United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 16-1125**
	)	**Issued: April 26, 2017**
U.S. POSTAL SERVICE, POST OFFICE, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 5, 2016 appellant filed a timely appeal from a March 31, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has more than eight percent permanent impairment of her left upper extremity, for which she previously received schedule awards.

On appeal appellant requested that the Board review the medical evidence and provide a decision addressing her claim for additional permanent impairment of her right upper extremity.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the two prior appeals are incorporated herein by reference.

On January 9, 2007 appellant, then a 52-year-old mail processing clerk, filed an occupational disease claim (Form CA-2), alleging that she developed shoulder pain due to her federal job duties. OWCP denied her claim on March 8, 2007 due to a lack of supporting medical evidence. Appellant requested reconsideration and OWCP declined to reopen her claim for consideration of the merits on May 3, 2007. She requested review by the Board, and in a decision dated March 13, 2008, the Board affirmed OWCP's decision.[2] On September 25, 2007 OWCP accepted that appellant developed right shoulder strain due to factors of her federal employment.

Appellant filed a claim for a schedule award (Form CA-7). By decision dated July 9, 2009, OWCP granted her a schedule award for seven percent permanent impairment of her right upper extremity. On August 26, 2009 appellant requested reconsideration of this decision. In a report dated August 14, 2009, Dr. Donald R. Bassman, a Board-certified orthopedic surgeon, opined that appellant had 30 percent permanent impairment of the right upper extremity. OWCP denied modification of the July 9, 2009 decision on September 29, 2009.

Appellant filed a claim for an increased schedule award (Form CA-7) and a claim for recurrence of disability (Form CA-2a) on October 16, 2009. OWCP accepted the recurrence on January 21, 2010. Appellant began receiving disability retirement benefits on March 1, 2010.

By decision dated September 30, 2010, OWCP denied appellant's claim for an additional schedule award. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on October 11, 2010. In a decision dated May 2, 2011, OWCP's hearing representative affirmed the September 30, 2010 decision finding that appellant had no more than seven percent permanent impairment of her right upper extremity for which she had received a schedule award.

Appellant submitted a series of requests for reconsideration resulting in OWCP decisions reviewing the merits of her claim and denying modification of the September 30, 2010 decision on February 8, June 13, and September 19, 2012, and February 25, 2013. She appealed the February 25, 2013 decision to the Board and, on June 10, 2014,[3] the Board found that she had not established more than seven percent permanent impairment of her right arm. The facts and circumstances of the case as set forth in the Board's prior decisions are adopted herein by reference.

Following the Board's June 10, 2014 decision, OWCP developed appellant's claim for a consequential left upper extremity injury. Appellant underwent a left shoulder magnetic resonance imaging (MRI) scan and arthrogram on March 5, 2014 which demonstrated a large full-thickness tear of the supraspinatus tendon and a possible tear of the infraspinatus tendon.

[2] Docket No. 07-2329 (issued March 13, 2008).

[3] Docket No. 13-1136 (issued June 10, 2014).

Dr. Matthew Bradley, an orthopedic surgeon, examined appellant on April 15, 2014. He reviewed her MRI scan and opined that appellant had a chronic tear and recommended surgery.

OWCP's medical adviser opined, however, on June 23 and October 8, 2014 that appellant's left shoulder condition was not work related.

On November 18, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Robert Sciortino, a Board-certified orthopedic surgeon. In a report dated December 12, 2014, Dr. Sciortino reviewed appellant's history of injury and medical history. He noted that appellant initially reported left shoulder pain in 2006, that she had used her left shoulder for all overhead work following her right shoulder surgeries, and that appellant's left shoulder condition was a consequence of her right shoulder injury. Dr. Sciortino also noted that appellant had neurological damage as a result of her right shoulder surgeries resulting in weakness in her deltoid muscle and abnormalities on her EMG. On January 16, 2015 OWCP accepted the claim for left rotator cuff sprain/tear.

In a report dated February 24, 2015, Dr. Bradley evaluated both of appellant's shoulders for permanent impairment, if any. He opined that she had 75 percent permanent impairment of her right shoulder and 30 percent permanent impairment of her left shoulder due to full-thickness rotator cuff tear resulting in disability and pain. Dr. Bradley found bilateral loss of range of motion (ROM), as well as loss of muscle strength, and positive impingement tests on the left.

Subsequently, OWCP's medical adviser, using the diagnosis-based impairment (DBI) method, determined that appellant had seven percent permanent impairment of her bilateral upper extremities based on her full-thickness rotator cuff tear with residual loss. He reported pain, limited ROM, and positive impingement signs. The medical adviser found that five percent permanent impairment was warranted for a full-thickness rotator cuff tear with residual loss. He further noted that grade modifiers for Clinical Studies (GMCS) and Physical Examination (GMPE) resulted in an increase from the default value of five to seven percent permanent impairment of the left upper extremity.

In an April 9, 2015 decision, OWCP granted appellant a schedule award for seven percent permanent impairment of her left arm. Appellant requested reconsideration on August 7, 2015 and requested additional schedule awards for both her right and left arms.

OWCP referred appellant for a second opinion evaluation with Dr. Richard T. Katz, a Board-certified physiatrist, on December 11, 2015. Dr. Katz examined appellant on January 7, 2016 and provided ROM findings for her left shoulder as 180 degrees of flexion, 50 degrees of extension, 90 degrees of internal rotation, and 90 degrees of external rotation, 180 degrees of abduction and 50 degrees of adduction.[4] Appellant's right shoulder demonstrated flexion of 80 degrees, extension of 50 degrees, internal rotation of 90 degrees, external rotation of 60 degrees, abduction of 75 degrees and adduction of 50 degrees. Dr. Katz repeatedly noted that he was providing appellant's permanent impairment rating for her right shoulder only. He found that she had no neurological weakness and that her lack of active motion in the right shoulder was due to pain and illness behaviors. Dr. Katz noted an absence of denervation of the EMG. He

[4] Dr. Katz found that appellant's left shoulder ROM figures were normal. A.M.A., *Guides* 475, Table 15-34.

found that appellant was entitled to an additional right upper extremity award due to lack of ROM. Dr. Katz, using the ROM method, found that loss of flexion was nine percent permanent impairment, loss of abduction was six percent permanent impairment, loss of external rotation was not a ratable loss, and that appellant had 15 percent permanent impairment of the right arm due to loss of ROM. He found that appellant had GMPE of 2 due to loss of motion.[5] Dr. Katz also noted that appellant's *Quick*DASH score was grade 4 resulting in a functional history grade adjustment of 2 and 10 percent increase to total ROM or 16.5 percent rounded up to 17 percent of the right upper extremity.

OWCP's medical adviser reviewed appellant's medical records on May 3, 2016. She found, using the DBI method, that appellant's right arm impairment was due to the diagnosed condition of right rotator cuff full-thickness tear. OWCP's medical adviser opined that under the A.M.A., *Guides*, if there is a diagnosis of the condition, then the DBI method should be used. Only if there is no diagnosis that fits the condition is it appropriate to utilize the ROM method to determine impairment.[6] With regard to appellant's right upper extremity, the medical adviser found that appellant's rotator cuff injury had a default grade of 5 due to residual loss and normal motion.[7] She applied the net adjustment formula of the A.M.A., *Guides*, grade modifier for Functional History (GMFH) - Class of Diagnosis (CDX) (Regional Grid) + (GMPE - CDX) + (GMCS - CDX).[8] The medical adviser found that appellant had GMFH of 4 based on her *Quick*DASH score, and that her GMPE was 2 based on decreased ROM. She discounted appellant's GMCS as it was used in the diagnosis and GMFH as it differed from the GMPE by two grades. Applying the truncated formula, the medical adviser reached right shoulder permanent impairment rating of six percent.

OWCP's medical adviser applied the shoulder regional grid to appellant's left upper extremity impairments and determined that appellant had a class 1 rotator cuff injury with a default of grade 3, due to residual loss, functional with normal motion. She noted that appellant had no consistent objective abnormal findings[9] and functional normal motion. The medical adviser noted that the GMPE was zero based on findings on no instability and normal ROM found by Dr. Katz. She determined GMFH was 1 due to pain, that GMCS was inapplicable as it was used to reach the diagnosis. Applying the net adjustment formula, the medical adviser reached class 1, impairment rating of two percent due to residual loss function with normal motion.

By decision dated March 31, 2016, OWCP granted appellant a schedule award for an additional one percent permanent impairment of her left upper extremity.

[5] *Id.* at 477, Table 15-35.

[6] *Id.* at 387.

[7] *Id.* at 403, Table 15-5.

[8] *Id.* at 411.

[9] *Id.* at 403, Table 15-5.

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.[10] 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.[11] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[12]

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).[13] 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.[14]

ANALYSIS

The issue on appeal is whether appellant has more than eight percent permanent impairment of her left upper extremity, for which she previously received schedule awards.

The Board finds 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 ROM

[10] *See* 20 C.F.R. §§ 1.1-1.4.

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

[12] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[13] *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).

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

methodology when assessing the extent of permanent impairment for schedule award purposes.[15] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[16] 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 ROM 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 ROM 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.[17]

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 March 31, 2016 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 is not in posture for decision.

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

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

[17] *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2016 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 26, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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