United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 10-2029**
	)	**Issued: July 22, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Canandaigua, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant filed a timely appeal of the Office of Workers' Compensation Programs' (OWCP) April 28, 2010 schedule award decision. Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 11 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity, for which she received schedule awards.

On appeal, appellant contends that she is entitled to an additional schedule award due to her permanent impairment. She also contends that OWCP should have applied a previous

[1] 5 U.S.C. § 8101 *et seq.*

edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to her schedule award claim since it was not a new claim.

FACTUAL HISTORY

On September 25, 1992 appellant, then a 44-year-old nursing assistant, filed an occupational disease claim under File No. xxxxxx423 alleging that she sustained a left shoulder rotator cuff tear and a painful left trapezium metacarpal joint when she caught a patient who had toppled after having a seizure. OWCP accepted her claim for left rotator cuff tear and left trapezium metacarpal joint strain. It authorized left shoulder rotator cuff repair and anterior acromionectomy which appellant underwent on November 24, 1993. Appellant returned to full-duty work with no restrictions on June 21, 1994.

On May 22, 1996 appellant filed a traumatic injury claim under File No. xxxxxx036 alleging that she hurt her right shoulder and arm while escorting a patient downstairs on May 21, 1996. OWCP accepted her claim for right shoulder sprain. Appellant stopped work on June 5, 1996. She returned to work in a limited-duty position on June 11, 1996.[2]

On June 20, 2008 OWCP combined appellant's claims and File No. xxxxxx423 was designated as the master file.

On November 4, 2008 OWCP granted appellant schedule awards for 11 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity. The awards were based on the fifth edition of the A.M.A., *Guides*.[3]

By letter dated October 26, 2009, appellant requested an additional schedule award. In a January 22, 2010 medical report, Dr. David Cywinski, an attending Board-certified internist, advised that appellant had 50 percent impairment to each upper extremity based on the New York State Workers' Compensation Board Guidelines.

By letter dated March 1, 2010, OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Arlen K. Snyder, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a March 29, 2010 report, Dr. Snyder obtained a history of the employment injuries and appellant's medical treatment. Appellant's current symptoms included decreased range of motion of her right and left arms when lifting overhead and reaching behind. She had bilateral shoulder pain, interrupted sleep, and numbness and heaviness of the bilateral arms. On physical examination, Dr. Snyder found no tenderness on palpation of either shoulder. Biceps, triceps and deltoid strength bilaterally was normal. Deep tendon reflexes, grip strength and pinprick sensation were normal. Range of motion measurements for the right arm included 110 degrees of flexion, 80 degrees of abduction, 60 degrees each of external rotation and extension. Dr. Snyder noted that posterior right buttock for internal rotation. Range of motion

[2] The record reveals that appellant is no longer working at the employing establishment.

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

measurements for the left arm included: 90 degrees of flexion; 80 degrees of abduction; 45 degrees of external rotation; and 70 degrees of extension. Internal rotation was to the mid-lumbar spine. There was a slightly positive Tinel's sign involving the left hand and a slightly positive Phalen's test bilaterally. Dr. Snyder stated that appellant did not appear to be in any kind of pain during the entire examination, even with range of motion, although she experienced some discomfort at the extremes of motion testing.

Dr. Snyder advised that appellant had reached maximum medical improvement in December 1993 regarding her left shoulder and approximately May or June 1997 regarding her right shoulder. He utilized the sixth edition of the A.M.A., *Guides* to determine that, with regard to the left arm, appellant had a grade 2 modifier each for Functional History and Physical Examination and a grade 1 modifier for Clinical Studies under Table 15-23 on page 449. Applying Table 15-34 on page 475, Dr. Snyder determined that appellant had three percent impairment for 90 degrees of flexion, six percent impairment for 80 degrees of abduction and no impairment each for external and internal rotation. He added the impairments due to loss of range of motion to find a nine percent left upper extremity impairment. Dr. Snyder determined that, under Table 15-35 on page 477, nine percent impairment represented a grade 1 modifier. He multiplied the nine percent impairment for loss of motion by five percent impairment under Table 15-36 on page 477, for grade 1 modifier, to calculate 0.45 or one percent. Dr. Snyder added the 1.00 percent impairment to the 9 percent loss of motion impairment to calculate a 10 percent left upper extremity impairment. He applied the same calculations in rating the right upper extremity with the addition of one percent impairment due to decreased internal rotation only to the posterior buttock area. Dr. Snyder calculated a 10 percent impairment of the right upper extremity. He multiplied the 10 percent loss of motion impairment by 5 percent which resulted in 0.5 percent or 1.00 percent. Dr. Snyder added the 1 percent impairment to the 10 percent loss of motion impairment which resulted in 11 percent impairment of the right upper extremity impairment.

On April 18, 2010 Dr. Andrew A. Merola, OWCP's medical adviser, reviewed the medical record. He agreed with Dr. Snyder's finding that appellant had 11 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*.

In an April 28, 2010 decision, OWCP found that appellant was not entitled to an additional schedule award for her right and left upper extremities. The evidence was insufficient to establish that she had more than 11 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity, as previously awarded.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[6] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides*[8] as the appropriate edition for all awards issued after that date.[9]

ANALYSIS

OWCP accepted appellant's claim for left rotator cuff tear, left trapezium metacarpal joint strain and right shoulder sprain. On November 24, 1993 appellant underwent left shoulder rotator cuff repair and anterior acromionectomy. On November 4, 2008 she received a schedule award for 11 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity. In an April 28, 2010 decision, OWCP found that appellant was not entitled to any additional schedule award for either upper extremity. The Board finds that she did not meet her burden of proof to establish that she sustained greater impairment.

In a January 22, 2010 impairment evaluation, Dr. Cywinski, an attending physician, found that appellant had 50 percent impairment to each the right and left upper extremity under the New York State Workers' Compensation Board Guidelines. However, his opinion is of limited probative value. Dr. Cywinski did not provide a sufficiently reasoned opinion and impairment rating in conformance with the A.M.A., *Guides*, the standard adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.[10]

In order to determine the extent and degree of any employment-related impairment, OWCP referred appellant to Dr. Snyder for a second opinion examination. In a March 29, 2010 impairment evaluation, Dr. Snyder noted appellant's complaints of decreased range of motion of her right and left arms when lifting overhead and reaching behind, bilateral shoulder pain, interrupted sleep, and numbness and heaviness of the bilateral arms. On physical examination, he found normal bilateral biceps, triceps and deltoid strength, deep tendon reflexes, grip strength and pinprick sensation. Dr. Snyder also found no tenderness on palpation of either shoulder. He reported a slightly positive Tinel's sign involving the left hand and a slightly positive Phalen's test bilaterally. Dr. Snyder measured range of motion of the upper extremities and noted that appellant experienced some discomfort. For the left arm, he found 90 degrees of flexion yielded three percent impairment, 80 degrees of abduction yielded six percent impairment and 45

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

[7] *Supra* note 5.

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

[9] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

degrees of external rotation and 70 degrees of extension each yielded no impairment, which he added to find a total left arm impairment of nine percent. Dr. Snyder assessed a grade 1 modifier for the nine percent impairment under Table 15-35 on page 477. He multiplied the nine percent impairment for loss of motion by five percent impairment under Table 15-36 on page 477 to calculate 0.45 percent which he properly rounded up to one percent.[11] Dr. Snyder advised that the same calculations noted above applied to the right upper extremity with the addition of 1 percent impairment due to decreased internal rotation only to the posterior buttock area which resulted in 10 percent impairment. He multiplied the 10 percent loss of motion impairment by 5 percent which resulted in 0.5 percent or 1 percent.[12] Dr. Snyder added the 1 percent impairment to the 10 percent loss of motion impairment to calculate 11 percent impairment of the right upper extremity impairment. The Board finds that his ratings conform to the sixth edition of the A.M.A., *Guides*.

Dr. Merola, OWCP's medical adviser, reviewed Dr. Snyder's findings on April 18, 2010 and concurred with his determination that appellant had 11 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. The Board finds that the evidence supports that appellant has no more than 11 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity. There is no other medical evidence of record addressing the extent of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

Appellant's contention on appeal that she is entitled to an additional schedule award has not been established based on the discussion of the evidence above. She contended that her schedule award claim should not have been calculated under the sixth edition of the A.M.A., *Guides* since it was not a new claim. Pursuant to FECA Bulletin No. 09-03, all schedule award decisions after May 1, 2009 must utilize the sixth edition of the A.M.A., *Guides*.[13] Even though appellant's prior schedule award was previously rated impairment under the fifth edition of the A.M.A., *Guides*, she requested an additional schedule award on October 26, 2009 and submitted Dr. Cywinski's January 22, 2010 report finding that she had 50 percent impairment to each the right and left upper extremity. As appellant was seeking schedule awards for additional impairments, OWCP properly ought further medical review under the sixth edition.[14] The schedule award was not issued until after May 1, 2009. The Board finds that it properly based its decision on the sixth edition of the A.M.A., *Guides*.

[11] The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (January 2010). Fractions are rounded up from 0.50. *See also J.P.* Docket No. 08-832 (issued November 13, 2008); *Richard A. Neidert*, 57 ECAB 563 (2006).

[12] *Id.*

[13] FECA Bulletin 09-03 (issued March 15, 2009, expired May 1, 2010); *B.M.*, (Docket No. 09-2231, issued May 14, 2010) (for decisions issued beginning May 1, 2009, the sixth edition will be used).

[14] *Id.* FECA Bulletin 09-03 states, "Correspondence with treating physicians, consultants and second opinion specialists should reflect the use of the new edition for decisions issued after May 1, 2009." *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700, Exhibit 1 (January 2010).

Appellant may request a schedule award or increased schedule award 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 has failed to establish that she has more than 11 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity, for which she received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board