United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 12-1669**
	)	**Issued: February 21, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Chesapeake, VA, 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 July 31, 2012 appellant filed a timely appeal from the July 20, 2012 Office of Workers' Compensation Programs (OWCP) schedule award decision. 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.

ISSUE

The issue is whether appellant established that he sustained more than 12 percent permanent impairment of his right arm, for which he received a schedule award.

FACTUAL HISTORY

On December 1, 2008 appellant, then a 56-year-old letter carrier filed an occupational disease claim alleging that he sustained pain in the right shoulder, arm and wrist in the performance of duty. He stopped work on that date. OWCP accepted appellant's claim for other

[1] 5 U.S.C. § 8101 *et seq.*

specified disorder of the bursae and tendons in the right shoulder region, pain in the shoulder joint region and sprain of shoulder and upper arm, right rotator cuff. Appellant underwent authorized rotator cuff surgery in April 2009. On August 3, 2009 he underwent debridement and partial repair.

On December 18, 2009 appellant requested a schedule award. By letter dated December 30, 2009, OWCP advised him that he should provide an impairment rating from his treating physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment, (*A.M.A., *Guides*) (6th ed. 2009).

In a February 4, 2010 report, Dr. Edward Habeeb, an attending Board-certified orthopedic surgeon, noted that appellant underwent a functional capacity evaluation (FCE) which revealed that he was able to function within the limits of his job description. Based upon the findings as to strength, range of motion and function, appellant had a 16 percent impairment of the arm or 10 percent of the whole person. The record contains a January 26, 2010 FCE from a physical therapist which contained range of motion findings. For the shoulders: flexion on the right 110 degrees, left 150 degrees, extension right 30 degrees, left 6 degrees, abduction right 90 degrees, 170 degrees, adduction on the right 100 degrees, left 20 degrees, internal rotation right 40 degrees, left 60 degrees, external rotation right 60 degrees, left 90 degrees. It was noted that appellant put forth an acceptable level of effort and his performance was consistent with self-reported limitation. Dr. Habeeb recommended 16 percent impairment of the right upper extremity based on lost range of motion.

In an April 22, 2010 report, Dr. Willie Thompson, OWCP's medical adviser noted that appellant had not reached maximum medical improvement (MMI) as his most recent surgery occurred on August 3, 2009. He recommended that permanent impairment be evaluated on or after August 3, 2010.

On August 3, 2010 Dr. Habeeb referred appellant for another FCE and impairment rating. On August 9, 2010 the physical therapist recommended right upper extremity impairment of 35 percent. He noted that appellant's performance was "conservative in his effort levels as he [was] clearly fearful and apprehensive with regards to pain and potential for exacerbation of symptoms due to the chronicity of his condition. Overall performance levels were acceptable and substantiated through repeated protective and pain behaviors for the right upper extremity." On August 24, 2010 Dr. Habeeb noted the decreased function since the previous FCE. He did not address right arm permanent impairment.

In a December 6, 2010 report, Dr. Christopher R. Brigham, OWCP's medical adviser, evaluated appellant's impairment. He noted that neither FCE rating evaluations were performed by a physician. Dr. Brigham explained that there were significant pain complaints and the motion measurements were not consistent between evaluators such that motion measurements in the August 9, 2010 FCE were not reliable. He noted that the A.M.A., *Guides,* required that the evaluator consider both the diagnosis-based impairment (DBI) and range of motion (ROM) methods to determine impairment and to choose the applicable method which yielded the higher impairment value. Dr. Brigham explained that the ROM method provided a greater impairment value for appellant. At the time of Dr. Habeeb's February 4, 2010 rating, the motion measurements demonstrated much less restricted motion. Subsequent to the rating, Dr. Habeeb

examined the patient and documented "excellent range of motion." Dr. Brigham determined that at the time of surgery in August 2009, "[appellant] had little in the way of any positive findings that would have indicated a retear." He explained that Dr. Habeeb could not explain appellant's continued symptoms as there did not appear to be any new pathology. Dr. Brigham explained that the most recent FCE noted significant pain complaints which impacted the effort during examination. He referred to page 464 of the A.M.A., *Guides* which noted that "It is recognized that patients may under demonstrate their capabilities." Dr. Brigham recommended that impairment should not be based on the most recent FCE since the values were significantly worse, inconsistent with the prior evaluations and not explained by new pathology. He determined that the January 26, 2010 FCE was most consistent with the opinions and findings outlined by Dr. Habeeb. Dr. Brigham stated that the impairment rating should be based upon the examining physician's findings as opposed to measurements provided by a physical therapist. He determined that appellant had 12 percent right arm impairment and reached MMI on February 4, 2010, six months after the most recent right shoulder surgery.

By decision dated December 20, 2010, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right upper extremity.

On December 27, 2010 appellant requested a telephonic hearing, which was held on April 20, 2011. In a December 30, 2010 statement, he disagreed with the rating and noting that his FCE's were ordered by his physician. Appellant submitted additional medical records which did not provide an impairment ratin. OWCP also received physical therapy reports.

By decision dated July 12, 2011, OWCP's hearing representative affirmed the December 20, 2010 decision.

Appellant requested reconsideration on July 18 and September 20, 2011 and submitted additional evidence. He contended that the first FCE was premature as it should have been performed one year after his last surgery. Appellant resubmitted copies of FCE's.

By decision dated December 22, 2011, OWCP denied modification of its prior decisions.

On January 17, 2012 appellant requested reconsideration.

In a May 5, 2012 report, Dr. Lawrence A. Manning, OWCP's medical adviser, noted appellant's history and his previous right arm impairment rating of 12 percent based upon loss of range of motion. He explained that there was an issue with regards to the August 9, 2010 FCE in which 35 percent right arm impairment was found based on loss of range of motion. Dr. Manning noted that the August 9, 2010 FCE recommended 9 percent arm impairment for 54 degrees of right shoulder flexion, 1 percent impairment 40 degrees of extension, 6 percent impairment for 46 degrees of abduction, 10 percent impairment for minus 8 degrees of adduction, no impairment for 52 degrees of internal rotation and 9 percent impairment for 30 degrees of external rotation. He reviewed Table 15-34[2] and concurred with the findings for flexion, extension and abduction. For adduction, Dr. Manning explained that minus eight degrees adduction equated to two percent impairment. He explained that 52 degrees of internal

[2] A.M.A., *Guides* 475.

rotation corresponded to two percent impairment and 30 degrees of external rotation corresponded to two percent impairment. Dr. Manning found that the total loss of range of motion was 22 percent. As appellant previously received an award of 12 percent based on range of motion the 22 percent included the previously awarded 12 percent. Dr. Manning found that appellant reached MMI on August 3, 2010 one year from the date of the second rotator cuff surgery.

On July 12, 2012 OWCP requested clarification from Dr. Manning as to the January 25 and August 9, 2010 FCE reports. In a July 14, 2012 report, Dr. Manning explained that his rating of 22 percent right arm impairment was based on the August 9, 2010 FCE. After reviewing the January 26, 2010 FCE, he noted that appellant put forth an acceptable level of testing demonstrating consistent biomechanical asymmetry. Dr. Manning explained that the August 2010 FCE stated that appellant was "conservative in his effort levels as he [was] clearly fearful and apprehensive with regards to pain and potential for exacerbation of symptoms due to the chronicity of his condition." He stated that the more objective range of motion was the January 26, 2010 FCE. Appellant had 12 percent right upper extremity impairment based on the range of motion findings. Dr. Manning found that appellant reached MMI on August 3, 2010 one year from the date of the second rotator cuff surgery.

By decision dated July 20, 2012, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] 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.[5] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[6]

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 for the percentage of impairment specified.[7]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] FECA Bulletin No. 09-03 (issued March 15, 2009).

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

Before an award may be made, it must be medically determined that no further improvement can be anticipated and the impairment must reach a fixed and permanent state, which is known as MMI.[8] The period covered by a schedule award begins on the date that the employee reaches MMI from the residuals of the accepted employment injury. The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.[9]

ANALYSIS

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

Appellant's physician, Dr. Habeeb, opined that appellant had an impairment of 16 percent to the upper extremity or 10 percent of the whole person. The Board initially notes that he did not explain how he arrived at these ratings. For example Dr. Habeeb did not refer to any sections in the A.M.A., *Guides* to support his values. The Board also noted that while the A.M.A., *Guides* provide for both impairment to the individual member and to the whole person, FECA does not provide for permanent impairment for the whole person.[10] As Dr. Habeeb report did not comport with the A.M.A., *Guides*, OWCP referred the case to Dr. Brigham.

In a December 6, 2010 report, Dr. Brigham based his opinion upon the January 26, 2010 FCE report, as he believed that appellant may have under demonstrated his abilities in an August 9, 2010 FCE. He found that appellant had 12 percent right arm impairment due to loss of range of motion and reached MMI on February 4, 2010, six months after the last shoulder surgery. However, the January 26, 2010 FCE findings, on which the medical adviser based his impairment rating, predated the medical adviser's finding of MMI reached on February 4, 2010. Dr. Thompson noted in an April 22, 2010 report that appellant had not reached MMI from his August 3, 2009 surgery and that impairment should not be evaluated until August 3, 2010. Thus, it appears that there is disagreement among the medical adviser as to when MMI was reached. While appellant may not have demonstrated his full effort in his August 9, 2010 FCE, the impairment rating must be based on findings from an examination taken when he reached MMI.

In a May 5, 2012 report, Dr. Manning utilized the findings of the August 9, 2010 FCE. He determined that appellant had a 22 percent impairment of the right upper extremity and found MMI as of August 3, 2010. OWCP then requested clarification and Dr. Manning stated that the August 9, 2010 findings were not reliable. Dr. Manning utilized the January 26, 2010 FCE findings to determine that appellant had no more than 12 percent impairment of the right arm, but noted MMI on August 3, 2010. As noted, the January 26, 2010 FCE was prior to the date of MMI and he did not explain this apparent inconsistency. As such, the medical evidence requires

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a (January 2010); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of MMI was the date of the audiologic examination used as the basis of the schedule award).

[9] *Mark A. Holloway*, 55 ECAB 321 (2004).

[10] *Robert Romano*, 53 ECAB 649 (2002).

clarification as it is insufficient to resolve the issues of MMI or whether appellant sustained more than a 12 percent impairment of the right arm.

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a proper manner.[11] The reports from Dr. Manning are insufficient to resolve the matter of appellant's right arm impairment. The case will be remanded for further development of the medical evidence and a reasoned opinion regarding the date of MMI and the degree of permanent impairment of the right arm. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: February 21, 2013
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

[11] *Melvin James*, 55 ECAB 406 (2004).