United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 16-0429**
	)	**Issued: August 11, 2016**
U.S. POSTAL SERVICE, AIRPORT MAIL FACILITY, Philadelphia, PA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 4, 2016 appellant filed a timely appeal of a November 16, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has established that she is entitled to a schedule award for more than six percent permanent impairment of the right upper extremity impairment.

FACTUAL HISTORY

On October 12, 2007 appellant, then a 35-year-old laborer custodian, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her right arm and shoulder in the performance of duty. OWCP accepted the claim for a right shoulder sprain and subsequently accepted right mild shoulder impingement. It accepted that appellant sustained recurrences of

[1] 5 U.S.C. § 8101 *et seq.*

disability on May 7, 2008, August 30 and October 4, 2010, and May 9, 2011. Appellant received supplemental and periodic rolls payments commencing November 28, 2007.

On February 3, 2011 OWCP received appellant's claim for a schedule award (Form CA-7). In an April 20, 2011 report, Dr. Damon Cary, a treating osteopath, using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* determined that appellant had six percent permanent impairment due to cervical spine strain and right C5 radiculopathy using Table 17-2, page 564, and three percent right shoulder impairment using Table 15-5, page 401. He noted that appellant had reached maximum medical improvement (MMI).

An OWCP medical adviser reviewed Dr. Cary's impairment rating on June 20, 2011 and concluded that appellant had six percent right upper extremity impairment due to loss of range of motion using Table 15-34, page 475. He further explained that appellant had reached MMI on April 20, 2011, the date of Dr. Cary's examination.

On May 11, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, to determine whether she still had residuals of her accepted employment injury.[2] Dr. Smith, in a May 29, 2012 report, provided a history of illness, noted a right shoulder sprain as the accepted condition, and that mild right shoulder impingement was subsequently accepted. He related that physical examination of appellant's right shoulder revealed no crepitation or instability, she had normal neurologic examination and normal motor strength. Dr. Smith opined that there was no diagnostic or clinical evidence supporting an ongoing right shoulder sprain or mild impingement. He related that, while appellant had a lot of symptoms, they could not be verified by diagnostic testing or clinical examination. Dr. Smith concluded that appellant was capable of returning to her usual work duties as her accepted right shoulder sprain and mild impingement had resolved without residuals.

By decision dated January 23, 2013, OWCP advised appellant that she was entitled to a schedule award for six percent right upper extremity permanent impairment. It informed her that benefits for her schedule award could not be paid as she was currently in receipt of benefits for total disability on the periodic rolls. In an attached memorandum, OWCP noted that the schedule award determination was based upon a June 14, 2011 impairment rating calculated by the OWCP medical adviser.

On June 19, 2013 OWCP referred appellant to an impartial medical examiner physician, Dr. Charles D. Hummer, III, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Cary, a treating osteopath, and Dr. Smith, a second opinion Board-certified orthopedic surgeon, regarding whether appellant continued to have any disability or residuals due to her accepted October 12, 2007 employment injury. OWCP also requested that Dr. Hummer provide an impairment rating for appellant's right upper extremity, if MMI had been reached.

[2] The Board notes that the statement of accepted facts (SOAF) provided to Dr. Smith noted the only accepted condition was a shoulder sprain. However, on March 2, 2010 OWCP expanded the acceptance of appellant's claim to include mild right shoulder impingement.

In a letter dated August 21, 2013, Dr. Hummer informed OWCP that appellant did not appear for the appointment scheduled that day.

In a September 13, 2013 report, Dr. Andrew Berkowitz, an examining physician specializing in internal medicine, noted appellant's medical and employment history. He diagnosed acute post-traumatic cervical radiculopathy, acute post-traumatic right shoulder sprain/stain, and acute post-traumatic cervical strain/sprain. Dr. Berkowitz related that examination of appellant's right shoulder revealed decreased abduction of 90 degrees with palms facing downwards; normal acromioclavicular joint; tenderness over the supraspinatus, infraspinatus, and teres minor. He also reported an inability to fully externally rotate and abduct the right side and an inability to fully adduct and rotate her shoulders with both hands placed behind the small of the back. Dr. Berkowitz opined that appellant was unable to return to work and had lifting restrictions.

In a May 22, 2014 report, Dr. Berkowitz indicated that appellant had reached MMI in November 2010. He diagnosed cervical strain, cervical strain with C5 radiculopathy and right shoulder sprain which he attributed to the October 12, 2007 employment injury. A physical examination revealed right shoulder tenderness; trapezial muscle spasms; and right upper extremity weakness, numbness and tingling. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Berkowitz calculated that appellant sustained 12 percent permanent impairment of the cervical spine, and 6 percent permanent impairment of the right shoulder.

In a June 20, 2014 report, Dr. Berkowitz diagnosed acute post-traumatic cervical radiculopathy, acute post-traumatic right shoulder sprain/stain, and acute post-traumatic cervical strain/sprain. An examination of the right shoulder revealed decreased abduction of 90 degrees with her palms facing downwards; decreased abduction of 90 to 150 degrees with her palms facing upwards; normal supraspinatus, acromioclavicular joint, subscapularis, infraspinatus, clavicle, and teres minor; and no tenderness. Dr. Berkowitz also reported an inability to fully externally rotate and abduct the right side and an inability to fully adduct and rotate her shoulders with both hands placed behind the small of the back.

On September 16, 2014 appellant filed a claim for a schedule award (Form CA-7).

On January 21, 2015 OWCP requested that an OWCP medical adviser review the case record regarding appellant's schedule award claim. The accepted conditions were noted as right shoulder and upper arm sprain and other right shoulder region affections not elsewhere classified.

In a January 22, 2015 report, an OWCP medical adviser reviewed the medical evidence including Dr. Berkowitz's May 22, 2014 impairment rating and reports and Dr. Smith's May 29, 2012 report. Using the examination findings by Dr. Smith and Table 15-5, pages 401-05, he determined that appellant was a class zero for her right shoulder sprain which resulted in zero percent permanent impairment of her right upper extremity. The medical adviser further determined that the grade modifiers were not applicable as a class zero. He noted that Dr. Berkowitz had not performed a physical examination on May 22, 2014, and he performed a limited examination on September 13, 2013.

By decision dated February 12, 2015, OWCP denied appellant's claim for a schedule award as it found she failed to establish any permanent impairment to a scheduled member.

On February 17, 2015 appellant requested a hearing before the Branch of Hearings and Review. A telephonic hearing was held on August 31, 2015.

By decision dated November 16, 2015, an OWCP hearing representative affirmed the February 12, 2015 decision. She found the medical evidence was insufficient to establish that appellant had more than six percent permanent impairment of right upper extremity. The hearing representative also noted that OWCP should consider payment of the previously determined schedule award.

LEGAL PRECEDENT

Under section 8107 of FECA[3] and section 10.404 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5]

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 (ICF).[6] Under the sixth edition, the evaluator identifies the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[7] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[8]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[9]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404

[5] *D.J.*, 59 ECAB 620 2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[6] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[7] A.M.A., *Guides* (6th ed. 2009), pp. 383-419.

[8] *Id.* at 411.

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013). *See C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

ANALYSIS

OWCP accepted appellant's claim for a right shoulder sprain and right mild shoulder impingement. In a January 23, 2013 decision, it advised her that she was entitled to a schedule award for six percent right upper extremity permanent impairment, but that no payment could be issued at that time as she was in receipt of compensation for total disability.

On September 16, 2014 appellant filed a claim for a schedule award. By decision dated February 12, 2015, OWCP denied appellant's claim for an additional schedule award, which was affirmed by an OWCP hearing representative in a November 16, 2015 decision. The denial of appellant's claim was based on the January 22, 2015 report by an OWCP medical adviser. The Board notes that the OWCP medical adviser based the majority of his impairment rating on the physical examination findings provided by Dr. Smith in as May 29, 2012 report. The OWCP medical adviser, relied upon Dr. Berkowtiz's May 22 and June 20, 2014 reports, which contained limited examination findings. The Board finds that the OWCP medical adviser's impairment rating was based on stale medical evidence and is insufficient to form an impairment rating basis for appellant's schedule award claim.[10]

The Board has held that an impairment rating that is not based on reasonably current examination findings is of little probative value.[11] Thus, it was inappropriate for the OWCP medical adviser to base his impairment rating on the May 29, 2012 examination findings of Dr. Smith which were almost three years old at the time of the OWCP medical adviser's impairment calculation. The May 29, 2012 finding constituted stale medical evidence which would not be considered to be current medical evidence for use in calculating a permanent impairment.[12] As OWCP undertook development of the medical by the case to an OWCP medical adviser on January 21, 2015, it had a responsibility to do so in the proper manner.[13]

The Board also notes that in support of her September 16, 2014 claim for a schedule award, appellant submitted a May 22, 2014 report by Dr. Berkowitz who determined that appellant had 12 percent permanent impairment for the cervical strain and C5 radiculopathy. However, Dr. Berkowitz's impairment rating is insufficient for purposes of determining appellant's entitlement to an additional schedule award. The May 22, 2012 SOAF related that only a right shoulder sprain had been accepted as causally related to appellant's employment injury. This SOAF also noted that appellant sustained injuries to her cervical, thoracic and lumbar spine, as well as headaches following an April 7, 2007 nonwork-related motor vehicle accident. Upon return of the case record, OWCP shall prepare a new SOAF and clarify the

[10] *J.R.*, Docket No. 15-1487 (issued March 4, 2016); *B.N.*, Docket No. 12-1394 (issued August 5, 2013); *see also Keith Hanselman*, 42 ECAB 680 (1991).

[11] *See W.M.*, Docket No. 12-773 (issued March 29, 2013) (where a physician sought in June 2011 to update a prior impairment rating, but the Board found that the May 2004 findings which served as the basis for the updated rating constituted stale medical evidence); *P.S.*, Docket No. 12-649 (issued February 14, 2013) (the Board found that a physician's January 2010 impairment rating was of reduced probative value because the physician relied on October 2007 findings as the basis for this updated impairment rating).

[12] *See id.*

[13] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *Richard F. Williams*, 55 ECAB 343 (2004).

conditions that have been accepted as employment related and refer appellant for a second opinion examination in accordance with its procedures.[14] After such further development, as it deems necessary, it should issue an appropriate *de novo* decision.[15]

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 16, 2015 is set aside and remanded for further development consistent with the above opinion.

Issued: August 11, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[14] OWCP's procedures provide that, if a medical adviser provides an opinion which is not strong enough to constitute a conflict with the opinion of the treating physician, but is of sufficient value to warrant additional action, OWCP may refer the claim for a second opinion examination. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.8(h) (September 2010).

[15] The Board also notes that the record indicates that appellant did not receive payment of the six percent schedule award for permanent impairment of the right upper extremity as she was in receipt of periodic rolls compensation benefits for disability wage loss until April 15, 2014.