

**United States Department of Labor
Employees' Compensation Appeals Board**

S.B., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
MONTGOMERY VETERANS MEDICAL
CENTER, Jackson, MS, Employer

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Docket No. 12-157
Issued: December 19, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2011 appellant filed a timely appeal from a June 23, 2011 merit decision and a July 29, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. The record also contains a September 13, 2011 merit decision in which OWCP changed the pay rate of appellant's original schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

ISSUES

The issues are: (1) whether appellant sustained more than five percent right upper extremity impairment, for which she received a schedule award; (2) whether OWCP properly

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant requested an oral argument. On October 5, 2012 the Clerk of the Board contacted appellant and inquired as to whether she still had a continuing desire for an oral argument in Washington, DC. Appellant stated that she did not desire an oral argument; thus, the Board will decide the appeal on the record.

denied her request for reconsideration; and (3) whether it properly recalculated the pay rate of appellant's original schedule award.

FACTUAL HISTORY

On September 11, 2008 appellant, then a 40-year-old nurse, injured her right shoulder while assisting a patient. OWCP accepted the condition of right-sided rotator cuff tear and paid appropriate benefits. On February 5, 2009 appellant underwent surgery for a right shoulder anterior partial rotator cuff tear including extensive subacromial bursitis and labral fraying. She returned to modified duty.

On July 2, 2009 appellant requested a schedule award. In a May 18, 2009 report, Dr. Jason A. Craft, a Board-certified orthopedic surgeon, advised that she was three and a half months post surgery and was working, with soreness and swelling at the end of the day. He noted appellant's shoulder range of motion and advised that she had "4+/5" strength. Dr. Craft noted that she had reached maximum recovery from physical therapy and would have a functional capacity evaluation. In a June 16, 2009 report, he stated that appellant had pain and difficulty with elevation after a patient grabbed her right arm and shook it. Dr. Craft listed an impression of right shoulder rotator cuff strain. On June 25, 2009 appellant underwent a functional capacity evaluation, which determined that she was capable of performing medium level work eight hours a day.

On July 20, 2009 OWCP's medical adviser reviewed appellant's medical record and opined that maximum medical improvement was reached on May 18, 2009. He noted that she had arthroscopic debridement for anterior superior labral fraying, a 30 percent partial thickness rotator cuff tear and a subacromial bursa on February 25, 2009 with residual postoperation loss of motion and slight weakness. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), the medical adviser rated four percent right upper extremity impairment. Under Table 15-34, page 475, he found forward evaluation or flexion 155 degrees equaled three percent impairment; internal rotation 75 degrees equaled one percent impairment; and that this totaled four percent right arm impairment.

By decision dated August 7, 2009, OWCP granted a schedule award for four percent impairment to the right arm. The date of maximum medical improvement was May 18, 2009 and the pay rate of September 11, 2008 was used. On August 24, 2009 OWCP reissued the schedule award decision with a corrected payment amount.

On August 13, 2009 OWCP received a July 31, 2009 report from Dr. Craft, who summarized appellant's findings post surgery. Under the A.M.A., *Guides*, appellant had three percent impairment for a partial thickness rotator cuff tear due to functional modifiers and some persisting continued pains. No impairment calculations were provided. In an appeal request form dated October 25, 2009, appellant requested reconsideration. A May 19, 2009 physical therapy report was received together with Dr. Craft's July 31, 2009 report.

By decision dated November 12, 2009, OWCP denied appellant's reconsideration request on the basis the evidence submitted was insufficient to warrant a merit review.

On March 3, 2010 appellant underwent authorized surgery for a right shoulder rotator cuff tear and labral fraying. She returned to full-time work June 1, 2010. OWCP accepted the condition of complete rotator cuff rupture and paid appropriate benefits.

In a July 19, 2010 report, Dr. Craft stated that appellant had very good passive range of motion of her shoulder with active only to about 110 degrees. He noted break away weakness with spasm in her paraspinal muscles with rotation and some nondermatomal diffuse numbness in her hand. Good strength was noted throughout appellant's rotator cuff with no swelling. Dr. Craft opined that she reached maximum medical improvement. Appellant underwent a work functional capacity evaluation on August 23 and 24, 2010. In a September 10, 2010 report, Dr. Craft advised that the functional capacity examination showed she was able to perform sedentary level work with restrictions of no lifting or carrying more than 15 pounds. Under the A.M.A., *Guides*, he opined that appellant had five percent impairment for her rotator cuff tear which stayed the same throughout grade modifier adjustments. No impairment calculations were provided.³

On March 25, 2011 appellant filed a claim for an increased schedule award.

In a June 15, 2011 report, OWCP's medical adviser reviewed appellant's medical record including Dr. Craft's September 10, 2010 report and the functional capacity evaluation reports of August 23 and 24, 2010. He stated that she reached maximum medical improvement July 19, 2010. The medical adviser noted that the rotator cuff tear was originally a partial tear with debridement on February 25, 2009 which progressed to a full thickness tear that required repair with a bone anchor and sutures on March 3, 2010 with excellent stable repair of the right shoulder rotator cuff. He agreed that appellant had five percent impairment due to rotator cuff injury, full thickness tear right rotator cuff post repair of right shoulder. Under Table 15-5, page 403, the medical adviser opined that she had class 1 or five percent default grade C for rotator cuff injury, full thickness tear. He found that appellant had grade modifiers of one for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). Under the net adjustment formula of (GMFH – diagnosed condition (CDX)) (1-1) + (GMPE – CDX) (1-1) + (GMCS – CDX) (1-1), the medical adviser found a zero net. As appellant previously received a four percent award for the partial rotator cuff repair, he subtracted that amount from the five percent impairment and found she had an additional one percent impairment of her right arm.

By decision dated June 23, 2011, OWCP granted appellant a schedule award for an additional one percent impairment. The date of maximum medical improvement was noted to be July 19, 2010 and compensation was calculated with a pay rate date of March 3, 2010.

On an appeal request form dated July 7, 2011, appellant requested reconsideration. No evidence was submitted with her request.

³ On October 20, 2010 appellant advised OWCP that she would like to change her physician from Dr. Craft to Dr. William Geissler, a Board-certified orthopedic surgeon. OWCP authorized the change.

By decision dated July 29, 2011, OWCP denied appellant's reconsideration request as her letter neither raised substantive legal questions nor included new and relevant evidence.⁴

LEGAL PRECEDENT -- ISSUE 1

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.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, the evaluator identifies the impairment class for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.⁹

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.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained the conditions of right-sided rotator cuff tear and right shoulder rotator cuff rupture and paid appropriate benefits, including two surgical procedures. On August 23, 2009 it granted her a schedule award for four percent impairment of her right upper extremity.

⁴ By decision dated September 13, 2011, OWCP amended the schedule award decision of August 24, 2009 to reflect a corrected pay rate which resulted in OWCP paying appellant an additional \$38.08 to reflect the proper pay rate. On appeal, appellant has not appealed this decision and only disputes the percentage of impairment determined by OWCP. OWCP also issued a September 19, 2011 decision denying wage-loss compensation from April 28 to 29, 2011. Appellant has also not appealed this decision.

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁶ A. *George Lampo*, 45 ECAB 441 (1994).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ 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.

⁹ *Id.* at pp. 494-531.

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

Appellant claimed an increased schedule award on March 25, 2011. In support of her claim, she submitted July 19 and September 10, 2010 reports from Dr. Craft, who indicated that appellant reached maximum medical improvement July 19, 2010. In his September 10, 2010 report, Dr. Craft indicated that the functional capacity examination showed that appellant was able to perform sedentary level work with restrictions. Under the A.M.A., *Guides*, he opined that she had five percent impairment for her rotator cuff tear which stayed the same throughout her grade modifier adjustments. However, Dr. Craft did not provide any impairment calculations or indicate what tables were used in the A.M.A., *Guides*.

On June 15, 2011 OWCP's medical adviser applied Table 155, page 403 of the A.M.A., *Guides* to Dr. Craft's findings. He opined that appellant had class 1 or five percent default grade C for rotator cuff injury, full thickness tear. The medical adviser found that appellant had grade modifiers of one for GMFH, GMPE and GMCS. He utilized the net adjustment formula of $(GMFH - CDX) (1-1) + (GMPE - CDX) (1-1) + (GMCS - CDX) (1-1)$ and found a zero net adjustment. While he assessed five percent right upper extremity impairment, the medical adviser found appellant was entitled to an additional one percent right upper extremity impairment as she was previously awarded four percent right upper extremity impairment for her shoulder condition. When a current impairment duplicates a prior impairment, the schedule award benefits are reduced by the period of compensation paid under the schedule award for an earlier injury.¹¹ As appellant previously received four percent right upper extremity impairment and the evidence supports she is entitled to five percent right upper extremity impairment, she is only entitled to an additional one percent right upper extremity impairment.

The Board finds that OWCP properly relied on Dr. Craft's clinical findings, as interpreted by OWCP's medical adviser, to find that appellant had an additional one percent impairment of the right upper extremity or a total impairment of five percent. OWCP's June 23, 2011 decision was proper under the law and facts of this case.

On appeal, appellant contended that she has greater impairment as she continues to experience pain and symptoms in her right shoulder. As noted, she did not submit probative medical evidence to establish greater impairment of her right arm.

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.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.¹² Evidence that repeats or duplicates

¹¹ T.S. Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

¹² 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³

ANALYSIS -- ISSUE 2

On reconsideration, appellant did not submit any specific argument nor did she provide new evidence. Consequently, she has not shown that OWCP erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by OWCP; and she has not submitted relevant and pertinent evidence not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits in its July 29, 2011 nonmerit decision.

CONCLUSION

The Board finds that appellant has not established that she is entitled to more than five percent total right upper extremity impairment, for which she received schedule awards and OWCP properly denied her reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the July 29 and June 23, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 19, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹³ *Howard A. Williams*, 45 ECAB 853 (1994).