United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 12-43**
	)	**Issued: March 12, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Bluebell, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 11, 2011 appellant, through her attorney, filed a timely appeal from a July 5, 2011 schedule award 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 the case.

ISSUE

The issue is whether appellant established that she sustained more than a two percent impairment of the right upper extremity, for which she received a schedule award, or a ratable impairment of the right lower extremity.

On appeal, counsel asserts that OWCP did not follow appropriate procedures in selecting the impartial medical examiner. He also contends that the impartial medical examiner's opinion does not represent the weight of the medical evidence as he did not properly address appellant's right knee condition.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the third appeal before the Board in this case. By decision and order issued January 28, 2010,[2] the Board set aside a February 13, 2009 OWCP decision finding that appellant did not have more than one percent impairment of her right upper extremity and a zero percent impairment of the right lower extremity. The Board remanded the case to OWCP for further medical development. The Board found that the opinion of Dr. Barry Snyder, a Board-certified orthopedic surgeon and impartial medical examiner, was insufficiently rationalized and failed to evaluate the impairment of appellant's right thumb according to the tables and grading schemes of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, the A.M.A., *Guides*). The facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

On remand, OWCP referred appellant, the medical record and a statement of accepted facts to Dr. John T. Williams, Sr., a Board-certified orthopedic surgeon. It prepared an ME023 Appointment Schedule Notification form on April 22, 2010 for a May 18, 2010 appointment. In an April 22, 2010 letter, OWCP advised appellant of Dr. Williams' selection to resolve the outstanding conflict of medical evidence.[3] OWCP issued a second ME023 on May 18, 2010 for a May 25, 2010 appointment with Dr. Williams and notified appellant of the change in date. The record contains screen captures from the Physician Directory System (PDS) showing that OWCP contacted nine physicians other than Dr. Williams. Four of the physicians did not perform impairment ratings, three had no appointments available and two did not treat or evaluate the extremities.

In a May 25, 2010 report, Dr. Williams reviewed the medical record and a statement of accepted facts. On examination, he found 80 degrees elevation and abduction of the right shoulder and 40 degrees internal and external rotation, 40 degrees supination of the right elbow, 50 degrees dorsiflexion and volar flexion of the right wrist, 20 degrees ulnar deviation and 10 degrees radial deviation. Appellant declined to perform backward flexion maneuvers. Motor testing was 5+/5, subjective numbness over the posterior and lateral right deltoid, finger to nose and forearm rotating tests "basically within normal limits," negative Tinel's and Phalen's signs. Bilateral triceps, biceps and brachial radial reflexes were 2+ bilaterally. Dr. Williams opined that in March 2003 appellant sustained a painful right shoulder of undetermined etiology and a possible sprain/strain of the right shoulder girdle. He opined that appellant had fully recovered as she had no atrophy or atony of the right upper extremity. Dr. Williams also noted that medical reports showed increasing ranges of right shoulder motion from 2004 to 2005, in contrast to significantly restricted active motion on current examination. Using the Shoulder Regional Grid at page 401 of the A.M.A., *Guides*, Dr. Williams found a class 1 diagnosis-based impairment

[2] Docket No. 09-1260 (issued January 28, 2010). On September 9, 2004 Dr. Weiss, an attending osteopath, rated 27 percent impairment of the right arm and 11 percent impairment of the right leg due to the accepted injuries. Dr. Hanley, a Board-certified orthopedic surgeon and second opinion physician, found one percent impairment of the right arm and no impairment of the right leg. OWCP found a conflict of medical opinion between Dr. Weiss and Dr. Hanley, and initially selected Dr. Snyder, a Board-certified orthopedic surgeon, to resolve the conflict.

[3] By notice dated May 19, 2010, OWCP advised appellant that it proposed to suspend her compensation under 5 U.S.C. § 8123(d) as she failed to attend the May 18, 2010 examination. It rescheduled the examination and did not suspend appellant's compensation.

(CDX) for nonspecific soft tissue shoulder pain with no significant signs or symptoms at the point of maximum medical improvement, with a default value of two percent. He found a grade modifier for Functional History (GMFH) of 2 for a *Quick*DASH score of 50, a grade modifier for Clinical Studies (GMCS) of zero, resulting in a total modifier of -1, moving the default grade of C downward to B, equaling two percent upper extremity impairment.

On June 23, 2010 OWCP referred the medical record to an OWCP medical adviser for review. In a June 29, 2010 report, Dr. Christopher R. Brigham, Board-certified in occupational medicine and an OWCP medical consultant, noted accepted diagnoses of a right shoulder sprain, closed fracture of the right thumb, right elbow contusion and right knee contusion. He agreed with Dr. Williams that appellant attained maximum medical improvement on May 6, 2003 and had no impairment for the right thumb and right elbow. Dr. Brigham opined that, according to Table 15-5 of the sixth edition of the A.M.A., *Guides*,[4] appellant had a class 1 for a right shoulder contusion with residual findings at maximum medical improvement, equaling a default two percent impairment of the right upper extremity. Referring to Table 15-7, he found a functional history of 2 for symptoms with normal activity controlled by medication, a grade modifier for Physical Examination (GMPE) of 1 according to Table 15-8, for mild motion loss with slight atrophy and clinical studies of 1 for mild pathology on an unspecified study. Applying the net adjustment formula, OWCP's medical adviser found a modifier of +1, raising the class of diagnosis default grade from C to D, equaling two percent right upper extremity impairment. Regarding the right knee, Dr. Brigham stated that, as appellant did not mention knee pain to Dr. Williams, she had class 0 right lower extremity impairment according to Table 16-3 as she had no objective abnormal findings at maximum medical improvement.

By decision dated June 30, 2010, OWCP granted appellant a schedule award for an additional one percent impairment of the right upper extremity, for a total of two percent. It further found that she had no impairment of the right lower extremity. The period of the award ran from October 1 to 22, 2004, based on May 6, 2003 as the date of maximum medical improvement and the end date of the prior schedule award.

In a July 13, 2010 letter, counsel requested an oral hearing. By decision dated August 23, 2010, an OWCP hearing representative set aside OWCP's June 30, 2010 decision, finding that the case was not in posture for a hearing as Dr. Williams' opinion required clarification. The hearing representative found that Dr. Williams did not resolve the medical conflict as he did not examine appellant's right leg. The hearing representative directed that OWCP refer appellant back to Dr. Williams.

In an August 25, 2010 letter, OWCP requested that Dr. Williams examine appellant's right lower extremity and state whether she had any ratable impairment based on the A.M.A., *Guides*. It advised appellant of the examination in September 3, 13 and October 7, 2010 letters.[5] Dr. Williams submitted a November 9, 2010 report. On examination, he noted a normal gait, normal toe and heel walking bilaterally, equal circumference of both lower extremities, full and

[4] Table 15-5, page 401 of the sixth edition of the A.M.A., *Guides* is entitled "Shoulder Regional Grid: Upper Extremity Impairments."

[5] Dr. Williams' office rescheduled the appointment several times.

equal ranges of hip motion bilaterally, a subjective pulling sensation in the posterior right thigh when crossing the right leg over the left, a pulling pain in her right knee with straight leg raising and right knee flexion, equal circumference of both lower extremities, flexion of the right knee at 110, no swelling or heat, a negative grind test, no instability in right knee, no abnormalities of the right foot or ankle. Dr. Williams diagnosed a resolved probable right knee sprain, by history. He noted that April 1, 2003 right knee x-rays were normal. Dr. Williams stated that as he was "stationed at our main office, assigned on a Tuesday morning to go to our other hospital to perform Independent Medical Evaluations, and in so doing, I do not have the records." Referring generally to the A.M.A., *Guides*, he opined that appellant had no permanent impairment of the right leg as she had an entirely normal clinical examination and no abnormal studies of record.[6]

By decision dated January 4, 2011, OWCP denied appellant's claim for a schedule award for the right lower extremity. It found that the weight of the medical evidence, as represented by Dr. Williams, demonstrated no ratable impairment of the right leg.

In a January 11, 2011 letter, counsel requested an oral hearing, held April 13, 2011. He submitted an April 1, 2011 report from Dr. Weiss, updating his September 9, 2004 calculations to conform to the sixth edition of the A.M.A., *Guides*. Dr. Weiss did not reexamine appellant. Referring to Table 15-34, page 475 of the A.M.A., *Guides*, Dr. Weiss found three percent impairment of the right arm due to flexion limited to 130 degrees and another three percent impairment due to abduction limited to 130 degrees. He added these impairments to total six percent, resulting in a grade modifier for physical examination of 1 according to Table 15-35 page 477. Dr. Weiss assessed a grade modifier for functional history of 2 for difficulty with personal care according to Table 15-7, page 406, raising the right arm impairment to five percent according to Table 15-36, page 477. He found a right upper extremity due to lost range of motion, after net adjustment, of six percent. Dr. Weiss also assessed class 1 right de Quervain's tenosynovitis, with a default rating of one percent under Table 15-3, page 395. Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), he found a net adjustment of zero. Dr. Weiss noted that the "[r]ight upper extremity impairment after net adjustment" equaled one percent, for a combined right upper extremity impairment of seven percent. He also assessed one percent impairment to the right leg due to a class 1 right knee contusion with no grade modifiers, according to Table 16-3, page 509.

At the hearing, counsel asserted that OWCP did not properly utilize the PDS in selecting Dr. Williams as impartial medical examiner, as the doctor bypass screen captures were undated. He also contended that Dr. Williams did not provide a complete impairment rating for appellant's right arm. Alternatively, counsel asserted that Dr. Weiss' April 1, 2011 report created a conflict with Dr. Williams' opinion. Counsel submitted appellant's May 3, 2011 statement contending that Dr. Williams told her not to perform maneuvers that were uncomfortable for her during his examination.

By decision dated July 5, 2011, an OWCP hearing representative affirmed OWCP's June 30 and January 4, 2011 decisions. She found that Dr. Williams' opinion as impartial medical examiner was sufficiently detailed and well rationalized to establish that appellant had a

[6] An OWCP medical adviser concurred with Dr. Williams' report on December 12, 2010.

two percent impairment of the right upper extremity and no ratable impairment of the right lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides,* published in 2008.[9]

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).[10] Under the sixth edition, 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.[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.[12] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,[13] no claimant is entitled to such an award.[14] However, in 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of FECA includes the extremities, a

[7] 5 U.S.C. § 8107.

[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* (6th ed. 2008), page 3, Section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] A.M.A., *Guides* (6th ed. 2008), pp. 494-531.

[12] *Henry B. Floyd, III*, 52 ECAB 220 (2001).

[13] FECA specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[14] *Thomas Martinez*, 54 ECAB 623 (2003).

claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[15]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[16] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[17] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[18]

ANALYSIS

Appellant claimed a schedule award for permanent impairment of the right upper and lower extremities caused by an accepted right shoulder strain, right thumb fracture, right elbow contusion and right knee contusion sustained on March 25, 2003. On September 9, 2004 Dr. Weiss, an attending osteopath, rated 27 percent impairment of the right arm and 11 percent impairment of the right leg due to the accepted injuries. Dr. Hanley, a Board-certified orthopedic surgeon and second opinion physician, found one percent impairment of the right arm and no impairment of the right leg. OWCP found a conflict of medical opinion between Dr. Weiss and Dr. Hanley, and initially selected Dr. Snyder, a Board-certified orthopedic surgeon, to resolve the conflict. As Dr. Snyder's reports were insufficient to resolve the conflict, OWCP selected Dr. Williams, a Board-certified orthopedic surgeon, as the new impartial medical examiner.

The record contains Form ME023 appointment schedule notifications dated April 22 and May 18, 2010. Print screens from the PDS system document that OWCP contacted nine physicians who could not perform the requested evaluation, setting forth the reasons for their refusal. The Board finds that the Form ME023 and print screens establish that OWCP properly utilized the PDS system to select Dr. Williams as impartial medical examiner.

Dr. Williams was asked to provide an impairment rating of appellant's right upper extremity and right lower extremity. Regarding the right arm, Dr. Williams submitted a May 25, 2010 report finding two percent impairment. He based his opinion on the medical record and statement of accepted facts. Dr. Williams applied the A.M.A., *Guides* to his findings on clinical examination. Referring to the Shoulder Regional Grid at page 401 of the A.M.A., *Guides,* Dr. Williams found a class 1 diagnosis for nonspecific shoulder pain with no significant signs or symptoms at maximum medical improvement, with a default value of two percent. He noted a functional history of 2 for a *Quick*DASH score of 50 and clinical studies of zero. Applying the

[15] *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

[16] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[17] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[18] *Anna M. Delaney*, 53 ECAB 384 (2002).

net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) resulted in a modifier total of -1, moving the default grade from C to B, equaling two percent impairment of the right upper extremity. Dr. Williams explained that appellant's shoulder motion was voluntarily restricted and therefore could not be used as a rating element. He noted that chronically limited motion would have resulted in atrophy and atony of the muscles in the right arm and shoulder girdle, whereas appellant had normal and symmetrical muscle bulk and tone. Dr. Brigham reviewed Dr. Williams' report on June 29, 2010. The medical adviser concurred with Dr. Williams' class for the diagnosis and functional history ratings, but found that appellant had a clinical study of 1 for findings on an unspecified study and a physical examination of 1 for mild motion loss. Applying the net adjustment formula, this also resulted in two percent impairment of the right arm.

Pursuant to an April 13, 2011 oral hearing, appellant contended that an April 1, 2011 report from Dr. Weiss, an attending osteopathic physician, substantiated seven percent impairment of the right arm due to limited active shoulder motion using the A.M.A., *Guides*.

The Board finds that Dr. Williams' impairment rating of appellant's right upper extremity is entitled to the weight of the medical evidence. It was based on the medical record and statement of accepted facts, and utilized the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides*.[19] Dr. Williams provided medical rationale explaining why appellant's voluntarily limited right shoulder motion could not constitute more than one percent impairment of the right arm. Dr. Weiss did not set forth objective findings showing objectively restricted motion of the right shoulder. There were no new findings after 2004, other than an application of the sixth edition. OWCP's July 5, 2011 decision finding that appellant has two percent impairment of the right upper extremity was proper under the facts and circumstances of this case.

Regarding the right leg, Dr. Williams submitted a November 9, 2010 report noting clinical findings; but stated that he did not have access to the medical record during the examination or while preparing his report. He explained that he was out at a hospital and had left the case record in his office. The Board finds that as Dr. Williams did not base his impairment rating of the right lower extremity on the full medical record, his opinion requires clarification. Therefore, the case will be returned to OWCP to obtain Dr. Williams' opinion regarding the appropriate percentage of right leg impairment, based on the medical record. Following this and any other development deemed necessary, OWCP will issue an appropriate decision in the case.

Appellant may request a schedule award or increased schedule award regarding the right upper extremity, based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

On appeal, counsel asserts that OWCP did not follow appropriate procedures in selecting Dr. Williams. As stated above, the record demonstrates that OWCP properly utilized the PDS system. Counsel also contends that Dr. Williams did not properly address appellant's right knee

[19] *Id.*

condition. As stated above, the case will be returned to OWCP for clarification of Dr. Williams' opinion regarding the right lower extremity.

CONCLUSION

The Board finds that appellant has not established that she sustained more than two percent impairment of the right arm, for which she received a schedule award. The Board further finds that the case is not in posture for a decision regarding any impairment to the right leg. The case will be returned to OWCP for further development on that issue.

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part regarding the right upper extremity, and set aside in part regarding the percentage of impairment to the right lower extremity. The case is returned to OWCP for further action consistent with this decision.

Issued: March 12, 2013
Washington, DC

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

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

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