United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
	)	**Docket No. 16-0979**
and	)	**Issued: October 6, 2016**
U.S. POSTAL SERVICE, MANAGER, CANTON PROCESSING & DISTRIBUTION FACILITY, Canton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 7, 2016 appellant, through counsel, filed a timely appeal from a February 3, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish more than seven percent permanent impairment of the right upper extremity, for which he received a schedule award.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

OWCP accepted that on April 20, 2011 appellant, then a 29-year-old mail handler, sustained a right shoulder sprain as a result of moving a wire cage of flats at work. He stopped work on the date of injury.

On June 22, 2011 appellant underwent an authorized arthroscopic right rotator cuff repair performed by Dr. Philip G. Wilcox, a Board-certified orthopedic surgeon. He had a right rotator cuff retear and underwent authorized open repair of the right rotator cuff performed by Dr. Wilcox on January 13, 2012.

OWCP subsequently expanded acceptance of appellant's claim to include right rotator cuff tear and tendinitis of the right shoulder. On May 12, 2012 appellant returned to his regular full-time work duties.

On February 12, 2014 Dr. Wilcox reported that appellant had reached maximum medical improvement (MMI) as of that date.

On April 21, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a May 2, 2014 letter, OWCP requested that appellant provide a medical report from his physician assessing his permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a July 3, 2014 report, Dr. Catherine E. Watkins Campbell, an attending physician Board-certified in occupational and family medicine, examined appellant on May 19, 2014 and reviewed his medical history. On examination, she reported a 10-centimeter (cm) scar running from the acromioclavicular (AC) joint down the anterior aspect of the right arm. There was tenderness of the proximal scar, the coracoid process, subacromial space, and in the posterior shoulder joint. There was also tenderness over the bicipital groove. The AC joint was wider than normal due to a surgical resection. Dr. Campbell reported right shoulder range of motion measurements which included 140 degrees of active flexion, 53 degrees of extension, 130 degrees of abduction, 30 degrees of adduction, 74 degrees of external rotation, and 52 degrees of internal rotation. Mild impingement signs were present. Mild-to-moderate instability of the glenohumeral and AC joints was identified. Appellant was right-hand dominant. The right upper arm measured 31.5 cm and the left upper arm was 29.7 cm. There was mild muscle weakness (4/5) with flexion, external rotation, and internal rotation of the right shoulder. Mild muscle weakness (4/5) was noted with elbow flexion and supination. Dr. Campbell determined that appellant had reached MMI following his surgeries. She noted that the first surgery

addressed appellant's rotator cuff with the bone resection at the AC joint (as evident on physical examination) part of a subacromial decompression that was performed at the first surgery.

The second surgery involved repair (tenodesis) of the long head of the biceps tendon. Dr. Campbell advised that the associated arthroplasty performed was referenced in Table 15-5, Shoulder Regional Grid, under the diagnosis of shoulder arthroplasty with resection and abnormal range of motion (complicated), which represented a class 3 impairment. She assigned a grade modifier 2 for Functional History (GMFH). Dr. Campbell assigned a grade modifier 2 for Physical Examination (GMPE) based on moderate findings on palpation and assessing instability. She did not assign a grade modifier for Clinical Studies (GMCS) as no clinical studies were made available. This rendered a net adjustment of -2 or grade A for 34 percent permanent impairment of the right upper extremity.

On January 23, 2015 Dr. Morley Slutsky, an OWCP district medical adviser (DMA) Board-certified in occupational medicine, reviewed the medical record, including Dr. Campbell's July 3, 2014 findings. He determined that appellant had seven percent permanent impairment of the right arm under the sixth edition of the A.M.A., *Guides* and advised that appellant had reached MMI on May 19, 2014, the date of Dr. Campbell's evaluation. He noted that she had improperly rated appellant based on an arthroplasty resection with complication. Dr. Slutsky noted that appellant had not undergone this surgery. Rather, he had complications from both of his rotator cuff repair surgeries. Utilizing Table 15-5, pages 401 to 405, Dr. Slutsky determined that appellant had a class 1 impairment for a full thickness rotator cuff tear with residual dysfunction, which was the most impairing diagnosis. Dr. Slutsky assigned a grade modifier 2 for GMFH under Table 15-7, page 406 because his shoulder was still symptomatic as he had to perform functional modifications in order to achieve self-care activities. He reported a grade modifier 2 for GMPE under Table 15-8, page 408 based on tenderness to palpation. Dr. Slutsky noted that no other objective deficits were documented. He assessed a grade modifier 2 for GMCS under Table 15-9, page 410 based on a May 24, 2011 right shoulder magnetic resonance imaging (MRI) scan which demonstrated a full-thickness tear of the distal rotor cuff. The MRI scan also revealed a longitudinal split tear of the distal subscapularis tendon into which insinuated the bicipital tendon which demonstrated changes of mild tendinosis. There was diffuse labral degeneration. Intraoperative findings did not include biceps or labral pathology. Dr. Slutsky calculated a net adjustment of +2, which moved the impairment to grade E for seven percent permanent impairment of the right arm.

In an April 1, 2015 decision, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The period of the award ran from May 19 to October 18, 2014.

By letter dated April 9, 2015, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative, which was held on November 19, 2015.

In a February 3, 2016 decision, an OWCP hearing representative affirmed the April 1, 2015 schedule award decision. She found that the weight of the medical opinion evidence rested with Dr. Slutsky's opinion.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] 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.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to rate permanent impairment.[6]

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).[7] For upper extremity impairments, the evaluator identifies the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[8] 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]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than seven percent permanent impairment of the right upper extremity.

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404(a).

[6] *See* 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, Exhibit 1 (January 2010).

[7] 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.

[8] *Id.* at 385-419.

[9] *Id.* at 411.

[10] *J.W.*, Docket No. 11-289 (issued September 12, 2011).

[11] *See* Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.808.6(f) (February 2013).

OWCP accepted appellant's claim for right shoulder sprain and tendinitis, and right rotator cuff tear. It authorized right rotator cuff repair performed on June 22, 2011 and open repair of recurrent right rotator cuff performed on January 13, 2012.

OWCP granted appellant a schedule award for seven percent permanent impairment of his right upper extremity. The Board finds that the July 3, 2014 opinion of Dr. Campbell, appellant's treating physician, that appellant had 34 percent permanent impairment of his right upper extremity due to a right shoulder arthroplasty resection with complication and abnormal range of motion (complicated) is of diminished value. Dr. Campbell provided no explanation as to why she thought the arthroplasty resection rating was appropriate. The surgical reports specifically describe the June 22, 2011 surgery as right rotator cuff repair and the January 13, 2012 surgery as an open repair of recurrent right rotator cuff as opposed to a right shoulder arthroplasty resection.

Dr. Slutsky, OWCP's DMA, reviewed Dr. Campbell's findings and noted that an arthroplasty resection with complication was not performed in this case. It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of diminished probative value.[12] The impairment rating of Dr. Campbell is based on an inaccurate description of the surgery and, thus, is of diminished probative value. Thus, the Board finds that Dr. Campbell's report does not establish greater than the seven percent permanent impairment of the right upper extremity awarded.

The Board finds that Dr. Slutsky, OWCP's DMA, relied on the diagnosis-based method for rating appellant's right upper extremity impairment in his January 23, 2015 report. Based on Dr. Campbell's findings, he utilized Table 15-5, pages 401 to 405 and found that appellant had a class 1 impairment for a full thickness rotator cuff tear with residual dysfunction, which he determined was the most impairing diagnosis. Dr. Slutsky assessed a grade modifier 2 for GMFH under Table 15-7, page 406 because appellant's shoulder was still symptomatic as he had to perform functional modifications in order to achieve self-care activities. He assessed a grade modifier 2 for GMPE under Table 15-8, page 408 based on tenderness to palpation. Dr. Slutsky assessed a grade modifier 2 for GMCS under Table 15-9, page 410 based on the May 24, 2011 right shoulder MRI scan which demonstrated, among other things, a full-thickness tear of the distal rotator cuff. He calculated a net adjustment of 2, which moved the impairment from the default grade C to grade E for seven percent impairment of the right upper extremity.

OWCP may rely on the opinion of a DMA to apply the A.M.A., *Guides*.[13] The Board finds that, the January 23, 2015 impairment rating from Dr. Slutsky, the DMA, represents the weight of the medical evidence in this case as he properly applied the appropriate provisions of the A.M.A., *Guides* to the clinical findings of record.[14] Accordingly, as the record contains no other probative, rationalized medical opinion which indicates that appellant has greater

[12] *James R. Taylor*, 56 ECAB 537 (2005); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[13] *See J.G.*, Docket No. 09-1714 (issued April 7, 2010).

[14] *W.M.*, Docket No. 11-1156 (issued January 27, 2012).

impairment based on his accepted right shoulder conditions, OWCP properly granted him a schedule award for seven percent right upper extremity impairment in its February 3, 2016 decision.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that the weight of the medical evidence establishes that appellant had no more than seven percent permanent impairment of his right upper extremity, for which he received a schedule award.

Appellant may request an 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 not met his burden of proof to establish more than seven percent permanent impairment of the right upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 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