United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 17-1818**
	)	**Issued: April 3, 2018**
DEPARTMENT OF THE ARMY, TANK-AUTOMOTIVE & ARMAMENTS COMMAND, Fort Benning, GA, 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 August 24, 2017 appellant filed a timely appeal from June 12 and July 12, 2017 merit decisions 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 claim.[2]

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective June 14, 2017; and (2) whether appellant has established greater than 23 percent permanent impairment of his left upper extremity, for which he previously received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record on appeal includes evidence received after OWCP issued its July 12, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from considering this new evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On November 14, 2012 appellant, then a 32-year-old mobile equipment servicer, filed a traumatic injury claim (Form CA-1) alleging a left shoulder condition that allegedly arose in the performance of duty that same date. He claimed that he was working on a tank turret when he injured his left rotator cuff. Appellant stopped work on the date of injury and received continuation of pay. On February 20, 2013 OWCP accepted his claim for left shoulder region affections (not elsewhere classified) and unspecified disorder of the bursas and tendons. Appellant underwent OWCP-approved left shoulder arthroscopic procedures on July 15, 2013 and February 27, 2014. Both surgeries were performed by Dr. Michael M. Tucker Jr., who is Board-certified in orthopedic surgery and sports medicine. On March 17, 2014 appellant returned to work full time in a limited-duty capacity with restrictions of no use of his left arm.[3] Effective June 27, 2014, the employing establishment removed him from service because of a failure to obtain a favorable background investigation.

On August 20, 2014 appellant filed a claim for a schedule award (Form CA-7). By decision dated August 27, 2014, OWCP granted a schedule award for 12 percent permanent impairment of his left upper extremity.[4] The award covered a period of 37.44 weeks beginning August 20, 2014.

On April 2, 2015 Dr. Tucker performed an additional OWCP approved left shoulder surgery.

In August 2015, appellant filed a claim (Form CA-7) for an additional schedule award. He submitted an August 5, 2015 report from Dr. Turner who found 23 percent left upper extremity permanent impairment due to loss of shoulder ROM. Dr. Turner rated appellant under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*).[5] In an August 27, 2015 report, the DMA noted his agreement with Dr. Turner's 23 percent left upper extremity impairment rating.

On September 3, 2015 OWCP awarded appellant an additional 11 percent permanent impairment of the left upper extremity. It subtracted the previous 12 percent award from the latest rating of 23 percent. The additional award covered a 34.32-week period beginning August 5, 2015.

Appellant continued to experience left shoulder pain. In a November 26, 2016 report, Dr. Tucker diagnosed adhesive capsulitis, and recommended a magnetic resonance imaging (MRI) scan and an electromyogram.

A December 5, 2016 left upper extremity electrodiagnostic study was found to be normal. However, a December 5, 2016 left shoulder MRI scan revealed moderate supraspinatus and

[3] OWCP paid wage-loss compensation for temporary total disability for the period February 27 through March 14, 2014.

[4] The award was based on Dr. Tucker's August 20, 2014 impairment rating for left shoulder motion deficits. In an August 25, 2014 report, OWCP's district medical adviser (DMA) concurred with Dr. Tucker's 12 percent left upper extremity (shoulder) range of motion (ROM) impairment rating.

[5] Dr. Tucker referenced Table 15-34, shoulder ROM, A.M.A., *Guides* 475 (6th ed. 2009).

infraspinatus tendinosis, prior biceps tenodesis, posterior sub-deltoid bursitis, findings suspicious of a recurrent superior labral tear posteriorly, and mild nonspecific thickening of the interior joint capsule " … seen with adhesive capsulitis."

In a December 9, 2016 follow-up report, Dr. Tucker diagnosed left shoulder adhesive capsulitis and recommended shoulder manipulation under anesthesia.

On December 27, 2016 OWCP expanded the acceptance of appellant's claim to include left shoulder adhesive capsulitis as an accepted condition. It also authorized the recommended left shoulder procedure, which Dr. Tucker performed on December 28, 2016. Appellant received wage-loss compensation for temporary total disability beginning December 28, 2016.

In a January 27, 2017 follow-up report, Dr. Tucker provided an assessment of adhesive capsulitis of left shoulder and left full-thickness rotator cuff tear. He released appellant to work with restrictions of waist level only work, with no overhead lifting.

Prior to his latest surgery, appellant had been working as a State/County correctional officer. His nonfederal employing establishment was unable to accommodate any restrictions at the time, and therefore, OWCP placed him on the periodic compensation rolls, effective February 5, 2017.

In a March 24, 2017 report, Dr. Tucker indicated that appellant could return to light-duty work with no use of left arm. Appellant also completed a work capacity evaluation (OWCP-5c) form.

On or about April 22, 2017 appellant was terminated from his private sector employment due to issues unrelated to the accepted work-related conditions.

In an April 24, 2017 report, Dr. Tucker noted that appellant reported that he had full motion and that he was "doing great." Examination revealed flexes 160 degrees external rotation and 30 degrees internal rotation with 4/5 strength. Dr. Tucker released appellant to full duty without restrictions as of April 25, 2017 and completed an OWCP-5c form. He also indicated that appellant was at maximum medical improvement (MMI) and that a permanent partial disability rating would be ordered.

On May 2, 2017 OWCP proposed to terminate appellant's wage-loss compensation benefits. It found that the weight of the medical opinion rested with the April 24, 2017 opinion of Dr. Tucker, appellant's attending physician, who advised that appellant was no longer disabled from work as a result of the accepted work-related conditions. OWCP noted that appellant's medical benefits would remain open for treatment. Appellant was afforded 30 days to submit additional evidence or argument.

On May 30, 2017 appellant underwent a functional capacity evaluation (FCE) and an impairment rating evaluation, which was conducted by a physical therapist. The FCE indicated that he was capable of working in the medium physical demand level for eight hours a day five days a week.

For the impairment rating, the physical therapist noted the history of the injury, appellant's medical course, and that he had received two impairment ratings on the left shoulder. ROM

findings of the left shoulder were reported as flexion 105 degrees, extension 41 degrees, abduction 89 degrees, adduction 45 degrees, internal rotation 47 degrees, and external rotation 45 degrees. Under the sixth edition of the A.M.A., *Guides,* the physical therapist assigned an 11 percent left upper extremity impairment based on ROM measurements under Table 15-34, page 475 and provided his calculation.

In a June 12, 2017 letter, OWCP requested that Dr. Tucker review the May 30, 2017 impairment rating report and indicate whether he agreed with its findings and whether appellant had reached MMI based on a recent examination. With regard to a final rating of permanent impairment, it informed Dr. Tucker that if the A.M.A., *Guides* allowed for the use of both the diagnosis-based impairment (DBI) and ROM methods to calculate an impairment rating for the diagnosis in question, then the method which produced the higher rating should be used and an explanation provided with regards to the calculation.

By decision dated June 12, 2017, OWCP terminated appellant's wage-loss compensation benefits effective June 14, 2017. It noted that it had "not received any additional evidence or argument in response to the Notice of Proposed Termination." OWCP determined that the weight of the evidence rested with Dr. Tucker's April 24, 2017 report that appellant was no longer disabled from work due to the employment injury.

Also on June 12, 2017 OWCP received the May 30, 2017 FCE report, which Dr. Tucker signed on June 9, 2017. In his June 9, 2017 report, Dr. Tucker indicated that he had signed off on appellant's FCE, which indicated that appellant could work medium duty, and that he had 11 percent upper extremity permanent impairment. He opined that appellant reached MMI as of June 9, 2017 and that he could work medium duty.

On June 19, 2017 OWCP received a May 25, 2017 report from Dr. Gary Dawson, a Board-certified physiatrist. Dr. Dawson reported decreased left shoulder abduction and flexion limited to 90 degrees due to pain, positive left Neer's maneuver and Hawkin's sign, and scapular winging in the left subacromial area. He provided an assessment of left shoulder pain, chronic pain syndrome, and other specified dorsopathies, cervical region.

In a June 17, 2017 report, Dr. James W. Butler, a Board-certified family practitioner and OWCP's medical adviser, noted his review of the statement of accepted facts dated May 1, 2017 and the medical record. He opined that appellant had reached MMI on June 9, 2017, the date of the examination results. The medical adviser noted that appellant previously had significant decreased ROM and that the most recent surgery had significantly improved appellant's condition. He reported that appellant's ROM impairment was greater than his partial thickness rotator cuff tear rating. Therefore, the medical adviser stated that the ROM measurements were used to access impairment. He set forth his calculations under the DBI method, which resulted in 2 percent impairment, and the ROM method, which resulted in 11 percent permanent impairment. The medical adviser opined that there was no additional impairment rating as appellant's most recent impairment rating was 11 percent and he was previously awarded 23 percent upper extremity permanent impairment. He further noted that Dr. Tucker's impairment rating of 11 percent was based on ROM measurements and he did not indicated that there was any further impairment from his previously assigned rating.

By decision dated July 12, 2017, OWCP found that appellant had failed to establish an increase in permanent impairment of his left upper extremity greater than the 23 percent impairment previously awarded.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[6] Having determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[7] OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's traumatic injury claim for adhesive capsulitis of the left shoulder, disorder of the bursae and tendons in the shoulder region, and unspecified other affections of the shoulder region on the left. By decision dated June 12, 2017, it terminated his wage-loss compensation benefits, effective June 14, 2017. This was based on the April 24, 2017 opinion of Dr. Tucker, appellant's attending physician, who released appellant to full duty without restrictions.

The Board finds that the case is not in posture for decision as OWCP, in its June 12, 2017 decision, failed to review all the evidence submitted. In its June 12, 2017 decision, OWCP noted that it had "not received any additional evidence or argument in response to the Notice of Proposed Termination." However, on June 12, 2017 it had received Dr. Tucker's June 9, 2017 endorsement of the May 30, 2017 FCE. The FCE indicated that appellant was capable of working in the medium physical demand level for eight hours a day five days a week. This is new and relevant medical evidence not previously considered.[9] Accordingly, OWCP did not review all evidence received prior to the issuance of the June 12, 2017 termination decision.

As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.[10] Because

[6] *Bernadine P. Taylor,* 54 ECAB 342 (2003).

[7] *Id.*

[8] *Jaja K. Asaramo,* 55 ECAB 200 (2004).

[9] *See William A. Couch,* 41 ECAB 548 (1990) (OWCP is obligated to consider all evidence properly submitted by a claimant and received by it before a final decision is issued).

[10] The Board's review is limited to evidence which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

OWCP did not consider the new medical evidence submitted by appellant, the Board cannot review such evidence for the first time on appeal.[11] The June 12, 2017 decision, therefore will be reversed.

LEGAL PRECEDENT -- ISSUE 2

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 FECA program with the director of OWCP.[12] 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.[13] 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.[14]

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[15] 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.[16]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical consultant for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with OWCP's medical consultant providing rationale for the percentage of impairment specified.[17]

ANALYSIS -- ISSUE 2

OWCP accepted appellant's traumatic injury claim for adhesive capsulitis of the left shoulder, disorder of the bursae and tendons in the shoulder region, and unspecified other affections of the shoulder region on the left. The issue is whether appellant sustained more than 23 percent permanent impairment of his left upper extremity for which he previously received schedule awards.

In support of his claim, appellant submitted a June 9, 2017 report from Dr. Tucker who opined that appellant reached MMI that day and sustained 11 percent permanent impairment of

[11] *Id.*

[12] *See* 20 C.F.R. §§ 1.1-1.4.

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

[14] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

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

[17] *See supra* note 15 at Chapter 2.808.6(f) (February 2013).

the left upper extremity. Dr. Tucker noted that appellant's impairment rating was based on the ROM method, as that method had provided the greater impairment.

Dr. Butler, serving as OWCP's medial adviser, concurred with Dr. Tucker's impairment rating based on the ROM method. He provided impairment calculations under both the DBI and ROM method and indicated that appellant's ROM impairment of 11 percent was greater than his partial thickness rotator cuff tear rating. Therefore, Dr. Butler reported that the ROM measurements were used to access impairment. He further noted that Dr. Tucker's impairment rating of 11 percent was based on ROM measurements and that he did not indicate that there was any further impairment from his previously assigned rating. Dr. Butler found that appellant had no additional impairment rating as he was previously awarded 23 percent upper extremity impairment rating and his most recent impairment rating was only 11 percent. The only medical evidence that properly applied the A.M.A., *Guides* is that of OWCP's medical adviser and OWCP based its schedule award decision on that report.[18] There is no rationalized medical evidence of record establishing greater permanent impairment.

Appellant contends that he has very limited ROM and that a shoulder MRI scan was necessary as he has winging of his scapula. The Board notes that his medical benefits have not been affected by OWCP's termination decision. As previously noted, there is no rationalized medical evidence of record establishing greater permanent impairment than the 23 percent permanent impairment of the left upper extremity, for which appellant previously received awards.

Appellant may request a schedule award or increased schedule award at any time 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 the case reversed. The Board further finds that appellant has not met his burden of proof to establish greater than 23 percent permanent impairment of his left upper extremity, for which he previously received schedule awards.

[18] *See M.C.*, Docket No. 15-1757 (issued March 17, 2016) (the only medical evidence that demonstrated a proper application of the A.M.A., *Guides* was that of OWCP's medical adviser, who found that appellant had 11 percent right upper extremity permanent impairment).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2017 schedule award decision of the Office of Workers' Compensation Programs is affirmed. The June 12, 2017 decision of OWCP is reversed.

Issued: April 3, 2018
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