United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 16-1045**
	)	**Issued: December 6, 2016**
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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 22, 2016 appellant filed a timely appeal from a March 29, 2016 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.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment of his right upper extremity causally related to his accepted October 7, 1991 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the March 29, 2016 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt,* 57 ECAB 126 (2005).

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts are set forth below.

On October 8, 1991 appellant, then a 28-year-old part-time, flexible distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 7, 1991 he sustained a right shoulder dislocation when he slipped and fell in the performance of duty. He did not stop work. OWCP accepted appellant's claim for right shoulder dislocation. On October 29, 1991 appellant underwent authorized right shoulder surgery and stopped work. OWCP paid wage-loss compensation benefits. Appellant accepted a full-duty job offer on July 29, 1992.

On February 3, 2012 appellant filed a claim for a schedule award (Form CA-7).

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 a permanent impairment rating utilizing the American Medical Association, *Guide to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), (6th ed. 2009).

Appellant thereafter submitted reports from Dr. James Judge, a Board-certified family practitioner. In reports dated March 9 and 27, and May 11, 2012, Dr. Judge related that appellant's right shoulder had full range of motion with no tenderness. Deep tendon reflexes were positive bilaterally. Dr. Judge diagnosed superficial antebrachial neuritis. He related 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*.

In a March 9, 2012 electromyography (EMG) and nerve conduction velocity (NCV) study report, Dr. Michael Merchut, a Board-certified psychiatrist and neurologist specializing in clinical neurophysiology, observed no compression at the wrist or elbow areas, muscular habitus, and intact sensation. He opined that appellant had normal findings without EMG/NCV evidence for a nerve or root lesion in the upper limbs.

OWCP referred appellant to a medical adviser to review the evidence of record and provide an opinion as to whether he attained MMI and sustained a permanent impairment according to the sixth edition of the A.M.A., *Guides*. By report dated June 4, 2012, Dr. David H. Garelick, a Board-certified orthopedic surgeon specializing in orthopedic sports medicine, reviewed the record and stated that while Dr. Judge related that appellant had 10 percent permanent impairment of the right upper extremity, the rating documentation 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 study was normal without evidence for a nerve root or root lesion in the upper limbs. He opined that, given appellant's normal strength

[3] Docket No. 15-1512 (issued October 22, 2015).

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 permanent impairment of the right upper extremity.

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

Appellant submitted a request for reconsideration, which was received by OWCP on July 30, 2013.

Appellant submitted a May 9, 2012 report from Dr. Steve M. Gnatz, Board-certified in PMR. Dr. Gnatz explained that appellant had a long-standing mild right shoulder dysfunction after a work-related accident and subsequent surgical repair. He opined that appellant reached MMI and had 10 percent permanent 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 PMR, related appellant's complaints of right shoulder pain and restricted range of motion. She opined that he 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,* 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 specialist in orthopedic surgery, stated that he reviewed appellant's chart and Dr. Gnatz' 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 reported that upon examination appellant currently had normal motion and muscle strength and pointed out that the May 9, 2012 examination was essentially normal. He 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 permanent impairment. Dr. Gross 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 provided Dr. Gross the additional medical evidence he 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 study 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 zero percent permanent impairment of the right upper extremity. 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 have been when appellant returned to light duty on June 17, 1992.

In a decision dated March 5, 2014, OWCP denied modification of the prior denial. It found that the medical evidence demonstrated that appellant was not entitled to a schedule award for permanent impairment of his right upper extremity.

On November 12, 2014 OWCP received appellant's request for reconsideration. Appellant submitted a November 6, 2014 report from Dr. Harold T. Pye, a specialist in preventive medicine. Dr. Pye provided an accurate history of the October 7, 1991 employment injury and reviewed appellant's medical treatment for right shoulder dislocation. He noted that appellant slowly improved, but appellant still complained of persistent right shoulder pain and lack of range of motion even after surgery. Upon physical examination, Dr. Pye observed decreased active range of motion in forward flexion, abduction, and internal rotation. Sensory examination revealed 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 noted that appellant had reached MMI. Referencing Table 15-5, page 404, of the A.M.A., *Guides*, he indicated that appellant was class 1 for unidirectional shoulder instability and concluded that appellant had 12 percent permanent impairment of the right upper extremity.

In a March 9, 2015 report, Dr. Garelick, an OWCP medical adviser, reviewed Dr. Pye's November 6, 2014 report and disagreed with his impairment rating. Dr. Pye noted that appellant demonstrated full range of motion without any tenderness, weakness, or instability of the right shoulder. He related that an EMG study was normal without any evidence for a nerve or root lesion in the upper limbs. Thus, Dr. Pye opined that appellant had zero percent permanent impairment of the right upper extremity.

By decision dated March 30, 2015, OWCP denied modification of its prior decision. It relied on the March 9, 2015 report of Dr. Garelick, who determined that appellant had not sustained any impairment to his right shoulder as a result of the October 7, 1991 employment injury.

Appellant appealed to the Board. By decision dated October 22, 2015, the Board set aside the March 30, 2015 OWCP decision.[4] The Board determined that a conflict in medical opinion existed between Dr. Pye, appellant's treating physician, and Dr. Garelick, OWCP's medical adviser, and remanded appellant's schedule award claim to OWCP for referral to a referee medical examiner in order to resolve the conflict.

On remand from the Board's decision, OWCP referred the medical record, along with a statement of accepted facts, to Dr. Steven Mash, a Board-certified orthopedic surgeon and impartial medical examiner, for an examination and opinion regarding whether appellant

[4] *Supra* note 3.

sustained any permanent impairment to his right upper extremity as a result of the October 7, 1991 employment injury.[5]

In a February 5, 2016 report, Dr. Mash accurately described the October 7, 1991 employment injury, reviewed appellant's medical treatment and noted that appellant underwent surgery. He related that, since 1992, appellant had complained of aching discomfort daily and that he found it difficult to reach overhead in his work. Upon examination, Dr. Mash observed subjective complaints of discomfort and reported an otherwise normal shoulder examination. He noted no swelling, warmth, erythema, ecchymosis, deformity, and atrophy. Range of motion examination was normal except for complaints of discomfort at the end of the range of motion, especially with overhead reaching. Impingement, acromioclavicular (AC) tenderness, Apprehension, and Speed tests were negative. Dr. Mash diagnosed status post Bristow reconstruction for recurrent dislocating shoulder and indicated that appellant had reached MMI. He explained that the A.M.A., *Guides* used objective findings on examination and noted that all of appellant's findings were subjective.

Dr. Mash referenced Table 15-5, page 404, for unilateral shoulder instability and assigned a class 0 rating because appellant had no findings of instability. He pointed out that prior examiners who opined that appellant had 10 to 12 percent impairment would have to use a diagnosis of grade 1 instability or subluxing humeral head even though appellant did not demonstrate these findings. Dr. Mash indicated that he agreed with Dr. Garelick's assessment that appellant did not have any permanent impairment to his right upper extremity causally related to his accepted October 7, 1991 employment injury.

Dr. Mash explained that he could also use a different diagnosis and approach with Table 15-5, page 401, for shoulder pain. He assigned appellant a class 1 injury for a history of painful injury with residual symptoms without consistent objective findings. Dr. Mash noted that appellant had a *Quick*DASH score of 27, which translated to a functional history grade modifier of 3. He further indicated that appellant had a physical examination grade modifier of 1 due to minimal palpatory findings. Dr. Mash reported that appellant had a clinical studies grade modifier of 1 because x-ray examination revealed surgical changes secondary to prior surgery. He applied the Net Adjustment Formula for a net adjustment of -2. Dr. Mash concluded that appellant was a class 1, grade A, for 0 percent impairment of the upper extremity under Table 15-5. He reported that appellant had class 0 impairment regardless if one chose to evaluate appellant in the traditional way with objective findings of instability or if one evaluated appellant based on appellant's subjective complaints.

On March 19, 2016 Dr. Jovito Estaris, Board-certified in occupational medicine and surgery and an OWCP medical adviser, reviewed appellant's medical record, including Dr. Mash's February 5, 2016 impartial medical report, and concurred with his opinion of a date of MMI of February 5, 2016. He opined that Dr. Mash correctly applied the tables in the sixth edition of the A.M.A., *Guides* except for one computation with the diagnosis of shoulder pain. Dr. Estaris noted that Dr. Mash incorrectly used 3 for Class of Diagnosis (CDX) and 1 for functional history grade modifier when computing the net adjustment, but he indicated that the

[5] The Board notes that OWCP initially referred appellant to Dr. Kenneth Sanders, a Board-certified orthopedic surgeon, but rescheduled appellant with Dr. Mash in the same medical group.

error did not affect the outcome because appellant's impairment rating should be based on a diagnosis of shoulder dislocation. He agreed with Dr. Mash's impairment rating of zero percent impairment of the right upper extremity.

In a March 29, 2016 decision, OWCP denied appellant's schedule award claim, finding that he had zero percent permanent impairment of the right upper extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[6] 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 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.[7]

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.[8] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition 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).[9] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[10]

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 who shall make an examination.[11] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

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

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

[11] 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).

[12] 20 C.F.R. § 10.321.

specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS

OWCP accepted that on October 7, 1991 appellant sustained a right shoulder dislocation injury in the performance of duty. Appellant underwent right shoulder surgery and stopped work. He returned to full duty and filed a claim for a schedule award.

On remand from the Board's October 22, 2015 decision, OWCP referred appellant's claim to Dr. Mash for an impartial medical examination. In a February 5, 2016 report, Dr. Mash accurately described the October 7, 1991 employment injury and reviewed appellant's medical records. He noted that appellant's claim was accepted for right shoulder dislocation. Upon examination, Dr. Mash observed subjective complaints of discomfort and reported an otherwise normal shoulder examination. He reported no swelling, warmth, erythema, ecchymosis, deformity, and atrophy. Range of motion examination was normal and impingement, AC tenderness, Apprehension, and Speed tests were negative. Dr. Mash diagnosed status post Bristow reconstruction for recurrent dislocating shoulder and indicated that appellant had reached MMI. He referenced Table 15-5, page 404, for unilateral shoulder instability and pointed out that appellant had no findings of instability. Dr. Mash indicated that appellant had a class 0 rating for zero percent permanent impairment. He explained that even with a different diagnosis for shoulder pain appellant still had zero percent permanent impairment of the upper extremity.

On March 19, 2016 Dr. Estaris, an OWCP medical adviser, reviewed appellant's medical record, including Dr. Mash's February 5, 2016 impartial medical report, and concurred that appellant had reached MMI. He agreed with Dr. Mash that appellant had an impairment rating of 0 percent of the right upper extremity.

The Board has carefully reviewed the opinion of Dr. Mash and finds that his February 5, 2016 report was sufficiently well rationalized to carry the special weight of the medical evidence. Dr. Mash's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides.* He referenced Table 15-5, page 404, for unilateral shoulder instability and assigned a class 0 rating because appellant had no findings of instability. Dr. Mash further explained that he could also use Table 15-5, page 401, for shoulder pain. He assigned appellant a class 1 injury for a history of painful injury without consistent objective findings. Dr. Mash noted that appellant had GMFH of 3 for a *Quick*DASH score of 27, GMPE of 1 due to minimal palpatory findings, and GMCS of 1 based on x-ray examination findings. He applied the Net Adjustment Formula for a net adjustment of -2. Dr. Mash concluded that appellant was a class 1, grade A, for 0 percent permanent impairment of the right upper extremity under Table 15-5.

The Board notes that under Table 15-7, page 406, a *Quick*DASH score of 27 actually results in a grade modifier 1. After applying the net adjustment formula, however, the impairment rating is still 0 percent impairment under Table 15-5. Nevertheless Dr. Mash

[13] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

provided sufficient medical rationale that appellant had a class 0 rating for either right shoulder unilateral instability or right shoulder pain according to the appropriate tables of the A.M.A., *Guides*. As previously noted, a reasoned medical opinion from an impartial medical examiner is entitled to special weight.[14] Thus, Dr. Mash's February 5, 2016 report represents the special weight of an impartial medical examiner. Dr. Estaris, an OWCP medical adviser, further reviewed Dr. Mash's February 5, 2016 report and concurred with his impairment rating. Appellant, therefore, has not met his burden of proof to establish permanent impairment of his right upper extremity causally related to the October 7, 1991 employment injury.

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 did not meet his burden of proof to establish permanent impairment to his right upper extremity causally related to the October 7, 1991 employment injury.

[14] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2016 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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