

**United States Department of Labor
Employees' Compensation Appeals Board**

J.K., Appellant

and

DEPARTMENT OF THE ARMY,
LETTERKENNY ARMY DEPOT,
Chambersburg, PA, Employer

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**Docket No. 16-1361
Issued: April 18, 2017**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 22, 2016 appellant filed a timely appeal from a June 9, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established more than 15 percent permanent impairment of the left upper extremity and nine percent permanent impairment of the right upper extremity for which he previously received schedule awards.

FACTUAL HISTORY

On November 7, 2013 appellant, then a 68-year-old electrical equipment repairer, filed an occupational disease claim (Form CA-2) alleging that he sustained right carpal tunnel syndrome

¹ 5 U.S.C. § 8101 *et seq.*

as a result of his federal employment. OWCP accepted the claim for right carpal tunnel syndrome on January 24, 2014. Appellant received compensation for intermittent wage loss from August 1 to September 12, 2014 and April 10 to July 5, 2015. On May 26, 2014 OWCP indicated that bilateral cubital tunnel syndrome was also accepted.

Before addressing the evidence with respect to a permanent impairment in this case, it is noted that appellant has prior claims that involved permanent impairment to the upper extremities.

Appellant had filed a claim for a left shoulder injury on April 10, 2002, assigned File No. xxxxxx151. OWCP accepted that the claim for a left shoulder impingement. By report dated May 13, 2004, an OWCP medical adviser opined that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*) appellant had 10 percent left upper extremity permanent impairment, based on loss of range of motion in the left shoulder.

OWCP issued a July 7, 2004 decision finding that appellant had 10 percent left upper extremity permanent impairment, based on loss of range of motion in the left shoulder. Appellant appealed to the Board. By decision dated August 2, 2006, the Board found that appellant had failed to establish more than 10 percent left arm permanent impairment.²

On May 20, 2011 appellant filed a claim for a traumatic injury (Form CA-1) on May 4, 2011 when he fell in the performance of duty. That claim, assigned File No. xxxxxx731, was accepted for abrasions to the left index finger, elbow, and forearm, and left elbow sprain. Applying the sixth edition of the A.M.A., *Guides*, an OWCP medical adviser opined in a May 28, 2013 report that appellant had one percent left upper extremity permanent impairment based on left lateral epicondylitis. By decision dated June 6, 2013, OWCP issued a schedule award for one percent additional left upper extremity permanent impairment.

Appellant filed a claim for an occupational disease (Form CA-2) on May 12, 2012, alleging that he had sustained left carpal tunnel syndrome as a result of his federal employment. OWCP assigned the claim File No. xxxxxx895 accepted for left carpal tunnel syndrome, cubital tunnel syndrome, and tardy ulnar nerve compression at the elbow.

In an October 15, 2013 report, an OWCP medical adviser opined that appellant had five percent left upper extremity permanent impairment. He applied Table 15-23 of the A.M.A., *Guides* for entrapment compression neuropathy.

By decision dated December 4, 2013, OWCP found that appellant was not entitled to an additional schedule award for the left upper extremity. It noted that he had previously received schedule awards to the left upper extremity totaling 11 percent.

By decision dated August 18, 2014, an OWCP hearing representative affirmed the December 4, 2013 OWCP decision, finding that appellant had not established an increased schedule award for the left upper extremity. He acknowledged that current medical evidence showed five percent left upper extremity permanent impairment based on left carpal tunnel

² Docket No. 06-0517 (issued August 2, 2006).

syndrome, but the hearing representative found that appellant had previously received schedule awards for 11 percent to the left upper extremity in two prior claims and, therefore, was not entitled to an increased award.

Appellant appealed to the Board. The Board remanded the case by order dated April 21, 2015.³ The Board found that OWCP had failed to explain why appellant was precluded from receiving a schedule award for left carpal tunnel syndrome when the prior schedule awards involved different injuries to the shoulder, elbow, and finger.

By report dated May 12, 2014, an OWCP medical adviser opined that appellant had four percent left upper extremity permanent impairment due to compression neuropathy. In a decision dated May 19, 2015, OWCP issued a schedule award for an additional four percent left upper extremity permanent impairment for left carpal tunnel syndrome.

With respect to the right upper extremity, appellant filed a claim for a right shoulder injury on February 10, 2006, alleging that he fell on his right shoulder in the performance of duty. OWCP assigned the claim xxxxxx000 and accepted right shoulder and lumbar sprains.

An attending physician, Dr. Bruce Edwards, opined in a June 1, 2007 report that appellant had nine percent right upper extremity permanent impairment under the fifth edition of the A.M.A., *Guides*. He indicated that appellant had strength deficits in his right shoulder. An OWCP medical adviser noted Dr. Edwards' findings in an August 17, 2007 report. He also indicated that the permanent impairment to the right upper extremity was eight percent based on loss of range of motion.

By decision dated September 11, 2007 issued a schedule award for nine percent right upper extremity permanent impairment. This award was also appealed to the Board. By decision dated April 11, 2013, the Board found appellant had not established a permanent impairment to his lower extremities based on an employment-related back injury.⁴

On September 1, 2015 appellant submitted a request for a schedule award Form CA-7. OWCP referred appellant to Dr. Robert Smith, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 1, 2015, Dr. Smith provided a history and results on examination. He opined that appellant had three percent right upper extremity permanent impairment based on median and ulnar nerve entrapment.

OWCP referred the case to an OWCP medical adviser for review. In a report dated November 7, 2015, he opined that appellant had three percent right upper extremity permanent impairment based on the accepted conditions. The medical adviser also found that appellant had two percent left upper extremity permanent impairment due to the cubital tunnel syndrome. He applied Table 15-23 of the A.M.A., *Guides* sixth edition, for entrapment/compression neuropathy impairment.

³ Docket No. 14-2058 (issued April 21, 2015).

⁴ With respect to the lower extremities, the Board affirmed a May 10, 2012 OWCP decision finding that appellant had not established an employment-related permanent impairment from the February 10, 2006 injury. Docket No. 12-1242 (issued April 11, 2013).

By decision dated February 4, 2016, OWCP found that appellant was not entitled to an additional schedule award. It noted that there were prior claims in which appellant had received schedule awards for 15 percent to the left upper extremity, and 9 percent for the right upper extremity and; therefore, he had not established an increased impairment to either upper extremity.

On February 18, 2016 appellant requested a review of the written record before an OWCP hearing representative. On March 18, 2016 a request for reconsideration of his claim. By letter dated April 4, 2016, OWCP requested that appellant clarify whether he wanted reconsideration or a review of the written record. A memorandum of telephone call dated April 8, 2016 indicated that appellant had left a message indicating that he wanted reconsideration, and he was advised to select an appeal opinion in writing. Appellant submitted an April 14, 2016 letter indicating that he wanted his schedule award reconsidered. By letter dated April 18, 2016, OWCP's Branch of Hearings and Review indicated that it had received a request to withdraw a hearing request, and the withdrawal had been accepted.

By decision dated June 9, 2016, OWCP reviewed the case on its merits and denied modification of its prior decisions. It noted the prior claims, finding that appellant received a schedule award for 10 percent permanent impairment of the left upper extremity by decision dated July 7, 2004 (OWCP File No. xxxxxx151), and an additional 1 percent for permanent impairment of the left upper extremity by decision dated June 13, 2013 (OWCP File No. xxxxxx731). In addition, appellant had four percent permanent impairment from his left carpal tunnel claim (OWCP File No. xxxxxx895). Therefore, his left upper extremity permanent impairment totaled 15 percent.

For the right upper extremity, OWCP indicated that appellant had received a schedule award for nine percent permanent impairment by decision dated September 11, 2007. It concluded, "The amount already awarded is greater than your current impairments of [three percent] impairment of the right upper extremity and [two percent] impairment of your left upper extremity. Accordingly, the medical evidence does not support an increase in the impairment already compensated."

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent impairment 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

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).

adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.⁸

ANALYSIS

In the present case, OWCP has accepted that appellant sustained right carpal tunnel syndrome and bilateral cubital tunnel syndrome. As indicated in the factual history, appellant has prior claims that have resulted in schedule awards for 15 percent permanent impairment of the left upper extremity and 9 percent permanent impairment of the right upper extremity.

OWCP found that appellant was not entitled to an additional schedule award because appellant had already received schedule awards for greater permanent impairment in each upper extremity.

The June 9 and February 8, 2016 OWCP decisions do not discuss the nature of the injuries in the prior claims. As the Board explained in the April 21, 2015 order, issued pursuant to the claim for left carpal tunnel syndrome, a claimant is not precluded from an additional schedule award solely because the claimant had received a greater award to the same scheduled member from a prior claim. If the current impairment duplicates the prior impairment to the same member, then a claimant is not entitled to an additional award. This is a medical issue that is resolved by the medical evidence.⁹ OWCP did not provide a complete background to OWCP's medical adviser and the medical adviser did not discuss the prior awards in the November 7, 2015 report. The Board notes, for example, the schedule award for nine percent right upper extremity impairment from the February 10, 2006 claim was for a right shoulder injury, based on strength deficits in the shoulder. OWCP does not explain why appellant is not entitled to an additional award based on right carpal tunnel syndrome or cubital tunnel syndrome. The prior left upper extremity permanent impairment awards did include four percent permanent impairment for compression neuropathy, but the medical adviser was not asked and did not confirm that this represented a duplication of the prior award. The A.M.A., *Guides* notes that, when impairment results strictly from a peripheral nerve lesion, no other rating method is applied

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

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 200); Federal (FECA) Procedure Manual Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁸ T.S., Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(d).

⁹ See, e.g., J.S., Docket No. 15-1252 (issued January 19, 2016).

to this section (15.4 Peripheral Nerve Impairments) to avoid duplication or unwarranted increases in the impairment estimation.¹⁰

The case will be remanded to OWCP to properly make findings with respect to additional impairments to the upper extremities. OWCP should develop the evidence as necessary to make a proper determination as to the current permanent impairment to the right and left upper extremities, and the extent that the current permanent impairment might duplicate a prior award to the same member.¹¹ After such development as is warranted, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development.

¹⁰ A.M.A., *Guides* 423 (note that peripheral nerve impairment may be combined with diagnosis-based impairments (DBI) at the upper extremity as long as the DBI does not encompass the nerve impairment. *Id.* at 419).

¹¹ See *T.H.*, Docket No. 14-0943 (issued November 25, 2016) (OWCP, through its implementing regulations and/or internal procedures, shall establish a consistent method for rating upper extremity impairment so as to ensure consistent results and equal justice under the law for all claimants).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 9, 2016 is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: April 18, 2017
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