United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 13-195**
	)	**Issued: April 3, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION MEDICAL CENTER, Buffalo, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2012 appellant filed a timely appeal from a June 20, 2012 merit decision and a September 18, 2012 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 issues are: (1) whether appellant is entitled to a schedule award for permanent impairment of the left upper extremity; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 13, 2009 appellant, then a 64-year-old housekeeping aid, filed a traumatic injury claim Form CA-1 alleging that on May 11, 2009 he strained his left shoulder when he was wringing a mop and felt a popping noise in his left shoulder. By decision dated June 9, 2010, OWCP accepted the claim for left complete rotator cuff rupture.

On October 26, 2009 appellant underwent a left shoulder arthroscopy, labral debridement, open rotator cuff repair with acromioplasty and distal clavicle excision by Dr. Joseph E. Buran, a Board-certified orthopedic surgeon.

On September 30, 2010 appellant filed a claim for a schedule award Form CA-7.

By letter dated October 4, 2010, OWCP requested that appellant have his attending physician submit an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*). It provided his physician with a series of questions and a permanent impairment worksheet of the upper extremity.

In a September 20, 2010 medical report, Dr. Buran reported that appellant's shoulder pain persisted and was causing him to become weaker. He stated that he could not think of a procedure that would allow him to work and have strength based on the condition of his rotator cuff. Dr. Buran placed appellant on light duty with restrictions until February 1, 2011.

By decision dated December 9, 2010, OWCP denied appellant's schedule award claim for permanent partial impairment of the left upper extremity.

On December 14, 2010 appellant requested reconsideration of OWCP's decision.

In support of his request, appellant submitted the disabilities of the arm, shoulder and hand (*Quick*DASH) worksheet rating *Quick*DASH which provided appellant with a *Quick*DASH disability/symptom score of 93.33.

In a November 23, 2010 permanent impairment worksheet of the upper extremity, Dr. Buran used appellant's postoperative history, examination findings, Clinical Studies (GMCS) and *Quick*DASH scores to process an impairment rating of the left rotator cuff full thickness tear using Table 15-5, page 503 of the A.M.A., *Guides*.[3] According to Table 15-5, Functional History (GMFH) was processed as a grade modifier of 1, Physical Examination (GMPE) as a grade modifier of 2 and clinical studies as a grade modifier of 2. The *Quick*DASH score was reported as 93.33 and appellant was found to be in class 1 of the rotator cuff full thickness tear in grade E. Using these findings, Dr. Buran determined that appellant had a seven percent

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

[3] *Id.*

permanent impairment of the left upper extremity.[4] He also provided a 15 percent range of motion impairment of the upper extremity for the left shoulder which he noted as class 2.

By decision dated March 21, 2011, OWCP affirmed the December 14, 2010 decision denying appellant's schedule award claim. It noted that the permanent impairment worksheet was insufficient to establish a schedule award for permanent partial impairment of the left shoulder.

On March 10, 2012 appellant requested reconsideration of the March 21, 2011 OWCP decision. In support of his request, he submitted additional medical reports from Dr. Buran, his attending physician.

In a March 29, 2010 medical report, Dr. Buran stated that appellant continued to experience left shoulder pain and decreased range of motion with no real relief from surgery. He noted that appellant could return to work with no lifting over 10 pounds and the left shoulder was restricted from excessive pushing, pulling or overhead activities.

In a June 14, 2010 medical report, Dr. Buran reported that a June 2, 2010 magnetic resonance imaging (MRI) scan of the upper extremity revealed full thickness tear of the supraspinatus tendon, partial tear of infraspinatus tendon, partial tear of the subscapularis tendon, atrophic change of the supraspinatus and infraspinatus tendon, degenerative joint disease involving glenohumeral joint and evidence of acromioplasty. He stated that appellant was weaker but repair was not feasible since atrophy had set in, speculating that appellant may need a reverse total shoulder arthroplasty rendering him incapable of performing his job.

Appellant also resubmitted Dr. Buran's November 23, 2010 *Quick*DASH and permanent impairment worksheet which provided a seven percent left upper extremity impairment. On a November 3, 2010 OWCP questionnaire, his date of maximum medical improvement was noted as April 1, 2011.

In an April 1, 2011 note, Dr. Buran stated that his seven percent permanent impairment of the upper extremity for the left shoulder was based on the sixth edition of the A.M.A., *Guides*.[5]

By decision dated June 20, 2012, OWCP affirmed the March 21, 2011 decision finding that the medical evidence of record was insufficient to support appellant's claim for a schedule award.

On August 16, 2012 appellant requested reconsideration of the June 20, 2012 OWCP decision.

In support of his request, appellant submitted an August 3, 2012 medical report from Dr. Buran, who diagnosed a massive rotator cuff tear repaired and failed left shoulder. Dr. Buran noted that appellant was disabled and felt that he had reached maximum medical improvement, with a reverse total shoulder as the only option for improvement.

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

[5] *Id.*

By decision dated September 18, 2012, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.[6] 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.[7]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[8] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

The sixth edition of the A.M.A., *Guides* also provides that range of motion (ROM) may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using ROM may not be combined with a diagnosis-based impairment and stands alone as a rating.[12]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.[13]

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[6] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[7] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[8] A.M.A., *Guides*, page 3, section 1.3, The ICF: A Contemporary Model of Disablement.

[9] *Id*. at 385-419.

[10] *Id.* at 411.

[11] *J.W.*, Docket No. 11-289 (issued September 12, 2011).

[12] *W.T.*, Docket No. 11-1994 (issued May 22, 2012).

[13] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale of the percentage of impairment specified.[14]

ANALYSIS

The issue is whether appellant is entitled to a schedule award for permanent partial impairment of the left upper extremity. The Board finds this case is not in posture for decision and must be remanded for further development.

OWCP accepted that appellant sustained a left complete rotator cuff rupture. On September 30, 2010 appellant filed a claim for a schedule award. In an October 4, 2010 development letter, OWCP requested he provide his attending physician with a permanent impairment worksheet of the upper extremity for an impairment evaluation.

Appellant submitted medical reports dated March 29 to September 20, 2010 from Dr. Buran, his attending physician. In his reports, Dr. Buran stated that appellant had undergone a left shoulder arthroscopy, labral debridement, open rotator cuff repair with acromioplasty and distal clavicle excision on October 26, 2009. Postoperative reports noted that the surgery was unsuccessful and appellant continued to experience left shoulder pain and decreased range of motion. Dr. Buran stated that appellant was weaker but repair was not feasible since atrophy had set in, as evidenced by a June 2, 2010 MRI scan. He speculated that appellant could need a reverse total shoulder arthroplasty which would render him incapable of performing his job.

In a November 23, 2010 permanent impairment worksheet of the upper extremity, Dr. Buran used appellant's postoperative history, examination findings, clinical studies and *Quick*DASH score to process an impairment rating of the left rotator cuff full thickness tear using Table 15-5, page 503 of the A.M.A., *Guides.*[15] According to Table 15-5, functional history was processed as a grade modifier of 1, physical examination as a grade modifier of 2 and clinical studies as a grade modifier of 2. The *Quick*DASH score was reported as 93.33 and appellant was found to be in class 1 of the rotator cuff full thickness tear in grade E. Using these findings, Dr. Buran determined that appellant had a seven percent permanent impairment of the upper left extremity.[16] He also provided a 15 percent range of motion impairment of the upper extremity for the left shoulder, which he noted as class 2. In an April 1, 2011 note, Dr. Buran reported that he used the sixth edition of the A.M.A., *Guides* to calculate the seven percent upper extremity impairment of the left shoulder. On the November 3, 2010 OWCP questionnaire, the date of maximum medical improvement was noted as April 1, 2011.

While Dr. Buran did not explain how he calculated the class 1, grade E impairment under the A.M.A., *Guides*, OWCP may rely on the opinion of an OWCP district medical adviser

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); *Tommy R. Martin*, 56 ECAB 273 (2005).

[15] *Supra* note 2.

[16] *Id.*

(DMA) to apply the A.M.A., *Guides* to the findings reported by the attending physician.[17] In this case, however, it did not refer any of Dr. Buran's reports or the November 23, 2010 impairment evaluation to OWCP's medical adviser for review of a permanent impairment. In its June 20, 2012 decision, OWCP found that his medical reports and permanent impairment worksheet did not establish any findings and concluded that the medical evidence of file did not indicate permanent impairment.

In this case, appellant submitted medical evidence in support of his schedule award claim. The claims examiner, however, made a medical determination without the benefit of medical advice or review by OWCP's medical adviser that appellant's injury did not cause or contribute to any permanent impairment. OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of any impairment in accordance with the A.M.A., *Guides*.[18] None of the medical evidence, however, was forwarded to the medical adviser for review.

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[19] Despite having submitted medical evidence in support of his schedule award claim, OWCP failed to develop the evidence as appellant's case record was not referred to a DMA for review for a determination on whether maximum medical improvement had been reached and the percentage of permanent partial impairment.[20]

For these reasons, the June 12, 2012 decision will be set aside and the case remanded to OWCP for review of the medical record by OWCP's medical adviser. If the medical adviser is unable to render a reasoned opinion fully explaining the application of the A.M.A., *Guides*, OWCP shall refer appellant to an appropriate Board-certified specialist for a second opinion regarding the extent of his left upper extremity impairment.[21] Following such development as OWCP deems necessary, it shall issue an appropriate merit decision.

[17] *See Linda Beale*, 57 ECAB 429 (2006).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[19] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *William J. Cantrell*, 34 ECAB 1233 (1993); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(i) (September 2010); *J.G.*, Docket No. 09-1714 (issued April 7, 2010).

[21] If the medical evidence does not contain the required elements for a schedule award impairment calculation, the claims examiner should request such information from the attending physician prior to a DMA review. If the attending physician does not submit the requested information, the claims examiner should obtain the evidence through a second opinion evaluation prior to a DMA review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(i) (September 2010).

CONCLUSION

The Board finds that the issue of appellant's entitlement to a schedule award is not in posture for decision.[22]

ORDER

IT IS HEREBY ORDERED THAT the June 20 and September 18, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further development consistent with this decision.

Issued: April 3, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[22] Given the Board's disposition on the merits of the schedule award claim, the issue of whether OWCP properly denied appellant's September 18, 2012 request for reconsideration is moot.