United States Department of Labor
Employees' Compensation Appeals Board

D.N., Appellant	)	
and	)	**Docket No. 15-1456**
	)	**Issued: April 3, 2017**
U.S. POSTAL SERVICE, BEVERLY HILLS STATION, Dallas, TX, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 25, 2015 appellant filed a timely appeal from an April 6, 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 over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has permanent impairment of his left upper extremity due to the accepted left shoulder injury.

On appeal appellant generally asserts that he has physical disabilities that warrant a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 17, 2013 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he dislocated his left shoulder at work that day. He was treated at Methodist Charlton Medical Center that same day for an interval reduction of prior glenohumeral dislocation. A post-reduction left shoulder x-ray showed satisfactory alignment.

On January 23, 2014 OWCP accepted closed dislocation of the left shoulder. Dr. Kristen E. Fleager, a Board-certified orthopedic surgeon, began treating appellant. On March 3, 2014 she advised that appellant could return to modified duty, and on April 14, 2014, that he could return to full duty with no restrictions. Appellant received continuation of pay and wage-loss compensation benefits. He returned to full duty on April 15, 2014.

On July 17, 2014 Dr. Fleager noted that examination of appellant's shoulder showed no gross deformity, muscle atrophy, or shoulder girdle tenderness to palpation. Shoulder range of motion was symmetric with 180 degrees of forward flexion and abduction, 70 degrees of external rotation, and internal rotation to the lower thoracic spine. Motor testing was normal 5/5 throughout without guarding, and no shoulder apprehension or sulcus sign were present. Neer and Hawkins impingement tests were negative. Dr. Fleager concluded that appellant had an excellent recovery with full strength in his rotator cuff. She advised that he had reached maximum medical improvement and could resume all activities.

On July 17 and October 8, 2014 appellant filed schedule award claims (Form CA-7).

In a September 5, 2014 report, Dr. Robert A. Helsten, a family physician, reported appellant's complaint of pain. Physical examination demonstrated mild, diffuse left shoulder tenderness, and range of motion on the left was decreased when compared to the right. Dr. Helsten diagnosed closed dislocation of left shoulder. He noted that he had evaluated appellant's left upper extremity impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] and that maximum medical improvement was reached on April 15, 2014, the date appellant returned to full duty. Dr. Helsten noted that appellant's shoulder dislocation could be rated under Table 15-5, Shoulder Regional Grid, for a diagnosis of shoulder joint dislocation. He continued that, because appellant had residual symptoms of pain and limited range of motion, he therefore elected to use the range of motion methodology to determine appellant's impairment. Dr. Helsten indicated that he used right shoulder range of motion testing for comparison and control. He reported left shoulder flexion of 150 degrees, extension of 30 degrees, abduction of 160 degrees, adduction of 30 degrees, internal rotation of 70 degrees, and external rotation of 50 degrees, concluding that appellant had 12 percent left shoulder range of motion impairment. Dr. Helsten also reported that appellant had three percent right shoulder impairment due to decreased flexion.[3] He subtracted the 3 percent right shoulder impairment from the left shoulder

[2] A.M.A., *Guides* (6th ed. 2009).

[3] Dr. Helston reported right shoulder flexion of 170 degrees, extension of 70 degrees, abduction of 170 degrees, adduction of 50 degrees, internal rotation of 90 degrees, and external rotation of 80 degrees.

impairment of 12 percent, concluding that appellant had 9 percent permanent impairment of his left shoulder.

On October 15, 2014 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record. He noted that Dr. Helsten utilized Table 15-34, Shoulder Range of Motion, to rate appellant's impairment and reported his findings. Dr. Katz also reviewed Dr. Fleager's July 17, 2014 report, noting that her range of motion findings were substantially different from those of Dr. Helsten and would yield no impairment. He opined that, due to the difference in examination findings, it was appropriate to refer appellant for a second opinion impairment evaluation by a Board-certified orthopedic surgeon or physiatrist.

In November 2014 OWCP referred appellant to Dr. John R. Sklar, Board-certified in physical medicine and rehabilitation, for a second opinion evaluation. In a December 16, 2014 report, Dr. Sklar noted that he evaluated appellant on December 8, 2014. He described the history of injury and his review of the record. Dr. Sklar indicated that appellant had no swelling, redness, or warmth in the left shoulder, and it was nontender. No shoulder instability was noted, and appellant had good strength. Dr. Sklar found crepitation in both shoulders. Range of motion was full and equal in the both shoulders. Dr. Sklar opined that appellant's examination was consistent with the diagnosis of a left shoulder dislocation which had resolved with good function and only minor ongoing complaints. He advised that maximum medical improvement was reached on April 14, 2014, when appellant was released to return to work. Dr. Sklar maintained that, since he found no loss range of motion in the shoulders, it was inappropriate to assign impairment under the range of motion methodology based on Dr. Helsten's analysis, since the loss of range of motion he had found was not permanent. He opined that the best way to rate appellant's impairment was under the diagnosis-based impairment (DBI) methodology under soft tissue section found on page 401 of Table 5-5, Shoulder Regional Grid. Dr. Sklar found a class 1 impairment, noting that appellant had some residual complaints without consistent objective findings. He noted that the range for a class 1 impairment under Table 15-5 was from 0 to 1 percent, with a default value of 1 percent. Dr. Sklar advised that appellant had a *Quick*DASH score of 11 for a functional history modifier of 0, and found a physical examination modifier of 1 for minimal findings on examination, and a clinical studies modifier of 1 because the studies confirmed the diagnosis. He then applied the net adjustment formula, finding a net adjustment of minus 1 for a grade of B, and zero percent left upper extremity permanent impairment.

On January 23, 2015 Dr. Ronald Blum, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the record, including Dr. Sklar's report. He found that maximum medical improvement was reached on December 8, 2014, the date of Dr. Sklar's evaluation. Dr. Blum noted that, under Table 15-5, for a diagnosis of shoulder strain/pain, with no instability, appellant had a class 1 impairment with a default value of zero percent. He found a zero modifier for functional history, and modifiers of one for physical examination and clinical studies. Dr. Blum applied the net adjustment formula and concluded that, with an adjustment of minus one, appellant had zero percent left upper extremity permanent impairment.

On April 6, 2015 OWCP found that, based on OWCP medical adviser's review, the medical evidence of record did not demonstrate a permanent, measurable, scheduled impairment, and therefore, appellant was not entitled to a schedule award for his accepted injury.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[4] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[5] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[8]

ANALYSIS

The issue on appeal is whether appellant met his burden of proof to establish permanent impairment of his left upper extremity due to the accepted left shoulder condition.

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

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the range of motion methodology when assessing the extent of permanent impairment for schedule award

[4] *See* 20 C.F.R. §§ 1.1-1.4.

[5] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[6] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[8] *Isidoro Rivera*, 12 ECAB 348 (1961).

purposes.[9] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[10] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and range of motion methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either range of motion or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[11]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the April 6, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

[9] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[10] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[11] *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 3, 2017
Washington, DC

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

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

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