge's report, appellant's right shoulder demonstrated full range of motion without any tenderness and no mention of weakness or residual instability. Dr. Garelick noted that an EMG was normal without evidence for a nerve root or root lesion in the upper limbs. He opined that given appellant's normal strength and range of motion, there was no objective evidence to support any permanent impairment of the right upper extremity. Dr. Garelick explained that MMI was estimated to have occurred long ago, back in 1991 and 1992. Thus, he concluded that appellant had no ratable impairment of the right upper extremity.

In a decision dated July 18, 2013, OWCP denied appellant's claim for a schedule award. It found that the medical evidence failed to establish that he sustained a permanent impairment to his right upper extremity as a result of his October 7, 1991 employment injury.

On July 30, 2013 OWCP received appellant's request for reconsideration.

Appellant submitted a May 9, 2012 report from Dr. Steve M. Gnatz, Board-certified in physical medicine and rehabilitation. Dr. Gnatz stated that he personally reviewed and confirmed the key elements of appellant's history and physical examination findings. He explained that appellant had a long-standing mild right shoulder dysfunction after a work-related accident and subsequent surgical repair. Dr. Gnatz opined that appellant reached MMI and had 10 percent impairment of the right shoulder according to the A.M.A., *Guides.*

In a May 9, 2012 report, Dr. Stacey L. Hall, Board-certified in physical medicine and rehabilitation, related appellant's complaints of right shoulder pain and restricted range of motion. She described how he sustained a right shoulder injury at work and underwent surgery. Dr. Hall stated that appellant never got full mobility back of the right shoulder. She noted that he had some numbness and tingling in his fingers, but the EMG was unremarkable. Dr. Hall further reported that an x-ray of the right shoulder demonstrated reconstruction of the coracoid/anterior-superior glenoid and chronic bone margination but no acute fracture. Upon examination, she observed no obvious atrophy in the shoulder and no pain with palpation. Range of motion of the right shoulder was restricted. Dr. Hall provided test results for manual muscle and sensation testing. She opined that appellant had reached MMI but the approximate date was unknown as this issue had been ongoing for 20 years. Dr. Hall diagnosed right shoulder pain and mildly restricted range of motion secondary to recurrent right shoulder dislocation. She determined that based on Table 15-5 of the sixth edition of the A.M.A., *Guides* on shoulder joint dislocation appellant was a class 1, mild grade C, 10 percent impairment rating.

On August 22, 2013 OWCP referred appellant's claim to another medical adviser for an impairment rating. In an August 25, 2013 report, Dr. Christopher Gross, a Board-certified psychiatrist, stated that he reviewed appellant's chart and Dr. Gnatz's May 9, 2012 report. He related that appellant had a work-related disorder of closed dislocation of the right shoulder in 1991, which resulted in an open shoulder reconstruction. Dr. Gross noted that the hospital records were not available. He reported that upon examination appellant currently had normal motion and muscle strength and pointed out that the May 9, 2012 examination was essentially normal. Dr. Gross stated that Dr. Garelick correctly utilized the A.M.A., *Guides* in his June 4, 2012 report when he determined that appellant had zero percent impairment. He stated that the

date of MMI was still not known at this point since he did not have the records from 1991 to 1992.

On December 5, 2013 OWCP advised Dr. Gross that it was attaching additional medical evidence that was requested. It asked him to provide a date of MMI and permanent impairment rating under the sixth edition of the A.M.A., *Guides.* In an updated report, Dr. Gross discussed appellant's history and noted that there was no documentation of any neurological injury and that a March 9, 2012 EMG was normal. Based on the Table 15-5, page 4, unidirectional shoulder instability +/- surgical treatment with no evidence of recurrent instability, he determined that appellant was a class 0 diagnosis with a zero percent permanent impairment. Dr. Gross stated that appellant currently has normal motion and muscle strength. After reviewing Dr. Garelick's June 4, 2012 report, he opined that Dr. Garelick correctly utilized the A.M.A., *Guides* in assigning a zero percent impairment. Dr. Gross explained that physical examination findings were essentially normal and did not add additional information that was useful for the impairment rating. He reported that appellant's date of MMI would likely be when appellant returned to light duty on June 17, 1992. Dr. Gross stated that appellant had zero percent permanent impairment of the right upper extremity.

By decision dated March 5, 2014, OWCP denied modification of the July 18, 2013 decision.

Appellant disagreed with the March 5, 2014 decision. On November 12, 2014 OWCP received his reconsideration request. Appellant stated that, at the time of his injury, he was a mail processing clerk whose job duties required prolonged standing, reaching above the shoulder, pushing and pulling heavy rolling stock/equipment, lifting heavy bags of mail weighing up to 70 pounds, and sorting mail. He described the October 7, 1991 employment injury and explained that after he had surgery it negatively affected his ability to perform his work and daily living activities. Appellant stated that he experiences a lot of pain and swelling, especially when he lifts anything on his right side.

In a November 12, 2014 report, Dr. Harold Pye, Board-certified in preventive medicine, reviewed appellant's medical records, including reports from Drs. Hall and Garelick. He described appellant's October 7, 1991 employment injury and the medical treatment received. Dr. Pye noted that appellant's claim was accepted for right closed dislocation shoulder. Upon examination, he observed evidence of mild atrophy compared to the contralateral side. Range of motion was decreased in forward flexion, abduction, and internal rotation. Dr. Pye observed that motor examination was 5/5 in all upper extremity motor groups and sensory was intact to light touch in all upper extremity dermatomes. Deep tendon reflexes were 2+ brisk and symmetric at the wrist and elbow bilaterally. Dr. Pye reported that appellant had positive posterior and anterior, Fulcrum, and anterior drawer tests. He stated that appellant reached MMI with regards to appellant's October 1991 right shoulder injury. Dr. Pye opined that appellant continued to experience intermittent pain and impingement from the screw, which was continually rubbing against the humeral head with any type of task or activity requiring forward elevation or abduction of his right shoulder and arm. He reported that appellant's first impairment rating was incorrect. Dr. Pye stated that appellant had and consistently reported a history of intermittent pain with a variety of work tasks and continued to suffer limitations with overhead and over the

shoulder lifting and pushing and pulling objects that weigh more than 30 to 40 pounds with discomfort and pain.

Referencing the sixth edition of the A.M.A., *Guides,* Dr. Pye reported that appellant should have been placed in class 1 within Table 15-5, page 404, for unidirectional shoulder instability, not a class 0 impairment rating. He opined that, based on appellant's history and physical examination, appellant continued to have permanent limitations of various activities of daily living and that all of these activities both at work and home caused a sensation of subluxation of his right shoulder. Dr. Pye reported that class 1 in Table 15-5 was defined for individuals who have a consistent relationship of symptoms with activities and a grade 1 Hawkins instability causing a subluxation of the humeral head and confirmed history of acute trauma. He stated that the laxity test was graded using the Hawkins grade, with a grade 1 laxity equals the humeral head rises onto the glenoid rim without resulting in complete dislocation. Dr. Pye explained that appellant's history and examination fit the description exactly. He determined that appellant's percentage of partial permanent impairment was 12 percent for appellant's right shoulder. Dr. Pye included his impairment evaluation report.

On March 5, 2015 OWCP referred appellant back to Dr. Garelick, a medical adviser, to review Dr. Pye's November 12, 2014 report and provide an impairment rating. In a March 9, 2015 report, Dr. Garelick stated that, since his last June 4, 2012 report, appellant was examined by Dr. Pye, who recommended 12 percent permanent impairment of the right upper extremity based on ongoing instability of the shoulder. He noted that Dr. Judge's March 9, 2012 report showed full range of motion without any tenderness and no mention of any weakness or residual instability. Dr. Garelick also noted that an upper extremity EMG was normal without evidence for a nerve or root lesion in the upper limbs. He determined that appellant had zero percent permanent impairment of the right upper extremity based on the previous testimony described. Dr. Garelick stated that, if there had been a material change in appellant's condition between 2012 and 2014, this would be unrelated to the shoulder dislocation, given that it occurred over 20 years ago. He explained that it was very unlikely that "new" instability would develop in the right shoulder after 20 years of no recurrence. Dr. Garelick reported that the date of MMI would remain 1992. He explained that there was occasionally a difference in opinion between physicians and that, if further disagreement persisted, he suggested that appellant be sent to an independent orthopedic surgeon for an impairment rating.

In a decision dated March 30, 2015, OWCP denied modification of the March 5, 2014 decision.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[3] and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of

[3] 5 U.S.C. §§ 8101-8193.

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 the appropriate standards for evaluating schedule losses.[4]

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.[5] Under the sixth edition, 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).[6] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[7]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[8] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

## ***ANALYSIS***

OWCP accepted that on October 7, 1991 appellant sustained a right shoulder condition in the performance of duty. Appellant stopped work, underwent right shoulder surgery, and returned to full duty. On February 3, 2012 he filed a claim for a schedule award.

Appellant submitted a November 12, 2014 report by Dr. Pye, who determined that appellant had a 12 percent right upper extremity impairment. Dr. Pye explained that appellant continued to experience intermittent pain and impingement of the right shoulder from the screw, which was continually rubbing against the humeral head, with any activity the required forward elevation or abduction of the right arm. He reported that, according to the sixth edition of the A.M.A., *Guides,* Table 15-5, page 404, appellant was a class 1. Dr. Pye explained that class 1 of Table 15-5 was defined for individuals who have a consistent relationship of symptoms with activities and a grade 1 Hawkins instability causing a subluxation of the humeral head and

[4] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris,* 54 ECAB 139 (2002).

[5] A.M.A., *Guides* (6th ed. 2009), p. 3, section 1.3.

[6] *Id.* at 494-531.

[7] *See R.V.,* Docket No. 10-1827 (issued April 1, 2011).

[8] 5 U.S.C. § 8123(a); *see R.S.,* Docket No. 10-1704 (issued May 13, 2011); *S.T.,* Docket No. 08-1675 (issued May 4, 2009).

[9] 20 C.F.R. § 10.321.

confirmed history of acute trauma. He stated that appellant's history and examination fit the description exactly.

Dr. Pye's opinion that appellant had a permanent impairment of the right shoulder resulting from the 1991 injury, and shoulder reconstruction surgery, was supported by the May 9, 2012 reports from Drs. Gnatz and Hall, as well as the May 11, 2012 report from Dr. Judge. These physicians related that appellant's right shoulder complaints had been long-standing, for over 20 years, and that appellant had never obtained full mobility of the right shoulder after his 1991 injury and right shoulder surgery.

OWCP referred appellant's claim to Drs. Gross and Garelick, its medical advisers for review. In a December 13, 2013 report, Dr. Gross determined that, based on Table 15-5, page 404 for unidirectional shoulder instability, appellant was a class 0 diagnosis with no evidence of recurrent instability, resulting in zero percent permanent impairment. He stated that appellant currently has normal motion and muscle strength. In addition, in a March 9, 2015 report, Dr. Garelick disagreed with Dr. Pye's November 12, 2014 impairment rating. He noted that Dr. Judge's March 9, 2012 report showed full range of motion without any tenderness and that an upper extremity EMG was normal. Dr. Garelick determined that appellant was a class 0 diagnosis. He also stated that, if further disagreement persisted between physicians, appellant should be seen by an independent orthopedic surgeon for an impairment rating.

The Board finds that a conflict exists between Dr. Pye, appellant's treating physician, and Drs. Gross and Garelick, OWCP medical advisers, under 5 U.S.C. § 8123(a). The Board notes that Drs. Pye, Gross, and Garelick disagree over the proper class designation under Table15-5 and both have supported their opinion with medical rationale.[10] Accordingly, the Board will remand the case to OWCP to properly resolve the conflict regarding whether appellant sustained a permanent impairment of his right upper extremity under the sixth edition of the A.M.A., *Guides*. After such further development as OWCP deems necessary, it should issue an appropriate decision.

## ***CONCLUSION***

The Board finds that the case is not in posture for decision and is remanded to OWCP for proper resolution of a conflict under 5 U.S.C. § 8123(a).

[10] *See M.O.*, Docket No. 14-1077 (issued July 2, 2015).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 30, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: October 22, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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