United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 13-176**
	)	**Issued: March 25, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Ingleside, TX, 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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 31, 2012 appellant filed a timely appeal from an October 15, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying an additional schedule award. 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 schedule award decision.

ISSUE

The issue is whether appellant has more than a 15 percent permanent impairment of the left upper extremity.

FACTUAL HISTORY

On April 12, 2002 appellant, then a 48-year-old letter carrier, sustained a strain in his left shoulder and neck in the performance of duty. OWCP accepted the claim for a sprain of the left shoulder and upper arm, left shoulder bursitis and a sprain of the rotator cuff. On September 5,

[1] 5 U.S.C. § 8101 *et seq.*

2002 appellant underwent a debridement of a partial thickness rotator cuff tear, a synovectomy and debridement of an anterior labral tear and a subacromial decompression and distal clavicular excision.

In a report dated November 18, 2002, Dr. Charles W. Breckenridge, an attending a Board-certified orthopedic surgeon, utilized the fifth edition of the American Medical Association., *Guides to the Evaluation of Permanent* Impairment (5th ed. 2001) (A.M.A., G*uides*). He found that appellant had an eight percent permanent impairment of the left arm due to loss of shoulder motion and a three percent impairment due to weakness. OWCP's medical adviser reviewed Dr. Breckenridge's report and determined that appellant had a 10 percent impairment for his distal clavical resection and a 5 percent impairment due to loss of range of motion for the shoulder, which he combined to find a 15 percent left upper extremity impairment. He noted that loss of strength was included in the range of motion rating.

By decision dated July 18, 2003, OWCP granted appellant a schedule award for a 15 percent impairment of the left upper extremity.

On September 30, 2005 appellant underwent an arthroscopy with debridement of the anterior and superior labrum with a synovectomy and a debridement of a partial thickness rotator cuff tear with chondroplasty. He accepted a modified position with the employing establishment in October 2005.[2]

On May 9, 2011 OWCP referred appellant to Dr. Walter Del Gallo, a Board-certified orthopedic surgeon, to determine the extent of any injury-related disability.[3] In a report dated May 26, 2011, Dr. Del Gallo found that he had residuals of his accepted work injury but could work with restrictions. He explained to appellant that he rated impairments using the fourth edition of the A.M.A., *Guides*.

On September 16, 2011 appellant filed a claim for an increased schedule award. In an impairment evaluation dated October 13, 2011, Dr. Breckenridge diagnosed status post left shoulder arthroscopy with debridement of a partial thickness rotator cuff tear, subacromial decompression and distal clavicectomy. He measured range of motion of the left shoulder as 155 degrees elevation, 50 degrees external rotation and internal rotation to L3. Dr. Breckenridge found weakness with abduction and external rotation but that appellant was intact neurologically with no "obvious muscular atrophy." Applying the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as a class 1 partial thickness rotator cuff tear which yielded a default

[2] In a November 14, 2005 impairment evaluation, Dr. Breckenridge found that appellant had a six percent left upper extremity impairment due to loss of shoulder motion and a three percent impairment due to weakness, for a nine percent total left upper extremity impairment under the fifth edition of the A.M.A., *Guides*. OWCP's medical adviser reviewed Dr. Breckenridge's report and determined that he had a 10 percent impairment for his distal clavicle resection and a 6 percent impairment due to loss of motion, for a 15 percent left upper extremity impairment. By decision dated February 22, 2006, OWCP denied appellant's claim for an increased schedule award. It found that he had no more than the previously awarded 15 percent impairment of the left upper extremity.

[3] On November 13, 2010 the employing establishment withdrew appellant's limited-duty employment. Appellant returned to modified work on June 18, 2011. By decision dated September 20, 2011, OWCP found that he received a $3,460.24 overpayment of compensation because he received compensation after he returned to work.

value of three under Table 15-5 on page 402. Dr. Breckenridge applied grade modifiers of two for Functional History (GMPH) and Physical Examination (GMPE) and a grade modifier of one for Clinical Studies (GMCS). He utilized the new adjustment formula and moved the default value two places to find a five percent impairment of the right shoulder.

On April 4, 2012 OWCP's medical adviser reviewed Dr. Breckenridge's report and concurred with his rating. He noted that, as appellant previously received a 15 percent permanent impairment for the left shoulder, he was not entitled to an additional schedule award.

By decision dated April 6, 2012, OWCP denied appellant's claim for an increased schedule award.

On May 4, 2012 appellant requested a telephone hearing. At the telephone hearing, held on August 8, 2012, he contended that Dr. Del Gallo found a permanent impairment. Appellant also argued that Dr. Breckenridge found that he had a five percent impairment greater than previously awarded.

In an impairment evaluation dated August 30, 2012, Dr. Thomas Martens, an osteopath, diagnosed a left shoulder sprain and status post surgery left rotator cuff syndrome. Using the diagnosis of acromioclavicular (AC) joint disease after a distal clavicle resection, set forth in the shoulder regional grid in Table 15-5 on page 403 of the sixth edition of the A.M.A., *Guides,* he found a default value of 10 percent. After applying grade modifiers, Dr. Martens determined that appellant had a 12 percent left upper extremity impairment.

In a decision dated October 15, 2012, OWCP's hearing representative affirmed the April 6, 2012 decision. He found that appellant had not submitted medical evidence to show more than the 15 percent impairment previously awarded.

On appeal, appellant contends that OWCP sent him to Dr. Del Gallo but then rejected his opinion as it was under the fourth edition of the A.M.A., *Guides*. He questioned OWCP's hearing representative's neutrality given that he worked at the Department of Labor with OWCP.

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 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

It is well established that benefits payable under section 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment would duplicate in whole or in part the compensation paid for the prior impairment.[9]

ANALYSIS

OWCP accepted that appellant sustained a left shoulder and arm sprain, left shoulder bursitis and a sprain of the rotator cuff due to an April 12, 2002 employment injury. On September 5, 2002 appellant underwent a surgical repair a partial thickness rotator cuff tear, a distal clavicular excision and subacromial decompression and on September 30, 2005 he underwent a debridement of the anterior and superior labrum with a synovectomy and a debridement of a partial thickness rotator cuff tear.

In a decision dated July 18, 2003, OWCP granted appellant a schedule award for a 15 percent permanent impairment of the left upper extremity. It based the rating on his distal clavicle resection and loss of range of motion pursuant to the fifth edition of the A.M.A., *Guides*.

On September 16, 2011 appellant filed a claim for an increased schedule award. In an October 13, 2011 impairment evaluation, Dr. Breckenridge diagnosed a history of a left shoulder arthroscopy with debridement of a partial thickness rotator cuff tear, subacromial decompression and distal clavicectomy. He measured range of motion of the shoulder and found that he had some weakness with abduction and external rotation but no neurological abnormalities or atrophy. Dr. Breckenridge identified a class 1 impairment due to a partial thickness rotator cuff tear using the shoulder regional grid set forth in Table 15-5, which yielded a default value of three percent. After determining the impairment class and default grade, he considered whether there were any applicable grade adjustments for functional history, physical examination and clinical studies. Dr. Breckenridge found a grade modifier of two for functional history and physical examination and a grade modifier of one for clinical studies. Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) or (2-1)

[6] *Id*. at § 10.404(a).

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

[8] A.M.A., *Guides* 494-531.

[9] *See T.S.*, Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

+ (2-1) + (1-1) = 2, yielded an adjustment two places to the right, or a five percent left upper extremity impairment. OWCP's medical adviser agreed with Dr. Breckenridge's rating. He noted that there was no evidence to show that appellant had more than the previously awarded 15 percent left upper extremity impairment.

OWCP denied appellant's request for an additional schedule award as his current left upper extremity impairment was 5 percent and he had previously received an award for 15 percent. The prior award was based on his distal clavicle resection and loss of range of motion of the shoulder. In applying the Diagnosis-Based Impairment under Table 15-5 relevant to rating the shoulder, the A.M.A., *Guides* provides that in most cases only one diagnosis in a region will be appropriate and if a patient has two significant diagnoses, the claim examiner should use the diagnosis with the highest impairment in that region.[10] An impairment due to loss of range of motion or a distal clavicle resection is not combined with an impairment for a partial thickness rotator cuff tear. Consequently, the finding of a five percent impairment based on his rotator cuff tear duplicates the prior award.[11] Appellant also submitted an August 30, 2012 report from Dr. Martens finding that he had a 12 percent impairment due to AC joint disease after a distal clavicle resection using Table 15-5 of the sixth edition of the A.M.A., *Guides*. Again, this duplicates the prior award he received for his shoulder. The Board finds that the evidence does not support a current impairment greater than the 15 percent previously awarded.

On appeal, appellant argues that OWCP should give weight to Dr. Del Gallo's report as he was a referral physician. Dr. Del Gallo, however, did not provide any impairment rating but merely informed him that he utilized the fourth edition when he rated impairments. He evaluated appellant to determine whether he had any further employment-related disability. The report of Dr. Del Gallo is not relevant to the issue of permanent impairment.

Appellant also contends that OWCP's hearing representative was not neutral as he worked for OWCP. The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulation at section 10.121.[12] No evidence of bias was submitted.

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 no more than a 15 percent permanent impairment of the left upper extremity.

[10] A.M.A., *Guides* 497.

[11] *See E.V.*, Docket No. 11-2117 (issued May 15, 2012).

[12] *See* 20 C.F.R. § 10.121.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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