

FACTUAL HISTORY

The case has previously been before the Board.² The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On June 29, 2009 appellant, then a 53-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in the performance of duty on June 12, 2009 when a ladder he was climbing collapsed. OWCP initially accepted a closed left radial neck fracture of the elbow on August 6, 2009. In addition, it subsequently accepted cervical strain, left shoulder impingement, and left carpal tunnel syndrome. Appellant underwent a left carpal tunnel release on January 21, 2010 and left shoulder arthroscopic surgery with excision of the distal clavicle on September 13, 2010.

In a report dated March 30, 2011, Dr. Tiffany Shay Alexander, Board-certified in occupational medicine, provided results upon examination. She opined that appellant had 20 percent left upper extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a report dated October 24, 2011, Dr. Arthur S. Harris, an OWCP medical adviser, reviewed Dr. Alexander's findings and opined that, under the sixth edition of the A.M.A., *Guides*, appellant had 10 percent left upper extremity permanent impairment. He indicated that his rating was based on impairments to the shoulder, elbow, and wrist.

By decision dated September 26, 2012, OWCP issued a schedule award for 10 percent permanent impairment to the left arm. The period of the award was 31.20 weeks commencing March 30, 2011.

Appellant requested reconsideration and submitted an October 9, 2012 report from Dr. Joseph Tauber, a Board-certified orthopedic surgeon. Dr. Tauber opined that appellant had 21 percent left upper extremity permanent impairment, based on left carpal tunnel syndrome, left shoulder impingement, and elbow tenderness.

OWCP denied modification of the schedule award determination by decision dated April 25, 2013. It found that Dr. Tauber had not reviewed the prior medical evidence and his report was insufficient to establish error in the September 26, 2012 decision.

Appellant filed an appeal of the April 25, 2013 decision, and by order dated February 4, 2014, the Board set aside the April 25, 2013 decision and remanded the case to OWCP.³ The Board found that the issue before OWCP was not reconsideration, but a request for an increased schedule award. The case was therefore remanded for a proper decision with respect to a claim for an increased schedule award.

² Docket No. 13-1781 (issued February 4, 2014); Docket No. 15-033 (issued March 2, 2015).

³ Docket No. 13-1781 (issued February 4, 2014).

OWCP referred Dr. Tauber's report to an OWCP medical adviser for review. In a report dated April 1, 2013, the OWCP medical adviser opined that appellant had 15 percent permanent impairment to the left upper extremity based on Dr. Tauber's October 9, 2012 report.

By decision dated January 22, 2014, OWCP issued a schedule award for an additional five percent permanent impairment to the left upper extremity. The period of the award was 15.60 weeks commencing October 19, 2012.

Appellant submitted a request for review of the written record to the Branch of Hearings and Review on February 20, 2014. By decision dated August 5, 2014, an OWCP hearing representative affirmed the January 22, 2014 OWCP decision. He found the weight of the medical evidence was represented by the OWCP medical adviser, Dr. Harris.

Appellant filed an appeal of the August 5, 2014 hearing representative decision. On March 2, 2015 the Board affirmed the August 5, 2014 decision.⁴ The Board found that the OWCP medical adviser had properly applied the A.M.A., *Guides* and his report represented the weight of the medical evidence. With respect to the left shoulder, the Board noted the medical adviser had properly applied Table 15-5, since this table indicates that when there are two diagnoses, only the diagnosis with the highest impairment rating is used. As to carpal tunnel syndrome, it was the medical adviser who properly explained how the impairment was calculated under Table 15-23.

Appellant continued to submit reports from treating physician Dr. Alexander. In a report dated May 19, 2015, Dr. Alexander provided results on examination and diagnosed cervical strain with radicular symptoms and paresthesias. By report dated July 20, 2015, he provided results on examination and diagnosed neck strain with symptoms of cervical radiculitis and left carpal tunnel syndrome.

In a report dated July 7, 2015, Dr. Larry Dodge, a Board-certified orthopedic surgeon, provided a history and results on examination, noted tenderness in the lower cervical spine, and reported that a June 9, 2015 magnetic resonance imaging (MRI) scan showed moderate central and foraminal narrowing at C4-5. Dr. Dodge diagnosed history of cervical strain and contusion, moderate cervical stenosis at C4-5, and left shoulder contusion and sprain with presumptive impingement syndrome. He opined that the diagnosed conditions were causally related to the employment injury.

In a letter to OWCP dated July 11, 2015, appellant noted that he believed the continuing medical evidence confirmed 21 percent permanent impairment of the left arm. He submitted an August 27, 2015 report from Dr. Dodge, reporting that electrodiagnostic testing on August 24, 2015 showed mild carpal tunnel syndrome, with no evidence of obvious cervical radiculopathy. Dr. Dodge reported that appellant had full range of motion in his upper extremities.

OWCP referred the new medical evidence to an OWCP medical adviser for an opinion as to whether appellant had an additional permanent impairment to his left upper extremity. By report dated October 1, 2015, OWCP medical adviser Dr. Harris opined that the medical

⁴ Docket No. 15-033 (issued March 2, 2015).

evidence did not establish an increased permanent impairment. He noted that he had previously reviewed the record on April 1, 2013 and that there had been no change with respect to increased permanent impairment.

By decision dated October 23, 2015, OWCP found that appellant had not established more than 15 percent permanent impairment was warranted.

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.⁵ 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.⁶

A claimant seeking compensation under FECA has the burden to establish the essential elements of her claim.⁷ With respect to a schedule award, it is appellant's burden of proof to establish an increased schedule award.⁸ A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment causally related to an employment injury.⁹

Under OWCP procedures, medical evidence to support a schedule award should include a report that shows that the impairment has reached a date of maximum medical improvement (MMI), describe the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability, and give a percentage of impairment under the A.M.A., *Guides*.¹⁰ The report should include a history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated.¹¹

⁵ 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).

⁶ *A. George Lampo*, 45 ECAB 441 (1994).

⁷ *John W. Montoya*, 54 ECAB 306 (2003).

⁸ *Edward W. Spohr*, 54 ECAB 806, 810 (2003).

⁹ *See Rose V. Ford*, 55 ECAB 449 (2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(b) (February 2013).

¹¹ *Id.* at Chapter 2.808.6(a)(1).

ANALYSIS

In the present case, the Board had previously reviewed the medical evidence of record as of August 5, 2014 and found the probative evidence established no more than 15 percent left upper extremity permanent impairment. The Board's review of the previous medical evidence of record is *res judicata*.¹² Appellant submitted additional medical evidence and claimed that his permanent impairment was 21 percent of the left upper extremity.

The Board has reviewed the medical evidence submitted after August 5, 2014 and finds there is no probative evidence warranting an increased schedule award. Dr. Alexander provided reports that included results on examination, but did not describe a permanent impairment to the arm or provide an impairment rating. Dr. Dodge also did not provide probative medical evidence with respect to a permanent impairment. The July 7, 2015 report provided results on examination, without describing a permanent impairment or providing an opinion on the issue. The August 27, 2015 report does not discuss a permanent impairment.

OWCP referred the case to its medical adviser Dr. Harris and in an October 1, 2015 report he found no evidence of an increased permanent impairment. The Board finds no probative medical evidence establishing an increased permanent impairment to the left upper extremity. It is appellant's burden to establish an increased schedule award, and he did not meet his burden in this case.

On appeal, appellant argues that his impairment should be 21 percent, in accordance with Dr. Tauber's opinion. The Board had addressed Dr. Tauber's October 9, 2012 report in a prior appeal. To establish an increased schedule award, appellant must submit probative medical evidence, as noted above. In the absence of such evidence, the Board finds OWCP properly determined that appellant was not entitled to an additional schedule award in this case.

Appellant may at any time submit to OWCP a request for an increased schedule award based on new medical evidence showing a progression of an employment-related permanent impairment.

CONCLUSION

The Board finds appellant has not established more than 15 percent permanent impairment of his left upper extremity.

¹² *P.L.*, Docket No. 15-1285 (issued February 5, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 23, 2015 is affirmed.

Issued: May 19, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board