United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 17-1474**
	)	**Issued: January 26, 2018**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Boise, ID, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2017 appellant filed a timely appeal from a May 31, 2017 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 this case.

ISSUE

The issue is whether appellant has more than 38 percent permanent impairment of the right upper extremity, for which he previously received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 9, 1996 appellant, then a 48-year-old employee, filed a traumatic injury claim (Form CA-1) alleging that on August 18, 1996 he injured his right rotator cuff loading cargo. OWCP accepted the claim, assigned OWCP File No. xxxxxx651 for a right rotator cuff tear, a sprain of the shoulder and upper arm at right supraspinatus, and right biceps tendon degeneration. Appellant underwent authorized right rotator cuff repairs on December 2, 1996 and March 5, 1997.

OWCP had previously accepted that appellant sustained a right rotator cuff tear due to a December 28, 1989 employment injury, assigned OWCP File No. xxxxxx657. On April 17, 1990 appellant underwent a right rotator cuff repair. In a September 9, 1991 decision, OWCP granted him a schedule award for 10 percent permanent impairment of the right arm due to his shoulder condition. The period of the award ran for 31.20 weeks from July 8, 1991 to February 11, 1992.

In an April 14, 1998 report, Dr. Kirk J. Lewis, an attending Board-certified orthopedic surgeon, opined that, for the right upper extremity, appellant had 20 percent impairment due to reduced shoulder motion, 10 percent impairment due to a distal clavicular resection, and 16 percent motor impairment due to a "nonfunctioning rotator cuff." He combined the impairment ratings to find 46 percent impairment of the right upper extremity.

An OWCP medical adviser reviewed the evidence of record on April 28, 1998. He found that appellant had 18 percent impairment due to loss of motion, 10 percent impairment due to the diagnosis of a distal clavicular resection, and 16 percent impairment due to a rotator cuff motor impairment, which he combined to find 38 percent permanent impairment of the right upper extremity.

Under the current OWCP File No. xxxxxx651, by decision dated May 5, 1998, OWCP granted appellant a schedule award for 38 percent permanent impairment of the right arm. The period of the award ran for 118.56 weeks from February 3, 1998 to May 12, 2000.[3]

OWCP, on November 1, 2012, accepted that appellant sustained a recurrence of a medical condition. On August 6, 2013 Dr. Lewis performed an authorized right shoulder arthroscopic debridement of the glenohumeral joint and a biceps tenotomy.

In a January 24, 2014 impairment evaluation report, Dr. Lewis found that appellant was medically stationary after surgery. He related that appellant had "endstage glenohumeral

[2] Docket No. 15-0403 (issued February 13, 2017).

[3] Ultimately, OWCP administratively combined File No. xxxxxx651 and File No. xxxxxx657, with the former serving as the master file.

arthrosis of his right shoulder with a global rotator cuff tear and subsequent biceps tenotomy." Appellant was noted to be severely limited with function and strength. Dr. Lewis identified the diagnosis as a full thickness tear of two rotator cuff tendons and a partial tear of a third tendon, for a class 3 impairment. He also diagnosed grade 4 glenohumeral arthrosis. Without citing to any specific tables or pages of the American Medical Association, *Guides to the Evaluation of Permanent* Impairment (A.M.A., *Guides*),[4] Dr. Lewis opined that appellant had 50 percent permanent right arm impairment. Appellant, on February 13, 2014, filed a claim for an increased schedule award (Form CA-7).

On August 13, 2014 Dr. Kenneth D. Sawyer, a Board-certified surgeon serving as an OWCP medical adviser, indicated that Dr. Lewis should provide detailed findings on examination, including measurements for range of motion (ROM), perform a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) assessment, and explain his use of the A.M.A., *Guides*.

OWCP, in a letter dated August 19, 2014, requested that Dr. Lewis provide a formal impairment evaluation in accordance with the A.M.A., *Guides* and enclosed the August 13, 2014 report of OWCP's medical adviser for his review.

In an October 16, 2014 report, Dr. Lewis reviewed appellant's history of four right upper extremity surgeries and found that he had reached maximum medical improvement (MMI) on January 24, 2014. On examination, he found symmetrical sensation and less than five millimeters of two-point discrimination in the median, ulnar and radial nerves. Dr. Lewis found "severe atrophy of the infraspinatus and supraspinatus tendons of both shoulders which is symmetric," bilateral positive impingement, crepitus of the right glenohumeral and acromial humeral joints, and "poor active strength in both the right and left shoulders." He measured ROM and determined that, for the right shoulder, 50 degrees abduction yielded six percent impairment, 45 degrees forward flexion yielded nine percent impairment, 20 degrees extension yielded two percent impairment, 20 degrees adduction yielded two percent impairment, 10 degrees internal rotation yielded four percent impairment, and negative 10 degrees external rotation yielded two percent impairment. Dr. Lewis added the ROM impairments to find 25 percent right upper extremity impairment. He found a grade 2 modifier due to appellant's *Quick*DASH score of 52, and grade modifiers of 2 for physical examination and functional history, for a net adjustment of zero and a total right upper extremity impairment of 25 percent.

Dr. Sawyer, on November 5, 2014, reviewed the evidence of record and opined that Dr. Lewis properly utilized ROM as the method to evaluate appellant's shoulder impairment. He concurred with Dr. Lewis' impairment findings for ROM, except for adduction, noting that 20 percent adduction yielded 1 percent rather than 2 percent permanent impairment. Adding the ROM findings yielded 24 percent right upper extremity impairment.[5] The medical adviser further determined that appellant's *Quick*DASH score was 70 rather than 52, which yielded a

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

[5] *Id.* at 475, Table 15-34.

grade modifier for functional history of three rather than two, which increased the total right upper extremity permanent impairment to 25 percent.[6]

By decision dated November 18, 2014, OWCP denied appellant's claim for an increased schedule award. It found that he had already received a schedule award for 38 percent right upper extremity permanent impairment, and thus was not entitled to an additional award.

Appellant appealed to the Board on December 10, 2014. By decision dated February 13, 2017 decision, the Board set aside the November 18, 2014 decision.[7] The Board found that OWCP had inconsistently applied Chapter 15 of the A.M.A., *Guides* regarding the proper use of either the diagnosis-based impairment (DBI) or ROM methodology in assessing the extent of permanent impairment. The Board remanded the case for OWCP to issue a *de novo* decision after development of a consistent method for calculating permanent impairment of the upper extremities.

On May 23, 2017 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed the evidence of record. He noted that appellant received a schedule award for 10 percent permanent impairment of the right upper extremity in 1991 and for 38 percent permanent impairment of the right upper extremity in 1998. Dr. Garelick indicated that he would assume that these awards were both for impairments of the shoulder, and that, if this were the case, "the award delineated below will be less than that already awarded." He noted that, regarding applying ROM or DBI in rating an upper extremity impairment, FECA Bulletin No. 17-06[8] provides that, if the loss of ROM had an organic basis, ROM should be measured three times and the greatest measurement used to determine impairment, and that the evaluator should determine whether ROM or DBI yields the greater impairment. Dr. Garelick found that there was an organic basis for rating appellant's permanent impairment of the right upper extremity using ROM, and concurred with the findings of Dr. Lewis and Dr. Sawyer that appellant had 25 percent permanent impairment of the right arm due to loss of shoulder motion. He determined that the most appellant would receive under the DBI was seven percent for a rotator cuff tear using Table 15-5 on page 403 and nine percent for degenerative joint disease under Table 15-5 on page 405 of the A.M.A., *Guides*. Dr. Garelick concluded that there was no basis for an increased award given the prior awards that appellant had received for his right upper extremity impairment of 38 percent and 10 percent.

By decision dated May 31, 2017, OWCP denied appellant's claim for an increased schedule award for the right upper extremity. It found that he had received a schedule award on September 17, 1991 for 10 percent impairment due to his right shoulder condition under File No. xxxxxx657 and a schedule award on May 5, 1998 for 38 percent permanent impairment due to the same right shoulder condition under the current file number. OWCP noted that it had failed to determine whether the 10 percent impairment should have been deducted from the May 5,

[6] *Id*. at 306, 477, Table 15-7, Table 15-36.

[7] *Supra* note 2.

[8] FECA Bulletin No. 17-06 (issued May 8, 2017).

1998 award for 38 percent impairment. It found that the evidence of record established that appellant did not have an increased impairment over that previously awarded.

On appeal appellant asserts that he received 28 percent rather than 38 percent permanent impairment in 1998. He maintains that he is entitled to the 50 percent permanent impairment rating found by Dr. Lewis.

LEGAL PRECEDENT

The schedule award provision of FECA,[9] and its implementing federal regulations,[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12]

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

> "As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).
>
> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the Guides allow for the use of both the DBI and ROM methods to calculate an impairment*

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id.* at § 10.404(a).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *id*. Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[13] A.M.A., *Guides* 494-531.

rating for the diagnosis in question, the method producing the higher rating should be used." (Emphasis in original).[14]

The Bulletin further advises:

"If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE."[15]

ANALYSIS

On prior appeal, the Board remanded the case for OWCP to reevaluate the extent of appellant's permanent impairment of his right upper extremity after it determined a consistent method for rating upper extremity impairments under the A.M.A., *Guides*. On remand, the DMA, Dr. Garelick, reviewed the evidence and noted that FECA Bulletin No. 17-06 afforded guidance for consistently rating upper extremity impairments. It provides that, if the A.M.A., *Guides* allowed both DBI and ROM methods for calculating an identified diagnosis, the method that yielded the higher impairment rating should be used. Dr. Garelick concurred with Dr. Sawyer's and Dr. Lewis' use of ROM for rating appellant's impairment after finding that there was an organic basis for his reduced shoulder motion.

Dr. Lewis, on October 16, 2014, measured ROM for the right shoulder and found that 50 degrees abduction yielded six percent impairment, 45 degrees forward flexion yielded nine percent impairment, 20 degrees extension yielded two percent impairment, 20 degrees adduction yielded two percent impairment, 10 degrees internal rotation yielded four percent impairment, and negative 10 degrees external rotation yielded two percent impairment. He added the impairment ratings due to motion loss to find 25 percent right upper extremity impairment.[16] Dr. Lewis applied no adjustment based on appellant's *Quick*DASH score of 52, for a total right upper extremity impairment of 25 percent.

On November 5, 2014 Dr. Sawyer, an OWCP medical adviser, reviewed the evidence of record and concurred with Dr. Lewis' impairment findings for ROM, except for adduction, noting that 20 percent adduction yielded 1 percent rather than 2 percent impairment.[17] He added impairment due to ROM which yielded 24 percent right upper extremity impairment, which he adjusted upward to 25 percent after finding a *Quick*DASH score of 70.[18]

[14] *Supra* note 5.

[15] *Id*.

[16] *Supra* note 4.

[17] Table 15-34 on page 475 of the A.M.A., *Guides* provides that 20 percent adduction constitutes 1 percent permanent impairment.

[18] A.M.A., *Guides* 486, Table 15-40.

The Board finds that appellant has no more than the previously awarded 10 percent permanent impairment and 38 percent impairment of the right upper extremity due to his shoulder condition. As found by Dr. Garelick in his May 23, 2017 report, his right upper extremity impairment due to his shoulder condition was appropriately rated using the ROM method, which yielded a greater impairment than the DBI method. The current right upper extremity permanent impairment of 25 percent is less than that previously awarded for the shoulder of 10 percent and 38 percent.[19]

As noted, it is appellant's burden of proof to establish an increased schedule award.[20] His right upper extremity impairment due to his shoulder condition is less than that previously awarded for his shoulder condition, and thus he is not entitled to an increased schedule award.[21]

On appeal appellant contends that he received a schedule award for 10 percent right upper extremity impairment in 1991 and 28 percent permanent impairment in 1998. OWCP, however, paid him a schedule award for 38 percent permanent impairment in 1998. The period of the award ran for 118.56 weeks, or 38 percent of the maximum allowed for an upper extremity impairment of 312 weeks.

Appellant further asserts that he is entitled to 50 percent permanent impairment as found by Dr. Lewis. In his January 24, 2014 impairment evaluation, Dr. Lewis found 50 percent right upper extremity impairment without citing to any specific provisions of the A.M.A., *Guides.* As his report does not conform to the A.M.A., *Guides*, it is of diminished probative value.[22]

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 appellant is not entitled to more than 38 permanent impairment of the right upper extremity, for which he previously received schedule awards.

[19] The 38 percent award from May 5, 1998 was based in part on loss of ROM.

[20] *See A.T.*, Docket No. 16-0738 (issued May 19, 2016).

[21] *See M.B.*, Docket No. 16-1826 (issued May 15, 2017).

[22] *Mary L. Henninger*, 52 ECAB 408 (2001).

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2018
Washington, DC

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

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

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