United States Department of Labor
Employees' Compensation Appeals Board

R.V., Appellant	)	
and	)	**Docket No. 16-1037**
	)	**Issued: November 14, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Carol Stream, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 20, 2016 appellant filed a timely application for review from a January 11, 2016 merit 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.

ISSUE

The issue is whether appellant has more than one percent permanent impairment of his right upper extremity, for which he received a schedule award.

On appeal, appellant argues that his cervical spinal impairment ought to entitle him to a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 23, 2012 appellant, then a 46-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging a "traumatic injury" as a result of duties of his federal employment, including lifting, pushing, standing, and dispatching for five days or more per week. On April 24, 2012 OWCP accepted appellant's claim as a traumatic injury that occurred on January 25, 2012 and accepted conditions including right shoulder joint pain and right-sided disturbance of skin sensation. On June 19, 2012 it accepted a temporary aggravation of syndromes affecting the right cervical region; right-sided disturbance of skin sensation; and right brachial neuritis or radiculitis. By decision dated June 19, 2012, OWCP amended its earlier acceptance to reflect that appellant's claim was accepted as an occupational disease, not a traumatic injury. It listed accepted conditions including right-sided disturbance of skin sensation, right cervical radiculopathy, and right shoulder joint pain.

On February 8, 2012 Dr. Rajit Shetty, Board-certified in neuroradiology, examined the results of a magnetic resonance imaging (MRI) scan test of appellant's cervical spine. He noted impressions of moderate bilateral neural foraminal narrowing at C5-6 and C6-7, as well as mild right-sided neural foraminal narrowing at C3-4.

On July 17, 2012 Dr. John Lavaccare, Board-certified in neurology, examined the results of an electromyography test and a nerve conduction study. He concluded that there was electrophysiologic evidence of mild chronic bilateral C6-7 radiculopathy, more notable on the right than on the left.

On September 5, 2013 Dr. Eugene Lopez, a Board-certified orthopedic surgeon, examined appellant and noted subjective complaints of neck pain, no paraspinal tenderness, a normal cervical spine range of motion, normal upper extremity strength, normal reflexes, and negative Spurling's and Hoffman's tests.

In a report dated September 24, 2013, Dr. Lopez examined appellant and calculated a permanent impairment rating for his neck and right shoulder according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He referenced the Regional Impairment Cervical Regional Grid on page 564, Table 17-2. Dr. Lopez found that appellant had class 3 diagnostic criteria as a result of a diagnosis of disc herniation at multiple levels with residual radiculopathy at a single appropriate level. He noted a grade C default rating of 19 percent, with a functional history adjustment of grade modifier 1 due to a pain disability questionnaire score of 48. Dr. Lopez determined that appellant had a physical examination grade modifier of 0 and no clinical studies adjustment. His final percentage of permanent impairment for appellant's cervical region was 15 percent. As for appellant's right shoulder, Dr. Lopez referenced the Regional Impairment Shoulder Regional Grid on page 402, Table 15-5. He noted that appellant had a class 1 diagnostic criteria as a result of a diagnosis of impingement syndrome. Dr. Lopez noted a grade C default rating of three percent, with no functional history adjustment, no clinical studies adjustment, and a grade modifier of 1 for physical examination due to positive impingement tests. His final percentage of permanent impairment for appellant's right shoulder was one percent.

Appellant submitted a September 23, 2013 report from Brian Trembly, a physical therapist.

On December 23, 2013 appellant requested a schedule award (Form CA-7).

On May 8, 2014 OWCP forwarded Dr. Lopez's report along with a statement of accepted facts (SOAF) to a district medical adviser (DMA) for review. In a May 12, 2014 report, the DMA noted that there was no accepted cervical spine condition in this case. He further noted that physical examination of appellant's right upper extremity was normal and the MRI scan findings were nonspecific. The DMA concluded that there was no compelling evidence that appellant had radiculopathy, and that as such there was no objective basis for assigning an impairment rating.

By decision dated June 3, 2014, OWCP denied appellant's claim for a schedule award. It found that the report of September 23, 2013 was to be disregarded as it did not appropriately apply the sixth edition of the A.M.A., *Guides* to appellant's accepted conditions. OWCP determined that the medical evidence failed to demonstrate a measureable impairment.

In an addendum report dated June 18, 2014, Dr. Lopez disputed the DMA's report of May 12, 2014. He noted that the DMA failed to consider the diagnostic tests of July 17, 2012, which indicated evidence of mild radiculopathy. Dr. Lopez noted that he maintained that appellant had 15 percent cervical impairment. He noted that appellant's impingement syndrome indicated one percent right upper extremity impairment.

On July 2, 2014 appellant requested a telephonic hearing before an OWCP hearing representative.

By decision dated January 14, 2015, a hearing representative found that appellant had submitted sufficient medical evidence to warrant further development of the case file. He noted that, due to this disposition, the case file was not in posture for a hearing. The hearing representative set aside the June 3, 2014 decision and remanded the case for further development of the medical evidence.

OWCP forwarded Dr. Lopez's June 18, 2014 addendum report, along with the case file and a SOAF, to a DMA for review. In a report dated February 13, 2015, the DMA adjusted appellant's shoulder regional impairment rating to one percent. He noted that using Table 15-5 on page 402 of the sixth edition A.M.A., *Guides*, appellant's diagnosis was a class 1, grade C, with a default value of three percent. The DMA found a functional history modifier of 0 based on a *Quick*DASH score of 18, a physical examination modifier of 1 based on Dr. Lopez's September 24, 2013 report, and a clinical studies modifier of 0. The net adjustment moved appellant's grade to a grade A, and using Table 15-5, appellant's final impairment rating was adjusted to one percent permanent impairment. The DMA also calculated appellant's cervical spinal impairment at zero percent impairment. He used the sixth edition of the A.M.A., *Guides* along with *The Guides Newsletter*, July/August 2009, in order to perform an impairment rating for appellant's cervical spine. The DMA noted that appellant had normal sensation and normal motor strength, which under Proposed Table 1 on page 4 of *The Guides Newsletter*,

July/August 2009 would result in zero percent impairment. He noted that Dr. Lopez had not used the newsletter in his calculation of impairment.

By decision dated May 12, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of the right upper extremity.

On May 22, 2015 appellant requested an oral hearing before an OWCP hearing representative. The hearing was held on October 30, 2015. At the hearing, appellant noted that he retired effective February 1, 2014. Appellant stated that he believed the DMA did not sufficiently address the "medical part" of his physicians' reports, relying entirely on the "mechanical part" of the examinations. He argued that a conflict of medical opinion existed between his physicians and the DMA. The hearing representative explained that schedule awards solely for the spine are not available under FECA, but that schedule awards based on spinal injuries affecting the extremities were compensable. He further noted that the 15 percent impairment rating was solely for the cervical spine, and was not calculated as an impairment of the extremities resulting from a spinal injury.

By decision dated January 11, 2016, the hearing representative affirmed OWCP's May 12, 2015 decision. He found that appellant had not submitted sufficient medical evidence to establish that his right upper extremity impairment rating should be altered based on an impairment of the cervical spine.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and its implementing federal regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions, and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[4] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5] For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.[6] It is well established that in determining the amount of a schedule award for a member of the body that sustained an

[2] *Id*. at § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[5] *Id.*

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

employment-related permanent impairment, preexisting impairments of the body are to be included.[7]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[8] A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA.[9] Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[10]

In 1960, amendments to FECA modified the schedule award provisions 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. Therefore, as the schedule award provisions of FECA include the extremities, a 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.[11]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that The *Guides* Newsletter, *Rating Spinal Nerve Extremity Impairment* Using the Sixth Edition (July/August 2009) is to be applied.[12] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[13] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[14]

[7] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a.3 (January 2010). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[8] *Pamela J. Darling*, 49 ECAB 286 (1998).

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

[10] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[11] *Supra* note 9.

[12] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[13] *D.S.*, Docket No. 14-12 (issued March 18, 2014).

[14] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

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 the medical adviser providing rationale for the percentage of impairment specified.[15]

ANALYSIS

The Board finds that the medical evidence of record does not establish any additional impairment beyond the one percent permanent impairment of appellant's right upper extremity, for which he received a schedule award.

On September 24, 2013 Dr. Lopez examined appellant and calculated a permanent impairment rating for his neck and right shoulder according to the sixth edition of the A.M.A., *Guides*. He referenced the Regional Impairment Cervical Regional Grid on page 564, Table 17-2. Dr. Lopez stated that appellant had a class 3 diagnostic criteria as a result of a diagnosis of disc herniation at multiple levels with residual radiculopathy at a single appropriate level. He noted a grade C default rating of 19 percent, with a functional history adjustment of grade modifier 1 due to a pain disability questionnaire score of 48. Dr. Lopez determined that appellant had a physical examination grade modifier of 0 and no clinical studies adjustment. His final percentage of permanent impairment for appellant's cervical region was 15 percent.

In an addendum report of June 18, 2014, Dr. Lopez disputed the DMA's report of May 12, 2014. He noted that the DMA failed to consider the diagnostic tests of July 17, 2012, which indicated evidence of mild radiculopathy. Dr. Lopez noted that he maintained that appellant had 15 percent cervical impairment. He stated that appellant's impingement syndrome indicated one percent permanent right upper extremity impairment.

In a report dated February 13, 2015, a DMA adjusted appellant's shoulder regional impairment rating to one percent permanent impairment. He noted that using Table 15-5 on page 402 of the sixth edition of the A.M.A., *Guides*, appellant's diagnosis was a class 1, grade C, with a default value of three percent. He found a functional history modifier of zero based on a *Quick*DASH score of 18, a physical examination modifier of 1 based on Dr. Lopez's September 24, 2013 report, and a clinical studies modifier of 0. The net adjustment moved appellant's grade to a grade A, and using Table 15-5, appellant's final impairment rating was adjusted to one percent permanent impairment. The DMA also calculated appellant's cervical spinal impairment at zero percent impairment. He used the sixth edition of the A.M.A., *Guides* along with *The Guides Newsletter*, July/August 2009, in order to perform an impairment rating for appellant's cervical spine. The DMA noted that appellant had normal sensation and normal motor strength, which under Proposed Table 1 on page 4 of *The Guides Newsletter*, July/August 2009 would result in a zero percent impairment. He noted that Dr. Lopez had not used *The Guides Newsletter* in his calculation of impairment.

The Board finds that the DMA's rating properly utilized the A.M.A., *Guides* and represents the weight of medical opinion evidence. The DMA explained the differences between

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

his impairment rating calculations and Dr. Lopez's with citations to the A.M.A., *Guides* and *The Guides Newsletter*, July/August 2009 for his estimate and adjustments based on the functional history, clinical studies, and physical examination adjustments, and noted the areas in which Dr. Lopez's reports did not comport with these reference materials. He utilized the proper method for measuring impairments of the extremities due to spinal injuries in calculating appellant's zero percent additional impairment beyond one percent of the right upper extremity attributable to a cervical spine condition. The Board notes that because schedule awards are not available for spinal impairments themselves, but are available for impairment to the extremities resulting from spinal impairments, the DMA used the proper method for calculating appellant's percentage of impairment.[16]

Dr. Lopez's reports, in contrast, do not provide a percentage of impairment to the extremities attributable to a spinal condition, but instead present only a percentage of impairment for the cervical spine itself. As such, his reports had diminished probative value on the issue of an impairment of the extremities, and OWCP properly relied upon the DMA's report in issuing its May 12, 2015 schedule award decision.

Therefore, the Board finds that appellant has no more than one percent permanent impairment of his right upper extremity, for which he has received a schedule award.

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 one percent permanent impairment of his right upper extremity, for which he received a schedule award.

[16] *See supra* notes 8 to 11.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board