United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 10-2253**
	)	**Issued: June 17, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Marion, IN, 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
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2010 appellant filed a timely appeal from the May 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) granting a schedule award. Pursuant to the Federal Employees' Compensation Act[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 met her burden of proof to establish that she has more than a 43 percent permanent impairment of her right arm, for which she received a schedule award.

FACTUAL HISTORY

OWCP accepted that on January 17, 1977 appellant, then a 29-year-old nursing assistant, sustained cervical and dorsal muscle strains and dislocation of her right shoulder while

[1] 5 U.S.C. §§ 8101-8193.

attempting to prevent a patient from falling. It later accepted that she sustained other work-related conditions, including recurrent dislocation and calcifying tendinitis of her right shoulder.

On May 10, 1978 appellant underwent a Magnuson-Bankart surgical procedure on her right shoulder and, on September 7, 1978, she had a right anterior scalenectomy.[2] Further right shoulder surgery included a repair of her posterior capsule and osteotomy of her glenoid procedure which were performed on August 22, 1983. These surgical procedures were authorized by OWCP. Appellant worked in limited-duty positions for various periods and received disability compensation from OWCP for periods of partial and total disability. She stopped work after undergoing a total arthroplasty of her right shoulder on April 8, 2003.

On June 9, 2008 Dr. Alois Gibson, an attending Board-certified orthopedic surgeon, reported his findings on examination and noted that appellant had persistent instability of her right shoulder despite undergoing several surgeries. On June 13, 2008 Dr. Peter Sallay, another attending Board-certified surgeon, indicated that his examination of her right shoulder revealed that she had significant pain and lacked good function of her shoulder.

In an August 11, 2008 report, Dr. Sallay stated that appellant reported continued pain and sensations of instability in her right shoulder. He indicated that she had permanent impairment of her right shoulder due to persistent instability of her glenohumeral arthroplasty. Dr. Sallay noted that, upon physical examination, range of motion of appellant's right shoulder was still severely limited with approximately 30 percent of active flexion and passive flexion to about 80 percent with a considerable amount of pain. External rotation was to 25 degrees and internal rotation was limited to the trochanter. Dr. Sallay indicated that strength was 2/5 to resisted flexion and 4+/5 to resisted external rotation. X-ray testing showed about one millimeter of lucency around each peg hole on the glenoid side, but there was no evidence of severe glenoid space narrowing. Dr. Sallay concluded that appellant had reached maximal medical improvement from conservative care. He felt that she was totally disabled from work and had permanent restrictions of no use of her right arm. Dr. Sallay evaluated the permanent impairment of appellant's right arm under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He indicated that under Table 16-40 through Table 16-46 her motion losses upon abduction, flexion, external rotation and internal rotation equaled a 23 percent impairment. Under Table 16-35, impairment of appellant's right arm for strength loss upon flexion, external rotation and abduction was 21 percent. Dr. Sallay stated that the total combined right arm impairment was 44 percent.[3]

In a November 30, 2009 report, Dr. Brian M. Tonne, a Board-certified orthopedic surgeon serving as OWCP medical adviser, indicated that appellant reached maximum medical

[2] On April 21, 1980 OWCP granted appellant a schedule award for a 35 percent permanent impairment of her right arm.

[3] Appellant returned to work on April 26, 2009 and received OWCP disability compensation up until April 25, 2009.

improvement on August 11, 2008, the date of an examination by Dr. Sallay. He stated that, regarding the permanent impairment of her right arm, his calculations differed from those of Dr. Sallay. Dr. Tonne indicated that Dr. Sallay did not detail the full range of motion measurements needed to calculate impairment based upon range of motion loss according to Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides*. He referenced Table 15-5 on page 405 of the sixth edition of the A.M.A., *Guides* and stated that, based upon the available medical record, appellant fell under a class 3, grade C diagnosis (complicated, unstable, or infected total shoulder arthroplasty) with a default impairment value of 40 percent. Dr. Tonne indicated that this diagnosis was chosen due to the reports of Dr. Sallay and Dr. Gibson which noted right shoulder instability on examination. A grade modifier 3 was applied for Functional History (GMFH) (Table 15-7 on page 406), a grade modifier 3 for Physical Examination (GMPE) (Table 15-8 on page 408) and a grade modifier 4 for Clinical Studies (GMCS) (Table 15-9 on page 410). Dr. Tonne used the net adjustment formula to find that appellant's impairment warranted moving one space to the right on Table 15-5 from a class 3, grade C diagnosis to a class 3, grade D diagnosis (of 43 percent). Therefore, appellant has a 43 percent permanent impairment of her right arm.

In a May 17, 2010 decision, OWCP granted appellant a schedule award for an additional eight percent permanent impairment of her right arm. The award ran for 24.96 weeks from April 26 to October 17, 2009. OWCP indicated that appellant had a 43 percent permanent impairment of her right arm, but noted that she had already received a schedule award for a 35 percent permanent impairment of her right arm.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing 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 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[7]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] *See* FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the Class of Diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE and GMCS. The net adjustment formula is GMFH - CDX + GMPE - CDX + GMCS - CDX.[8] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[9]

The Board notes that it is well settled that a claimant is not entitled to dual workers' compensation benefits for the same injury. Appellant may not receive compensation for temporary total disability and under a schedule award covering the same period of time.[10]

ANALYSIS

OWCP accepted that appellant sustained work-related cervical and dorsal muscle strains and recurrent dislocation and calcifying tendinitis of her right shoulder. Appellant had multiple right shoulder surgeries, including a total arthroplasty. On May 17, 2010 OWCP granted her a schedule award for an eight percent permanent impairment of her right arm, noting that she had a 43 percent permanent impairment of her right arm and had previously received a schedule award for a 35 percent permanent impairment of her right arm.

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 43 percent permanent impairment of her right arm. The Board finds that Dr. Tonne, a Board-certified orthopedic surgeon serving as OWCP medical adviser, properly evaluated the medical evidence of record to determine that appellant has a 43 percent permanent impairment of her right arm under the standards of the sixth edition of the A.M.A., *Guides*.

In a November 30, 2009 report, Dr. Tonne stated that appellant reached maximum medical improvement on August 11, 2008, the date of an examination by Dr. Sallay, an attending Board-certified orthopedic surgeon, who referenced Table 15-5 on page 405 of the sixth edition of the A.M.A., *Guides* and found that she fell under a class 3, grade C diagnosis (complicated, unstable or infected total shoulder arthroplasty) with a default impairment value of 40 percent. This diagnosis was chosen due to the reports of Dr. Sallay and Dr. Gibson, another attending Board-certified orthopedic surgeon, which noted right shoulder instability on examination.[11] A grade modifier 3 was applied for GMFH (Table 15-7), a grade modifier 3 for GMPE, (Table 15-8), and a grade modifier 4 for GMCS (Table 15-9). Dr. Tonne used the net adjustment formula to find that appellant's impairment warranted moving one space to the right on Table 15-5 from a

[8] *See* A.M.A., *Guides* 401-11 (6th ed. 2009). Table 15-5 also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis impairment. *Id.* at 405, 475-78.

[9] *Id.* at 23-28.

[10] *Dale Mackelprang*, 55 ECAB 174 (2003); *Robert T. Leonard*, 34 ECAB 1687, 1690 (1983).

[11] Dr. Tonne provided an opinion that it was not appropriate in the present case to use the alternative impairment rating method that evaluated range of motion of the right shoulder. *See supra* note 8.

class 3, grade C diagnosis to a class 3, grade D diagnosis (of 43 percent).[12] Therefore, he properly found that appellant has a 43 percent permanent impairment of her right arm.

On appeal, appellant argued that OWCP should have accepted the 44 percent impairment rating of Dr. Sallay. However, Dr. Sallay applied the standards of the fifth edition of the A.M.A., *Guides* and the May 17, 2010 schedule award was issued after the standards of the sixth edition of the A.M.A., *Guides* came into effect.[13] Appellant also questioned why her schedule award ran for the period April 26 to October 17, 2009. She had received disability compensation up until April 25, 2009 and FECA prevents a claimant from receiving disability and schedule award compensation at the same time for the same injury.[14]

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 did not meet her burden of proof to establish that she has more than a 43 percent permanent impairment of her right arm, for which she received a schedule award.

[12] *See* A.M.A., *Guides* 401-11 (including Table 15-5 through Table 15-9) (6th ed. 2009).

[13] *See supra* note 7.

[14] *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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