United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 17-1439**
	)	**Issued: February 15, 2018**
DEPARTMENT OF VETERANS AFFAIRS, JESSE BROWN VETERANS ADMINISTRATION MEDICAL CENTER, Chicago, IL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 19, 2017 appellant filed a timely appeal from a January 12, 2017 merit decision and a March 2, 2017 nonmerit 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 this case

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish greater than eight percent right upper extremity permanent impairment, for which she previously received a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 24, 2014 appellant, then a 35-year-old medical instrument technician, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she aggravated or pulled muscles/tendons from her right hand up to her neck while she was repositioning and resetting a hemodialysis unit. She stopped work on the date of injury. OWCP assigned this claim File No. xxxxxx471. The employing establishment controverted the claim, noting that the circumstances surrounding the claim were suspicious since appellant had just returned to work that day after being off work due to a prior work injury.

OWCP initially denied appellant's claim by decision dated November 13, 2014 finding that she had not established causal relationship between the employment incident and her diagnosed medical conditions.[2] By decision dated November 18, 2015, it accepted her claim for unspecified right shoulder joint sprain.[3]

The record reflects that appellant had a prior accepted occupational disease claim which had been accepted for bilateral carpal tunnel syndrome and right wrist sprain. OWCP assigned the claim File No. xxxxxx866. Appellant received compensation benefits on the supplemental rolls under this claim from November 19, 2012 until April 6, 2013, and on the periodic rolls from April 7, 2013 until September 20, 2014.

Appellant received a schedule award under OWCP File No. xxxxxx866 for bilateral carpal tunnel syndrome on September 21, 2014. OWCP found that she had eight percent permanent impairment of the right upper extremity, and eight percent permanent impairment of the left upper extremity due to the accepted bilateral carpal tunnel syndrome.

On September 29, 2015 OWCP referred appellant's claim to a district medical adviser (DMA). The DMA was instructed to review the medical file to determine whether appellant was entitled to a schedule award for more than eight percent right upper extremity and eight percent left upper extremity schedule award for her right upper extremity.

In an October 1, 2015 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a DMA, reviewed the evidence OWCP provided and noted that appellant's claim had been accepted for bilateral carpal tunnel syndrome and right wrist sprain under OWCP File No xxxxxx866. He opined that appellant was not entitled to a schedule award greater than the eight percent right upper extremity and eight percent left upper extremity, she had previously been granted.

In a report dated November 5, 2016, Dr. Anatoly M. Rozman, an examining Board-certified physiatrist, advised that appellant had been under his care since sustaining the right shoulder sprain on September 24, 2014. He indicated that she reached maximum medical

[2] On December 2, 2014 appellant filed an appeal with the Board. By order dated May 13, 2015, the Board granted her request to dismiss her appeal from a November 13, 2014 decision which denied her traumatic injury claim. *Order Dismissing Appeal*, Docket No. 15-0326 (issued May 13, 2015).

[3] In an internal memorandum dated January 28, 2016, OWCP combined OWCP File Nos. xxxxxx866, and xxxxxx471 with OWCP File No. xxxxxx866 listed as the master File No.

improvement (MMI) on November 5, 2016. Dr. Rozman advised that appellant had right shoulder residual pain as well as weakness and pain on movement and overhead work residuals. He reported no significant right shoulder range of movement changes; weakness on forward flexion and internal rotation; negative Adson's maneuver, Hawkins' test, drop arm test, and empty can test; and right shoulder pain on palpation with no swelling. Dr. Rozman provided an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] Based on a diagnosis of right shoulder tendinitis, Dr. Rozman found that, under Table 15-5, p. 402, Shoulder Regional Grid, appellant had a class 1 impairment with a default value of three percent. He assigned a grade modifier of 1 for functional history due to mild problems using Table 15-7, p. 406. Using Table 15-8, p. 408, Dr. Rozman assigned a grade modifier of 2 for physical examination findings due to moderate palpatory findings. No grade modifier was assigned for clinical studies. Dr. Rozman then applied the net adjustment formula, concluding that appellant had four percent permanent impairment due to right shoulder tendinitis.

On November 26, 2016 appellant filed a claim for a schedule award (Form CA-7) in the present claim.

On December 5, 2016 OWCP provided a statement of accepted facts (SOAF) and a copy of the medical record to the DMA for review. The DMA was instructed to determine whether appellant was at MMI, and if so, to provide a rating of permanent functional impairment of her right upper extremity due to the accepted right shoulder joint sprain pursuant to the A.M.A. *Guides*.

The SOAF indicated that, under OWCP File No. xxxxxx866, OWCP had accepted appellant's claim for bilateral carpal tunnel syndrome and right wrist sprain. It was also noted that under OWCP File No. xxxxxx471 appellant's claim was accepted for right shoulder joint sprain.

In a report dated December 6, 2016, Dr. Arthur S. Harris, Board-certified in orthopedic surgery, acting as OWCP's DMA, reviewed the SOAF and medical evidence and noted that appellant's claim had been accepted for right shoulder sprain. He noted that appellant had a permanent impairment due to a right partial rotator cuff tear, rotator cuff tendinitis, and impingement syndrome. Dr. Harris used the diagnosis-based impairment (DBI) method and for the diagnosis of partial rotator cuff tear and impingement syndrome assigned a class 1 with a default position C as per Table 15-5, p. 402 of the A.M.A., *Guides*. He concurred with Dr. Rozman's finding of four percent permanent impairment right upper extremity.

By decision dated January 12, 2017, OWCP denied appellant's schedule award claim as it found that the medical evidence of record did not warrant an increase beyond the prior schedule award. It noted that she had four percent right upper extremity impairment according to the December 5, 2016 report by Dr. Harris and November 5, 2016 report by Dr. Rozman due to her accepted right shoulder sprain. OWCP noted that appellant had previously been paid a schedule award for eight percent right upper extremity permanent impairment and eight percent left upper extremity permanent impairment under OWCP File No. xxxxxx866. It found the

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

medical evidence submitted did not support entitlement to an additional schedule award under the sixth edition of the A.M.A., *Guides* as the impairment rating for her right-sided carpal tunnel syndrome was higher than the current impairment rating for her right shoulder condition.[5]

On February 19, 2017 appellant requested reconsideration of the January 12, 2017 decision denying her request for a schedule award. She stated that she had been granted a schedule award for bilateral carpal tunnel syndrome under OWCP File No. xxxxxx866. Under the current claim, appellant contended that she was entitled to a schedule award for her accepted right shoulder condition.

By decision dated March 2, 2017, OWCP denied appellant's request for reconsideration.[6] It found that she had failed to submit relevant and pertinent new evidence or raise a substantive legal argument warranting further merit review.

LEGAL PRECEDENT -- ISSUE 1

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.[7] 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.[8] 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.[9]

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[10] The Board has approved the use by OWCP of the A.M.A.,

[5] In the decision denying appellant's request for an additional schedule award, OWCP did not explain how appellant's previous award for permanent impairment of her bilateral carpal tunnel syndrome and right wrist sprain would be duplicated by an award for unspecified right shoulder sprain. *See M.P.*, Docket No. 17-0150 (issued June 21, 2017).

[6] In a letter dated June 12, 2017, OWCP advised appellant that it had combined OWCP File Nos. xxxxxx866, xxxxxx471, and xxxxxx895, with OWCP File No. xxxxxx866 listed as the master File No.

[7] *See* 20 C.F.R. §§ 1.1-1.4.

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

[9] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[10] *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 2.808.5(a) (February 2013).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[11]

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. In addressing impairment for the upper extremities, the sixth edition of the A.M.A., *Guides* requires identifying the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on Functional History, Physical Examination, and Clinical Studies.[12] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[13] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grid and calculations of modifier scores.[14]

ANALYSIS -- ISSUE 1

The issue on appeal is whether appellant met her burden of proof to establish greater than eight percent right upper extremity permanent impairment, for which she previously received a schedule award.

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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the range of motion (ROM) 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 were 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 observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the

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

[12] A.M.A., *Guides* 385-419; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[13] *Id*. at 411.

[14] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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

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

Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[17]

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 2, 2017[18] and January 12, 2017 decisions. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after 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.[19]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 2 and January 12, 2017 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 15, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[17] *Supra* note 12.

[18] In light of the Board's findings, the second issue is moot and will not be addressed on this appeal.

[19] *See* FECA Bulletin No. 17-06 (May 8, 2017).