United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 17-1871**
	)	**Issued: January 23, 2018**
DEPARTMENT OF AFFAIRS, IOANNIS A. LOUGARIS VETERANS ADMINISTRATION MEDICAL CENTER, Reno, NV, 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 September 5, 2017 appellant filed a timely appeal from a May 1, 2017 merit decision and a July 24, 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 over the merits of this case.

ISSUES

The issue are: (1) whether appellant has more than 12 percent permanent impairment of her left upper extremity, for which he previously received a schedule award; and (2) whether OWCP properly denied her request for further reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 20, 2010 appellant, then a 46-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left shoulder injury when she backed into a coat hook and struck her shoulder while in the performance of duty. By decision dated March 3, 2011, OWCP accepted the claim for contusion of left shoulder region. It subsequently expanded acceptance of the claim to include sprain of left shoulder and upper arm acromioclavicular (AC), left calcium deposit tendon and bursa, and complete left rotator cuff rupture. On July 11, 2011 appellant underwent left shoulder arthroscopy. She received intermittent wage-loss compensation on the supplemental rolls from August 8 until November 11, 2011. Appellant was released to full duty on April 24, 2012. On November 20, 2012 she was provided additional work limitations.

On February 12, 2015 appellant filed a claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a February 23, 2015 postoperative report from Dr. Renny Uppal, a Board-certified orthopedic surgeon. Dr. Uppal discussed her status post left shoulder arthroscopy with rotator cuff repair. He released her to work with permanent light-duty restrictions and noted that maximum medical improvement (MMI) had been reached for which a ratable impairment was forthcoming.

By letter dated March 5, 2015, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] It provided her 30 days to submit the requested impairment evaluation.

In support of her claim, appellant submitted an April 24, 2012 medical report from Dr. Uppal reporting that MMI had been reached. In an April 7, 2015 medical report, Dr. Uppal reported that appellant had reached MMI on February 12, 2015.

OWCP referred appellant, a series of questions, the statement of accepted facts, and the medical record to Dr. Mark Bernhard, an osteopath Board-certified in physical medicine and rehabilitation, for a second opinion examination and determination as to whether she sustained a permanent impairment and the date of MMI.

In a February 24, 2017 medical report, Dr. Bernhard reviewed the case record and summarized the relevant medical and diagnostic reports, reporting that MMI had been reached. He noted that appellant had several conditions with respect to the left shoulder. Although the range of motion (ROM) method could be used, Dr. Bernhard reported that it was a stand-alone method and could not be combined with the diagnosis-based impairment (DBI) methodology. As such, he determined that the most impairing condition would be listed under rotator cuff injury, full-thickness tear, and repair. Utilizing the 6th edition of the A.M.A., *Guides*, Dr. Bernhard provided a diagnosis of rotator cuff injury full-thickness tear and repair, class 1 with a midrange grade C for three percent upper extremity impairment.[3] He assigned a grade

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

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

modifier of 2 for functional history,[4] a grade modifier of 2 for physical examination,[5] and no grade modifier for clinical studies was utilized since it had been used to assign the diagnosis.[6] Applying the net adjustment formula, Dr. Bernhard subtracted 1, the numerical value of the class, from the numerical value of the grade modifier for each applicable component (functional history and physical examination) and then added those values, resulting in a net adjustment of 2 ((2-1) + (2-1)).[7] Application of the net adjustment formula meant that movement was warranted two places to the right of class 1 default value grade C to grade E based on Table 15-5.[8] Pursuant to his calculations, appellant's rotator cuff tear and repair yielded five percent permanent impairment of the upper left extremity pursuant to the DBI method of rating permanent impairment.[9] Dr. Bernhard reported that appellant continued to suffer objective residuals of the injury based on the repeat magnetic resonance imaging scan showing labral lesion/labral tear at the biceps anchor, continued osteophyte formations, and limitations in ROM.

OWCP routed Dr. Bernhard's report and the case file to Dr. Herbert White, Board-certified in internal and occupational medicine serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment of the left upper extremity and date of MMI.

In an April 19, 2017 medical report, Dr. White provided a diagnosis of AC joint injury under class 1 for distal clavicle resection.[10] He assigned a grade modifier of 1 for functional history due to appellant's *Quick*DASH score of 38, a grade modifier of 1 for physical examination due to mild decreases in ROM and strength, and a grade modifier of 4 for clinical studies due to rotator cuff tear and biceps tendinopathy. Applying the net adjustment formula resulted in 3, warranting movement three places to the right of class 1 default value grade C to grade E for 12 percent permanent impairment of the left upper extremity. Dr. White reported that his rating differed with that of Dr. Bernhard because he utilized the diagnosis which would produce the higher rating in accordance with the A.M.A., *Guides*. He concluded that MMI was reached on February 24, 2017, the date of appellant's evaluation.

By decision dated May 1, 2017, OWCP granted appellant a schedule award for 12 percent permanent impairment of her left upper extremity. The date of MMI was noted as February 24, 2017. The award covered a period of 37.44 weeks from February 24 through November 13, 2017.

[4] *Id.* at 406, Table 15-7.

[5] *Id.* at 408, Table 15-8.

[6] *Id.* at 410, Table 15-9.

[7] *Id.* at 411.

[8] *Supra* note 3.

[9] *Id.*

[10] *Id.*

By letter dated June 1, 2017, appellant argued that she should be compensated for her left shoulder injury and could not find a physician who could provide an impairment rating. She argued that the February 24, 2017 date of MMI was incorrect as OWCP was only compensating her for that year when she had been injured since 2010.

By decision dated July 24, 2017, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included relevant and pertinent new evidence.

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 FECA program with the director of OWCP.[11] 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.[12] 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.[13]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A., *Guides* 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).[14] 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.[15]

[11] *See* 20 C.F.R. §§ 1.1-1.4.

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

[13] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

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

ANALYSIS

OWCP accepted appellant's claim for contusion of left shoulder, sprain of left shoulder and upper arm AC, left calcium deposit tendon and bursa, and complete left rotator cuff rupture. The issue is whether she sustained more than 12 percent permanent impairment of the left upper extremity, for which she previously received a schedule award.

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

In support of her claim, appellant submitted an April 7, 2015 medical report from Dr. Uppal who opined that she had reached MMI. The case was referred to Dr. Bernhard, serving as a second opinion physician, who opined that she was entitled to five percent permanent impairment of the left upper extremity. OWCP routed his report to Dr. White, serving as the DMA, who calculated 12 percent permanent impairment of the left upper extremity based on the DBI method of rating permanent impairment for her AC joint injury with a distal clavicle resection.

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 DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[16] The purpose of the use of uniform standards is to ensure consistent results and equal justice under the law to all claimants.[17] 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 DMA 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 Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[18]

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 May 1, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly,[19] 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.[20]

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

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

[18] *Supra* note 16.

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

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

CONCLUSION

The Board finds that this case is not in posture for a decision.[21]

ORDER

IT IS HEREBY ORDERED THAT the July 24 and May 1, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision.

Issued: January 23, 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

[21] The Board notes that, on appeal, appellant argued that the February 24, 2017 date of MMI was incorrect as she had been injured since December 8, 2010. The determination of the date for MMI ultimately rests with the medical evidence and is usually considered to be the date of the evaluation by the physician which is accepted as definitive by OWCP. The date of MMI only pertains to the date on which the schedule award will begin, not the amount of the award. For complete or 100 percent impairment of an arm, a claimant is entitled to a maximum of 312 weeks of compensation. *See* 5 U.S.C. § 8107(c)(2); 20 C.F.R. § 10.404; *see also Mark Holloway*, 55 ECAB 321 (2004).