United States Department of Labor
Employees' Compensation Appeals Board

N.G., Appellant	)	
and	)	**Docket No. 15-864**
	)	**Issued: May 22, 2015**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Yazoo City, MS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2014 appellant filed a timely appeal from the September 29, 2014 Office of Workers' Compensation Programs' (OWCP) schedule award decision.[1] Pursuant to the Federal Employees' Compensation Act[2] (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 met his burden of proof to establish that he sustained more than six percent permanent impairment of the right arm, for which he received a schedule award.

[1] The record contains a September 29, 2014 overpayment decision, which is proceeding separately under Docket No. 15-48. The record also contains a September 19, 2014 decision denying modification of a loss of wage-earning capacity. Appellant has not appealed the September 19, 2014 decision.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on December 25, 2006 appellant, then a 32-year-old correctional officer, sustained an injury to his right elbow in the performance of duty. It accepted the claim for right elbow coronoid fractures with tears of the medial and collateral ligaments, and postoperative heterotopic calcification of the right elbow. Appellant stopped work on the date of injury. On January 3, 2007 he underwent an open reduction internal fixation of coronoid fracture, open repair of lateral collateral ligament, and application of hinged external fixator to spanning right elbow. Appellant returned to work on February 11, 2007. On May 16, 2008 he underwent arthroscopy of the right elbow with capsular incision and excision of heterotopic ossification. Appellant received total disability wage-loss compensation from May 16, 2008 to November 20, 2010. Thereafter, he received wage-loss compensation based on his wage-earning capacity.[3]

In a May 27, 2009 report, Dr. Felix H. Savoie, Board-certified in orthopedic surgery and sports medicine, noted that appellant had an impairment of 14 percent to the right elbow and 8 percent to the body. He noted that he had utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4] Dr. Savoie found 14 percent impairment of the right arm based on right elbow findings. He indicated that appellant reached maximum medical improvement on May 20, 2009.

In a November 7, 2009 report, Dr. Robert Atkinson, an orthopedic surgeon and treating physician, opined that appellant had permanent restrictions and reached maximum medical improvement.

On March 13, 2012 OWCP referred appellant to Dr. Byron Thomas Jeffcoat, a Board-certified orthopedic surgeon for a second opinion.[5] In a March 28, 2012 report, Dr. Jeffcoat noted appellant's history of injury and treatment. He determined that appellant had full range of motion of the shoulders, wrist, and hands. Dr. Jeffcoat determined that the left elbow had full extension and flexion to 140 degrees. He found that the right elbow had 125 degrees of flexion and lacked 30 degrees of getting full extension. Appellant had full

[3] In a November 5, 2010 wage-earning capacity decision, effective November 21, 2010, OWCP reduced appellant's compensation to reflect its ability to earn wages in the selected position of radio dispatcher. On September 19, 2014 it modified the November 5, 2010 decision to reflect appellant's actual earnings as a veterans' service representative. In a January 13, 2012 decision, OWCP suspended appellant's compensation, effective January 15, 2012 on the grounds that he refused to attend a second opinion examination. The record reflects that appellant's compensation was suspended for the period January 15 through March 11, 2012. On March 13, 2012 appellant contacted OWCP to request that the second opinion examination be scheduled. His wage-loss compensation resumed, effective March 12, 2012, when he attended the rescheduled second opinion examination, on March 28, 2012.

[4] A.M.A., *Guides* 166 (5th ed. 2001).

[5] Appellant did not appear for a previous appointment with Dr. Jeffcoat. In a December 29, 2011 letter, he stated that he had previously attended a second opinion examination, which was used for his loss of wage-earning capacity determination and questioned why he needed to attend the examination. In a January 13, 2012 decision, OWCP suspended appellant's compensation under 5 U.S.C. § 8123(d).

supination and pronation bilaterally at about 80 to 85 degrees. Dr. Jeffcoat found multiple scars both medially and laterally on the side of the elbow that were all healed. Appellant had a negative Tinel's test at the elbow and at the wrist bilaterally. Motor function was 5/5 bilaterally. Reflexes in the upper extremities were equal. Additionally, the senses were decreased in the right ring and little fingers with hypersensitivity along the ulnar nerve distribution of the right forearm. Dr. Jeffcoat x-rayed the right elbow and found that the elbow joint appeared to be normally located. He found that heterotopic ossification appeared to be solid and reached maturity. There was no evidence of any acute ossification forming. Dr. Jeffcoat diagnosed status post fracture dislocation of the right elbow, reduction and heterotopic ossification, bilateral ulnar, and medical compression neuropathy. He opined that appellant reached maximum medical improvement in relation to the right elbow fracture dislocation and heterotopic ossification. Dr. Jeffcoat explained that the x-rays revealed that the ossification had matured with no new ossification forming. He indicated that appellant could perform his date-of-injury position as a correctional officer. Dr. Jeffcoat noted that when he watched appellant "he did not use his right arm to open doors or doing anything." He noted that appellant confirmed that he wrote with the arm and his examination revealed that the hand was used. Dr. Jeffcoat explained that there were no objective findings that would prevent appellant from using the hand normally. However, appellant would need to be put through a work hardening program. Dr. Jeffcoat noted that a functional capacity examination in 2009 revealed that appellant could do medium level work and also was self-limiting in 5 of the 21 tasks he was asked to do.

On April 9, 2012 OWCP requested clarification with regard to whether appellant's work-related conditions had resolved. In a May 1, 2012 report, Dr. Jeffcoat explained that appellant reached maximum medical improvement on March 27, 2012 but had some residual findings. He noted that appellant had decreased range of motion of the elbow lacking 30 degrees of full extension and flexion to 125 degrees. Dr. Jeffcoat also addressed permanent impairment under the sixth edition of the A.M.A., *Guides*.[6] He referred to Table 15.4[7] and explained that appellant had a class one fracture when he tore his collateral ligament, which was surgically repaired. Dr. Jeffcoat advised that appellant related that he had pain with extension of his arm or with flexion as far as possible. He determined that appellant qualified for a grade 2 modifier on Table 15.7[8] and this would coincide with a *Quick*Dash score of 54. Dr. Jeffcoat determined that his range of motion was decreased lacking 30 degrees of full extension and flexion forward to only 125 degrees, which corresponded to a grade modifier of 2 pursuant to Table 15.8.[9] He indicated that the clinical studies x-ray revealed ossification which would fall into a grade 3 modifier according to Table 15.9.[10] Dr. Jeffcoat opined that this would translate to a six percent permanent impairment of the

[6] *Supra* note 4 (6th ed. 2008).

[7] *Id*. at 389.

[8] *Id*. at 406.

[9] *Id*. at 408.

[10] *Id*. at 410.

right arm. He further determined that this would equate to a four percent impairment of the upper body as a whole.

On May 1, 2014 appellant filed a claim for a schedule award.

In a July 2, 2014 report, an OWCP medical adviser reviewed Dr. Jeffcoat's impairment determination and indicated that he concurred with the findings of Dr. Jeffcoat in his March 28 and May 1, 2012 reports. He determined that appellant reached maximum medical improvement on March 28, 2012. The medical adviser opined that appellant had six percent permanent impairment of the right upper extremity.

By decision dated September 29, 2014, OWCP granted appellant a schedule award for six percent permanent impairment of the right arm. The award covered a period of 18.72 weeks from September 21, 2014 to January 30, 2015, with a date of maximum medical improvement of March 28, 2012.

LEGAL PRECEDENT

The schedule award provision of FECA,[11] and its implementing federal regulations,[12] 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.[13] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[14] For decisions issued after May 1, 2009, the sixth edition will be used.[15]

In addressing upper extremity impairments, the sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[16] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[17]

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] *Id*. at § 10.404(a).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

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

[16] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[17] *Id*. at 521.

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with OWCP medical adviser providing rationale for the percentage of impairment specified.[18]

ANALYSIS

OWCP accepted appellant's claim for right elbow coronoid fractures with tears of the medial and collateral ligaments, and postoperative heterotopic calcification of the right elbow. On January 3, 2007 appellant underwent open reduction and internal fixation of coronoid fracture. On May 16, 2008 he underwent arthroscopy of the right elbow with capsular incision and excision of heterotopic ossification. On September 29, 2014 OWCP granted appellant a schedule award for a six percent impairment of the right arm based upon the opinions of Dr. Jeffcoat and OWCP medical adviser.

The record contains a May 27, 2009 report from Dr. Savoie, who noted that appellant, had an impairment of 14 percent to the right elbow and 8 percent to the body. However, he used the fifth edition of the A.M.A., *Guides.*[19] Dr. Savoie placed appellant at maximum medical improvement on May 20, 2009. However, effective May 1, 2009, OWCP was required to begin applying the sixth edition of the A.M.A., *Guides*[20] in calculating schedule awards.[21] Because he did not use the required edition of the A.M.A., *Guides,* the report of Dr. Savoie is of limited probative value.

In his May 1, 2012 report, Dr. Jeffcoat reviewed findings from his May 1, 2012 report and rated appellant's impairment, concluding that he had six percent permanent impairment of the right arm under the sixth edition of the A.M.A., *Guides*. After appellant requested a schedule award,[22] OWCP properly referred the case to an OWCP medical adviser who concurred with the second opinion physician. Dr. Jeffcoat used the sixth edition of the A.M.A., *Guides* and referred to Table 15-4, the elbow regional grid for upper extremity impairments.[23] OWCP medical adviser determined that appellant qualified for a class one fracture. Regarding function, they referred to Table 15.7[24] and determined that appellant had pain with extension and flexion of the arm, which qualified for a grade 2 modifier and this coincided with a *Quick*Dash score of 54. Regarding range of motion, OWCP medical adviser referred to Table 15-8 and determined that appellant had 30 degrees of full extension and flexion forward to only 125 degrees, which

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

[19] *Supra* note 4 at 166 (5th ed. 2001).

[20] *Id*. at (6th ed. 2008).

[21] *See* FECA Bulletin No. 09-03 (issued March 15, 2008).

[22] Appellant did not submit any medical evidence regarding permanent impairment with his request.

[23] *See supra* note 4 at 399.

[24] *Id*. at 406.

corresponded to a grade modifier of 2.[25] He reviewed the clinical studies x-ray which revealed ossification and found that appellant would qualify for a grade 3 modifier according to Table 15.9.[26] Both Dr. Jeffcoat and OWCP medical adviser concurred that this would equate to a six percent permanent impairment of the right arm.[27] Therefore, the Board finds that OWCP medical adviser correctly utilized the A.M.A., *Guides* and determined that appellant had an impairment of six percent of the right arm. Appellant has not submitted any other medical evidence conforming with the A.M.A., *Guides* establishing that appellant has a greater schedule award.

On appeal, appellant disagreed with the amount of his schedule award and asserts that he reached maximum medical improvement earlier than March 28, 2012. The Board notes that the record contains a May 27, 2009 report from Dr. Savoie, awarded appellant a 14 percent impairment of the right elbow. However, he used the improper edition of the A.M.A., *Guides* and his report was of limited probative value. There is no medical evidence using the sixth edition of the A.M.A., *Guides*, which supports a greater impairment than that received in the schedule award.

The determination of whether maximum medical improvement has been reached is based on the medical evidence of record. The date is usually the date of the medical examination which determined the extent of the impairment.[28] The Board finds OWCP did not err in finding that appellant reached maximum medical improvement on March 28, 2012, the date of Dr. Jeffcoat's examination. Appellant also asserted that he was not aware that Dr. Jeffcoat was going to perform an impairment rating. However, the determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP.[29] Appellant has not submitted any evidence showing that OWCP or Dr. Jeffcoat acted unreasonably. He also submitted additional evidence to OWCP after the September 29, 2014 decision. However, the Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision.[30]

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.

[25] *Id*. at 408.

[26] *Id*. at 410.

[27] The Board notes that Dr. Jeffcoat also translated the impairment to a four percent impairment of the body as a whole. However, FECA does not provide a schedule award based on whole person impairments. *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither FECA, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

[28] *J.H.*, Docket No. 08-2432 (issued June 15, 2009).

[29] *S.B.*, 58 ECAB 267 (2007).

[30] 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained more than a six percent permanent impairment of the right arm, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 2015
Washington, DC

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

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

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