United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 20-1316**
	)	**Issued: March 3, 2021**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, IMPERIAL BEACH STATION, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2020 appellant filed a timely appeal from a January 7, 2020 merit decision and June 3, 2020 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.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the June 3, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

(2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 14, 2008 appellant, then a 39-year-old senior patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on May 12, 2008 he suffered a left shoulder and arm injury after losing control and falling from an all-terrain vehicle (ATV) while in the performance of duty. He stopped work on May 12, 2008.

In a May 14, 2008 report, Dr. Benjamin Cox, a neurosurgeon, noted that appellant experienced bilateral shoulder and rib pain after falling from an ATV onto concrete. He examined appellant and reviewed x-rays of his shoulders. Dr. Cox diagnosed acute grade 2 left acromioclavicular (AC) joint separation, left all costochondral junction disruption syndrome, left pectoralis major and minor muscle strain/sprain, left deltoid muscle and triceps muscle strain/sprain, and right infraspinatus muscle strain.

Appellant returned to light-duty work on June 18, 2008 and full-duty work on August 20, 2008.

In a September 17, 2008 report, Dr. Cox noted that appellant had no subjective complaints. He examined appellant and found no external anatomical abnormalities and full left shoulder range of motion (ROM). Dr. Cox opined that appellant had reached maximum medical improvement (MMI).

On October 15, 2008 OWCP accepted appellant's claim for left AC joint separation.

On May 15, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated May 19, 2017, OWCP informed appellant that the medical evidence of record was insufficient to establish his schedule award claim. It requested that he submit a detailed narrative medical report from his treating physician based upon a recent examination including a date of MMI, the diagnosis upon which the impairment rating was based, a detailed description of any preexisting impairment, and a final rating of the permanent impairment and discussion of the rationale for calculation of the impairment, with references to the applicable criteria and tables of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] OWCP afforded appellant 30 days to submit the necessary evidence.

In a June 27, 2017 report, Dr. David Chao, an orthopedic surgeon, noted that appellant injured his left shoulder after rolling over in an ATV and landing on his left shoulder. He examined appellant and noted that he had normal ROM and full strength in his left shoulder. Dr. Chao reviewed x-rays of appellant's left shoulder and diagnosed closed traumatic dislocation of the left AC joint. Utilizing the fifth edition of the A.M.A., *Guides*,[4] he found that appellant had 10 percent

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

[4] A.M.A., *Guides* (5th ed. 2001).

permanent impairment of the upper extremity. Dr. Chao opined that appellant had reached permanent and stationary status.

On March 7, 2018 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), to Dr. Herbert White, Jr., a Board-certified occupational medicine specialist serving as the district medical adviser (DMA). In a March 10, 2018 report, Dr. White reviewed the SOAF and medical record. Utilizing the diagnosis-based impairment (DBI) method of the sixth edition of the A.M.A., *Guides*, he identified the class of diagnosis (CDX) as a class one impairment for the diagnosis of AC joint injury or disease with residual loss, functional with normal motion under Table 15-5, page 403. Dr. White noted a grade modifier for functional history (GMFH) of 1, in accordance with Table 15-7, page 406, as appellant had pain/symptoms with strenuous activity. He assigned a grade modifier for physical examination (GMPE) of 1, in accordance with Table 15-8, page 408, as appellant's AC joint prominence was exaggerated. Dr. White found that a grade modifier for clinical studies (GMCS) was excluded in accordance with Table 15-9, page 410. He calculated that appellant had a net adjustment of zero, resulting in no movement from the default value of C and corresponding to a three percent left upper extremity impairment. Dr. White determined that appellant had zero percent left upper extremity impairment under the range of motion (ROM) methodology and therefore concluded that the DBI method should be used for rating purposes. He disagreed with Dr. Chao's impairment rating as he found that appellant had a Type 2 AC separation based on Dr. Cox's report. Dr. White opined that appellant reached MMI on August 20, 2008, the date that appellant returned to full-duty work.

A left shoulder arthrogram, dated December 12, 2018, revealed extensive labral tearing with paralabral cyst formation and articular-sided tearing with mild medial subluxation consistent with remote grade 3 AC separation.

On April 29, 2019 OWCP referred appellant for a second opinion examination with Dr. Ronald Teed, a Board-certified orthopedic surgeon. In a July 3, 2019 report, Dr. Teed reviewed the SOAF and medical record.[5] He examined appellant and found no gross deformity in his bilateral shoulders. Dr. Teed noted that both shoulders had full ROM and full strength. He indicated that appellant's left shoulder had no pain to palpation and his left AC joint was prominent, nontender, and stable. Dr. Teed diagnosed closed left AC dislocation, healed, and noted that appellant had secondary, unrelated conditions that were due to aging. He opined that appellant reached MMI on September 17, 2008. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Teed identified the CDX as a class zero impairment for the diagnosis of AC joint injury or disease with no significant objective abnormal findings at MMI. He therefore concluded that appellant had zero percent permanent impairment of the upper extremity.

X-rays of appellant's left shoulder, dated November 19, 2019, revealed prior left AC joint separation.

In a November 19, 2019 report, Dr. Mallik Tella, a Board-certified orthopedic surgeon, noted that appellant presented with an 11-year history of left shoulder pain after falling from an ATV. He examined appellant's left shoulder and found tenderness to palpation at the biceps tendon and AC joint. Dr. Tella noted that appellant had full strength in his left shoulder. He diagnosed Type 3 left AC separation and indicated that appellant had 10 percent permanent

[5] Dr. Teed referenced findings of a February 28, 2019 magnetic resonance imaging (MRI) scan and a request for surgery from Dr. Patrick Denard that are unrelated to appellant's case.

impairment of the upper extremity. Dr. Tella noted that appellant had a class one injury/mild problem and that all of his grade modifiers were one.

On December 5, 2019 OWCP again referred appellant's case to Dr. White, the DMA, for a schedule award impairment rating. In a December 13, 2019 report, Dr. White reviewed the SOAF and medical record.[6] Utilizing the DBI method of the A.M.A., *Guides*, he identified the CDX as a class zero impairment for the diagnosis of AC joint injury or disease with no significant objective abnormal findings under Table 15-5, page 403. Dr. White therefore noted that appellant had zero percent left upper extremity impairment. He calculated that appellant also had zero percent left upper extremity impairment under the ROM methodology. Dr. White agreed with Dr. Teed's impairment rating, but opined that the date of MMI was July 3, 2019.

By decision dated January 7, 2020, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It based its determination on the opinion of Dr. White, the DMA.

On May 19, 2020 appellant requested reconsideration. He asserted that he had 10 percent upper extremity impairment based on the reports of Drs. Chao and Tella. Appellant argued that the July 3, 2019 report from Dr. Teed was inconsistent and referenced medical evidence that was unrelated to his case.

By decision dated June 3, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[7] and its implementing federal regulations,[8] 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.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health

[6] Dr. White did not review x-rays of appellant's left shoulder, dated November 19, 2019, and Dr. Tella's report of even date.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404(a).

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

(ICF).[11] Under the sixth edition, the evaluator identifies the CDX, which is then adjusted by the GMFH, GMPE, and GMCS.[12] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[13] Evaluators are directed to provide reasons for their impairment rating, including the choice of diagnoses from regional grids and the calculation of the modifier score.[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[15]

ANALYSIS -- ISSUE 1

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

In a June 27, 2017 report, Dr. Chao, appellant's attending physician, diagnosed closed traumatic dislocation of the left AC joint and found that appellant had 10 percent permanent impairment of the upper extremity under the fifth edition of the A.M.A., *Guides*.

In a March 10, 2018 report, Dr. White, the DMA, reviewed the SOAF and medical record. Utilizing the DBI method of the A.M.A., *Guides*, he identified the CDX as a class one impairment for the diagnosis of AC joint injury or disease with residual loss, functional with normal motion under Table 15-5, page 403. Dr. White calculated that appellant had three percent left upper extremity impairment. He disagreed with Dr. Chao's impairment rating as he found that appellant had a Type 2 AC separation as opposed to a Type 3 AC separation.

OWCP referred appellant to Dr. Teed for a second opinion examination to determine his permanent impairment for schedule award purposes. In a July 3, 2019 report, Dr. Teed provided findings on physical examination and noted that a diagnosis of closed left AC dislocation, healed. He opined that appellant reached MMI on September 17, 2008. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Teed identified the CDX as a class zero impairment for the diagnosis of AC joint injury or disease with no significant objective abnormal findings at MMI and concluded that appellant had zero percent permanent impairment of the upper extremity.

In a December 13, 2019 report, Dr. White, the DMA, reviewed Dr. Teed's July 3, 2019 report. Utilizing the DBI method of the A.M.A., *Guides*, he identified the CDX as a class zero impairment for the diagnosis of AC joint injury or disease with no significant objective abnormal findings under Table 15-5, page 403. Dr. White, therefore, found that appellant had zero percent left upper extremity impairment. He calculated that appellant also had zero percent left upper

[11] A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability, and Health (ICF): A Contemporary Model of Disablement.

[12] *Id.* at 493-556.

[13] *Id.* at 521.

[14] *E.W.*, Docket No. 19-1720 (issued November 25, 2020); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[15] *See supra* note 10 at Chapter 2.808.6(f) (March 2017).

extremity impairment under the ROM methodology and opined that the date of MMI was July 3, 2019.

Having reviewed the case record, the Board finds that OWCP failed to properly develop the evidence. OWCP received x-rays of appellant's left shoulder, dated November 19, 2019, which revealed prior left AC joint separation. It also received a November 19, 2019 report from Dr. Tella who provided findings on physical examination and found that appellant had 10 percent permanent impairment of the upper extremity. However, OWCP failed to forward this relevant medical evidence to Dr. White for comment and review pertaining to the extent of permanent impairment of appellant's left upper extremity impairment.[16] The record reflects that Dr. White's impairment rating was therefore not based on a full and accurate framework rendering his opinion of limited probative value.[17]

Additionally, the Board finds that Dr. White failed to adequately explain his opinion in accordance with the relevant standards. Although he identified the CDX as class zero impairment, Dr. White did not sufficiently explain how he classified appellant's AC joint injury based on severity.[18] Dr. White noted that there were no significant objective abnormal findings at MMI. However, he failed to account for appellant's arthrogram of his left shoulder, dated December 12, 2018, which revealed labral tearing with partial rotator cuff tearing, biceps tendon medial subluxation, and findings consistent with remote grade 3 AC separation. Dr. White also failed to explain why he identified the CDX as class zero impairment after finding that the CDX was a class one impairment in his March 10, 2018 report.

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[19] Once OWCP undertook development of the evidence by referring appellant's case file to an OWCP medical adviser, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[20]

The case is therefore remanded to OWCP for further medical development.[21] OWCP shall request that Dr. White review the entire case record and provide a supplemental opinion regarding whether appellant has permanent impairment of his left upper extremity in accordance with the sixth edition of the A.M.A., *Guides*. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[16] *L.S.*, Docket No. 19-1730 (issued August 26, 2020).

[17] *Id.*

[18] *See D.O.*, Docket No. 19-1729 (issued November 3, 2020); *R.O.*, Docket No. 10-2143 (issued August 15, 2011).

[19] *See W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[20] *See G.M.*, Docket No. 19-1931 (issued May 28, 2020); *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

[21] *L.S.*, *supra* note **Error! Bookmark not defined.**; *P.E.*, Docket No. 17-0961 (issued March 14, 2018).

CONCLUSION

The Board finds this case is not in posture for decision.[22]

ORDER

IT IS HEREBY ORDERED THAT the January 7 and June 3, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 3, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

[22] In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.