United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant **and** **DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH, Employer**	**Docket No. 14-1747** **Issued: September 14, 2015**

Appearances:
James Noucas, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2014 appellant, through his attorney, filed a timely appeal from a February 21, 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 a seven percent employment-related permanent impairment to his right upper extremity.

FACTUAL HISTORY

On July 20, 2007 appellant, then a 52-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on July 9, 2007 he sustained injuries when he fell on a stairway in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of duty. OWCP accepted the claim for right shoulder and upper arm contusions, and closed fracture of two ribs.

Appellant underwent right shoulder arthroscopic surgery on April 20, 2009 to repair a torn rotator cuff. On the issue of continuing disability, OWCP referred appellant for a second opinion examination by Dr. John Walsh, Jr., a Board-certified orthopedic surgeon. In a report dated December 2, 2011, Dr. Walsh opined that appellant's employment-related diagnoses included right rotator cuff rupture and chronic right C7 radiculopathy.

With respect to a permanent impairment, appellant submitted a June 29, 2012 report from Dr. Walsh.[2] He stated that, under Table 15-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition, hereinafter the A.M.A., *Guides*), with a diagnosis of full-thickness tear of the rotator cuff with residual loss, the right arm impairment was 13 percent.

OWCP referred the case to Dr. Morley Slutsky, an OWCP medical adviser, for an opinion as to permanent impairment. In a report dated April 2, 2013, an OWCP medical adviser opined that a proper application of Table 15-5 resulted in a seven percent right arm impairment for the diagnosed rotator cuff tear.

Appellant submitted a June 6, 2013 report from Dr. Walsh, who stated that it appeared the main difference between his opinion and Dr. Slutsky's opinion was the inclusion of radiculopathy. He stated that he agreed with the seven percent for the rotator cuff tear. Dr. Walsh stated that the lack of a distinctive structural diagnosis on which to base a diagnosis-based impairment rating made it difficult to rate the right C7 radiculopathy, but under Table 17-2 of the A.M.A., *Guides* there was a six percent impairment under "single level motion segment lesions." In his opinion, this represented the closest diagnostic category on which to base the rating.

By letter dated June 27, 2013, OWCP advised appellant that a conflict in the medical evidence existed between Drs. Walsh and Slutsky, and appellant was referred to Dr. Frank Graf, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Appellant's representative submitted a letter dated July 8, 2013, requesting that OWCP ask Dr. Graf whether the C7 radiculopathy was employment related.

In a report dated July 31, 2013, Dr. Graf provided a history and results on examination. He diagnosed right chest wall injury with rib fractures, rotator cuff rupture, and axial stretch injuries to the C7 nerve root. Dr. Graf opined that appellant had a 13 percent impairment under Table 15-5, and a 4 percent impairment under *The Guides Newsletter* for C7 radiculopathy with moderate sensory deficit, for a total of 16 percent impairment of the right upper extremity. In a report dated November 19, 2013, he stated that the date of maximum medical improvement was six months after the April 20, 2009 surgery.

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[2] Although appellant was initially referred to Dr. Walsh for a second opinion examination, the record indicates that Dr. Walsh subsequently became a treating physician.

In a report dated December 1, 2013, Dr. Robert Y. Pick, a second OWCP medical adviser, opined that appellant's right arm impairment was seven percent under Table 15-5 of the A.M.A., *Guides*. With respect to C7 radiculopathy, the medical adviser stated that the statement of accepted facts (SOAF) did not mention or reference C7 radiculopathy. The date of maximum medical improvement was reported as the date of Dr. Graf's evaluation.

By decision dated February 21, 2014, OWCP issued a schedule award for seven percent right arm impairment. The period of the award was 21.84 weeks commencing March 10, 2013.[3]

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[4] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[6]

With respect to a shoulder impairment, the A.M.A., *Guides* provide a regional grid at Table 15-5. The Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH) Table 15-7, Physical Examination (GMPE) Table 15-8 and Clinical Studies (GMCS) Table 15-9. The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[7]

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[8]

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[3] OWCP stated the MMI date was June 29, 2012, but appellant had received compensation through March 9, 2013.

[4] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[5] *A. George Lampo*, 45 ECAB 441 (1994).

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

[7] A.M.A., *Guides* 411. The net adjustment is up to +2 (grade E) or -2 (grade A).

[8] *See G.N.,* Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

ANALYSIS

In the present case, OWCP found there was a conflict under 5 U.S.C. § 8123(a) between attending physician, Dr. Walsh and an OWCP medical adviser. The Board finds, however, that there was no conflict in the medical evidence, as Dr. Walsh had not properly applied the A.M.A., *Guides*. In his June 29, 2012 report, Dr. Walsh had incorrectly applied Table 15-5. Under this table, for the diagnosis provided of rotator cuff injury, full-thickness tear, the default (grade C) impairment is five percent.[9] The maximum (grade E) impairment is seven percent. OWCP medical adviser used the net adjustment formula and found appellant was entitled to the maximum seven percent based on grade modifier two for functional history and physical examination.

In his June 6, 2013 report, Dr. Walsh concurred with the medical adviser as to the seven percent. He then opined that appellant had a C7 impairment under Table 17-2, but this table is for cervical spine impairments and provides a whole person impairment. Neither is appropriate under FECA, as the spine is not a scheduled member and whole person impairments are not utilized.[10] Therefore Dr. Walsh's reports are insufficient to create a conflict, as their only disagreement was related to an improper application of the A.M.A., *Guides*. When a physician refers to spinal impairments, the opinion is of little probative value and is not sufficient to create a conflict.[11]

Therefore OWCP's referral to Dr. Graf is as a second opinion physician.[12] With respect to his opinion regarding rotator cuff tear, as noted above, Table 15-5 provides a maximum of seven percent. Dr. Graf incorrectly found the maximum was 13 percent under Table 15-5, as Dr. Walsh had done in his June 29, 2012. The appropriate maximum impairment, for a rotator cuff full-thickness tear, is seven percent under Table 15-5.[13]

The remaining issue is whether there is an additional impairment based on C7 radiculopathy. Dr. Pick, the second medical adviser, states in his December 1, 2013 report that C7 radiculopathy was not mentioned in the SOAF. Dr. Walsh opined that the radiculopathy was employment related. There is no indication that Dr. Graf was specifically asked for an opinion on this issue, but his July 31, 2013 report appeared to consider the C7 radiculopathy as related to the employment injury. He discussed the diagnosis in connection with other employment-related injuries and provided an opinion as to permanent impairment.

The case will be remanded to OWCP to request clarification from Dr. Graf regarding causal relationship between C7 radiculopathy and the employment injury, and any impairment in

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[9] A.M.A., *Guides* 403, Table 15-5. The five percent default impairment is for residual loss, functional with normal motion. The default impairment for residual symptoms without consistent objective findings is three percent.

[10] *See M.P.,* Docket No. 14-777 (issued July 18, 2014).

[11] *G.C.,* Docket No. 11-82 (issued October 12, 2011).

[12] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[13] *Supra* note 9.

accordance with *The Guides Newsletter*. The Board notes that, under proposed Table 1, the default impairment for a moderate C7 sensory deficit is two percent, not four percent as reported by Dr. Graf.[14] OWCP should also clarify the date of MMI in this case. In the December 1, 2013 report, Dr. Pick referred to the date of Dr. Graf's evaluation on July 31, 2013, but OWCP indicated in its decision that MMI was June 29, 2012, the date of a report from Dr. Walsh. After such further development as is deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 21, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 14, 2015
Washington, DC

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

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

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

[14] *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009).