United States Department of Labor
Employees' Compensation Appeals Board

K.G., Appellant	)	
and	)	**Docket No. 15-0862**
	)	**Issued: September 2, 2015**
DEPARTMENT OF THE NAVY, FLEET READINESS CENTER SOUTHEAST, Jacksonville, FL, Employer	)	

Appearances:
Lenin V. Perez, 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 March 9, 2015 appellant, through his representative, filed a timely appeal from a January 29, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 seven percent permanent impairment of the right upper extremity.

[1] The record also contains a September 30, 2014 overpayment decision. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.3; *see also S.C.*, Docket No. 10-1706 (issued May 9, 2011).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 6, 2012 appellant, then a 35-year-old plastic fabricator, filed a traumatic injury claim alleging that on March 22, 2011 he injured his right shoulder while sanding the bottom wing of an aircraft. OWCP accepted the claim for an articular cartilage disorder of the right rotator cuff and right shoulder impingement. Appellant stopped work on March 22, 2012 and returned to modified employment on September 17, 2012.

On July 25, 2012 Dr. Patrick J. Hutton, a Board-certified orthopedic surgeon, performed a repair of a torn rotator cuff, a debridement, and a subacromial decompression of the right shoulder. On December 14, 2012 he performed a repair of a recurrent right rotator cuff tear, a debridement, and removal of a suture anchor of the right subacromial bursa. On October 3, 2013 Dr. Aaron Bates, a Board-certified orthopedic surgeon, performed a revision of a right rotator cuff repair with a limited debridement.[3]

In a report dated February 25, 2014, Dr. Bates noted that appellant continued to experience shoulder pain. He diagnosed status post a rotator cuff repair of the right shoulder and found that he had reached maximum medical improvement. Dr. Bates advised that appellant had eight percent permanent impairment of the right shoulder under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On March 11, 2014 appellant filed a claim for a schedule award.

On March 17, 2014 an OWCP medical adviser reviewed Dr. Bates' report and identified the diagnosis as a full-thickness rotator cuff tear using the shoulder regional grid set forth at Table 15-5 on page 403 of the A.M.A., *Guides*. He found that appellant was entitled to the maximum allowed for the diagnosis, which yielded seven percent permanent impairment of the right upper extremity. The medical adviser opined that Dr. Bates' finding of eight percent impairment appeared to be a typographical error.

By decision dated April 1, 2014, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The period of the award ran for 21.84 weeks from March 26 to August 25, 2014.

On April 8, 2014 appellant requested a telephone hearing.

In a report dated July 16, 2014, Dr. Rahul V. Deshmukh, a Board-certified orthopedic surgeon, evaluated appellant for bilateral shoulder pain greater on the right following a March 22, 2012 work injury. He diagnosed shoulder pain and shoulder internal derangement, osteoarthritis, and synovitis. Dr. Deshmukh requested authorization for a right arthrogram to rule out an infection or tearing of the rotator cuff and labral.

[3] On August 13, 2013 OWCP referred appellant to Dr. George C. Hochreiter, an osteopath, for a second opinion examination. In a report dated September 4, 2013, Dr. Hochreiter diagnosed a recurrent rotator cuff tear. He advised that it was difficult to answer when appellant would reach maximum medical improvement given that large tears were hard to repair and that it appeared that his "tissue quality is such that a retear can certainty occur…."

A July 22, 2014 magnetic resonance imaging (MRI) scan study of the right shoulder revealed a recurrent tear of the distal supraspinatus tendon.

In an impairment evaluation dated July 30, 2014, Dr. Samy F. Bishai, an orthopedic surgeon, discussed appellant's history of a March 22, 2012 work injury and his continued difficulty using his shoulder even after three surgeries. He measured range of motion of the shoulders bilaterally. Dr. Bishai diagnosed right shoulder internal derangement, right shoulder impingement syndrome, a torn right rotator cuff status post three surgeries, and rotator cuff syndrome of the left shoulder. He found that appellant reached maximum medical improvement on July 30, 2014. Dr. Bishai determined that appellant had a 24 percent permanent impairment of the right upper extremity due to loss of motion using Table 15-34 on page 475 of the A.M.A., *Guides*. He explained that he used range of motion to calculate the extent of impairment as appellant's "most severe disabling problem is the severe restriction in his range of motion of the right shoulder…."

On August 6, 2014 Dr. Deshmukh requested authorization for additional shoulder surgery.

By decision dated September 16, 2014, OWCP denied authorization for additional right shoulder surgery and left shoulder surgery. It found that Dr. Deshmukh had not explained why the requested procedures were related to appellant's March 22, 2014 employment injury.

In a report dated October 2, 2014, Dr. Deshmukh advised that he was treating appellant for a right shoulder injury. He stated:

> "I have submitted a request for authorization for a right shoulder arthroscopy including revision [of a] rotator cuff repair with double row repair, subacromial decompression, distal clavicle excision with possible augment/stem cell injection. Current finding of rotator cuff re-tear is demonstrated [by a] lack of healing of his original injury, despite prior surgery by another surgeon. The requested procedure is to address the originally accepted pathology which remains damaged."

A telephone hearing was held on November 12, 2014. At the hearing, appellant's representative requested that OWCP disregard the initial impairment evaluation by Dr. Bates as he did not cite the tables and pages of the A.M.A., *Guides*. He related that Dr. Bishai explained his use of range of motion in rating the extent of impairment.

On December 12, 2014 the employing establishment noted that the July 22, 2014 MRI scan study showed additional tearing and that Dr. Deshmukh had requested authorization for an additional surgery. It further asserted that the A.M.A., *Guides* indicated that range of motion should only be used if a diagnosis-based impairment rating was not available.

By decision dated January 29, 2015, the hearing representative affirmed the April 1, 2014 decision. She found that Dr. Bishai did not provide a rating using the diagnosis-based impairment method preferred by the A.M.A., *Guides*. The hearing representative additionally determined that the evidence submitted after the schedule award decision indicated that appellant

may not be at maximum medical improvement. She cited FECA Bulletin No. 96-17[4] that indicates that the medical adviser should compute the percentage of the schedule award.

On appeal appellant's representative contends that the hearing representative should have sent Dr. Bishai's report to an OWCP medical adviser for review. He also maintains that she cited a FECA Bulletin applicable to the fourth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing federal regulations[6] 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 the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the 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.[9]

ANALYSIS

OWCP accepted that appellant sustained impingement syndrome of the right shoulder and an injury to the right rotator cuff as the result of a March 22, 2011 employment injury. Appellant underwent shoulder surgeries for rotator cuff tears on July 24 and December 14, 2012, and October 3, 2013.

On March 11, 2014 appellant filed a claim for a schedule award. In an impairment evaluation dated February 25, 2014, Dr. Bates opined that appellant had reached maximum medical improvement. He concluded that appellant had eight percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. Dr. Bates did not, however, reference the tables and pages of the A.M.A., *Guides* that he used to calculate

[4] FECA Bulletin No. 96-17 (issued September 20, 1996).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] *See id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

impairment. His opinion, consequently, is of diminished probative value as he did not clearly explain his application of the A.M.A., *Guides*.[10]

On March 17, 2014 the medical adviser applied the provisions of the A.M.A., *Guides* to the findings by Dr. Bates. He identified the diagnosis as a full-thickness rotator cuff tear pursuant to Table 15-5, the shoulder regional grid. The medical adviser determined that appellant was entitled to the maximum allowed for the diagnosed condition under Table 15-5 of seven percent. He opined that Dr. Bates' finding of eight percent impairment may have been a typographical error.

Based on the medical adviser's report, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The Board finds that the evidence does not establish that he has more than seven percent right upper extremity impairment, the maximum allowed under the A.M.A., *Guides* using the diagnosis-based estimate for the diagnosed condition of a rotator cuff tear.

Subsequent to OWCP's decision, appellant requested a hearing and submitted a July 30, 2014 impairment evaluation from Dr. Bishai finding that he had 24 percent permanent impairment of the right upper extremity as a result of reduced range of motion under Table 15-34 on page 475 of the A.M.A., *Guides*. However, an MRI scan study of the right shoulder obtained on July 22, 2014, prior to the impairment evaluation by Dr. Bishai, showed that appellant had a recurrent tear of the distal supraspinatus tendon. While Dr. Bishai opined that appellant had reached maximum medical improvement on July 30, 2014, he did not address the July 22, 2014 diagnostic study showing evidence of a recurrent distal supraspinatus tendon tear or its effect on his impairment evaluation.[11] Consequently, his report does not show that appellant is entitled to a greater schedule award.

On appeal appellant's representative alleges that OWCP should have referred Dr. Bishai's report to an OWCP medical adviser. As discussed, however, Dr. Bishai did not sufficiently explain his impairment rating given the findings on the July 22, 2014 MRI scan study of a recurrent tear, and thus his opinion is of diminished probative value.

Appellant's representative also contends that the hearing representative cited an expired FECA Bulletin. The hearing representative cited FECA Bulletin No. 96-17[12] which was issued under the fourth edition of the A.M.A., *Guides* and indicates that the medical adviser should compute the percentage of the schedule award. Any error in citing an expired FECA Bulletin, however, is harmless as current OWCP procedures similarly provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*,

[10] *See R.B.*, Docket No. 14-2038 (issued May 5, 2015).

[11] It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement. *See J.C.*, 58 ECAB 258 (2007). Maximum medical improvement means that the physician condition of the injured member of the body has stabilized and will not improve further. *See V.C.*, Docket No. 14-1230 (issued December 29, 2014); *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[12] FECA Bulletin No. 96-17 (issued September 20, 1996).

with the medical adviser providing rationale for the percentage of impairment specified.[13] Such procedures were followed in this claim.

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 no more than seven percent permanent impairment of the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 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

[13] *See supra* note 9.