United States Department of Labor
Employees' Compensation Appeals Board

R.Y., Appellant	)	
and	)	**Docket No. 18-0332**
	)	**Issued: October 2, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Santa Clarita, CA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 27, 2017 appellant filed a timely appeal from a June 1, 2017 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.[2]

ISSUE

The issue is whether appellant has established more than 11 percent permanent impairment of the left upper extremity, for which he previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence on appeal. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Thus, the Board is precluded from reviewing this new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On January 3, 2000 appellant, then a 38-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that on August 27, 1999 he first became aware that his federal employment duties, including carrying a satchel on his left shoulder, fingering mail, and driving his postal vehicle, caused a left shoulder condition. OWCP accepted the claim for left shoulder impingement syndrome.

Appellant was treated by Dr. A.R. Berenji, an orthopedic surgeon. He underwent an authorized arthroscopic decompression and partial acromioplasty on September 5, 2000.

On January 9, 2016 appellant filed a claim for a schedule award (Form CA-7).[3]

In an August 12, 2015 impairment rating report, Dr. Mesfin Seyoum, a family medicine physician, calculated 25 percent permanent impairment of appellant's left upper extremity due to his left shoulder impairment.

In support of his claim, appellant submitted a December 8, 2015 report of Dr. Gil Tepper, a Board-certified orthopedic surgeon, who provided examination findings regarding appellant's loss of ROM of the left shoulder and opined that appellant sustained 23 percent permanent impairment of the left upper extremity, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4]

On May 19, 2016 OWCP routed the case file and a statement of accepted facts (SOAF) to Dr. Morley Slutsky, an OWCP district medical adviser (DMA), Board-certified in occupational medicine, for determination as to whether appellant sustained a permanent impairment of his left shoulder and date of maximum medical improvement (MMI).

In a June 1, 2016 report, Dr. Slutsky determined that appellant sustained three percent permanent impairment of his left upper extremity for left shoulder impingement utilizing the diagnosis-based impairment (DBI) method of the A.M.A., *Guides*. He noted that his rating was based upon the DBI methodology which was the preferred rating method while Dr. Seyoum had utilized the less preferred ROM methodology.

Following Dr. Slutsky's review, appellant submitted an April 8, 2016 report from Dr. Tepper with further examination findings pertaining to his left shoulder condition. He noted his prior impairment rating, but added that he wished to omit a prior rating based upon the whole person, but reiterated that appellant's final upper extremity rating was 94 percent.

On August 5, 2016 OWCP requested that Dr. Slutsky provide an addendum report clarifying whether the 3 percent left upper extremity impairment was in addition to the 11 percent

[3] The Board notes that on August 22, 2002 appellant was previously granted a schedule award for 11 percent permanent impairment of the left upper extremity. Appellant was assigned six percent permanent impairment for left shoulder range of motion (ROM) loss and five percent permanent impairment for musculocutaneous nerve deficits.

[4] A.M.A., *Guides* (6th ed. 2009).

previously paid. It noted the accepted condition of other affections of left shoulder region not elsewhere classified.

In an August 12, 2016 addendum report, Dr. Slutsky reported that no additional impairment was incurred from the prior 11 percent previously awarded for the left upper extremity. He noted that the three percent impairment was less than the six percent impairment previously paid for the left shoulder ROM joint.

By decision dated September 30, 2016, OWCP denied appellant's claim for a schedule award finding that he was entitled to no more than the 11 percent permanent impairment of the left upper extremity previously awarded.

On January 19, 2017 appellant requested reconsideration of the schedule award determination. He argued that the DMA did not review Dr. Seyoum's August 12, 2015 medical report pertaining to the left upper extremity under this OWCP File No. xxxxxx117. Rather, the DMA reviewed Dr. Seyoum's August 19, 2015 report pertaining to the right upper extremity under OWCP File No. xxxxxx965. In addition appellant related that the DMA did not properly consider Dr. Tepper's December 8, 2015 report wherein he provided left shoulder loss of ROM findings due to his accepted left shoulder condition. He also argued that the DMA was improperly advised to perform an impairment rating for the condition of other affections of left shoulder region not elsewhere classified when he should have been advised to rate the accepted condition of left shoulder impingement.

On May 9, 2017 OWCP submitted a SOAF and a clarification request to Dr. Slutsky pertaining to a left upper extremity impairment rating. The SOAF noted the accepted condition of left shoulder impingement syndrome. The clarification request noted that the accepted condition of other affections of left shoulder region, not elsewhere classified. OWCP provided Dr. Slutsky a copy of Dr. Seyoum's August 12, 2015 impairment rating for review and comment, noting that his prior report did not appear to address the physician's opinion of left upper extremity impairment. It further requested that he provide calculations consistent with FECA Bulletin No. 17-06 issued on May 8, 2017. OWCP noted that, if applicable, to provide an explanation as to why the method chosen was used in lieu of other allowable methods (*e.g.*, DBI *versus* ROM). Additionally, it asked that, if any information was missing and necessary to correctly calculate the percentage, indicate the specific evidence that is needed.

In a May 20, 2017 report, Dr. Slutsky calculated five percent permanent impairment of the left upper extremity in accordance with Dr. Seyoum's August 12, 2015 examination findings. He reported that appellant was previously assigned six percent permanent impairment for left shoulder ROM loss, and five percent for musculocutaneous nerve deficits. Based upon this, Dr. Slutsky determined that the final left upper extremity impairment remained at 11 percent and no additional impairment was incurred. Regarding FECA Bulletin 17-06, he noted that Dr. Seyoum used the less preferred ROM method and provided invalid shoulder ROM measurements per the requirements set forth by the A.M.A., *Guides.* MMI was noted as August 12, 2015, the date of Dr. Seyoum's examination.

By decision dated June 1, 2017, OWCP denied modification of the September 30, 2016 schedule determination. It explained that appellant correctly noted that it had made an error and

did not send the proper medical evidence to the DMA for review initially. However, that error was corrected when the missing medical evidence was provided to Dr. Slutsky for additional review. OWCP found that the evidence of record failed to support any additional impairment of the left upper extremity greater than the 11 percent previously awarded.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

The sixth edition requires identifying the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

> "As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).
>
> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. If the [A.M.A.,] *Guides allow for the use of both the DBI and ROM methods to calculate*

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] A.M.A., *Guides* 383-492.

[10] *Id*. at 411.

an impairment rating for the diagnosis in question, the method producing the higher rating should be used."[11] (Emphasis in the original.)

The Bulletin further advises:

> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.
>
> "If the medical evidence of record is not sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[12]

ANALYSIS

The Board finds that this case is not in posture for decision.[13]

FECA Bulletin No. 17-06 provides that, if the rating physician provided an assessment using the ROM method and the A.M.A., *Guides* allows for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the claims examiner.[14]

Dr. Slutsky reviewed Dr. Seyoum's August 12, 2015 impairment rating in assessing permanent impairment to the left upper extremity and concluded that Dr. Seyoum's impairment rating was invalid because he used the less preferred ROM method. Since Dr. Seyoum provided a rating based upon appellant's loss of ROM of the left shoulder, which is allowed pursuant to the A.M.A., *Guides*, Table 15-34, Dr. Slutsky should have independently calculated appellant's impairment using both the ROM and DBI methods under the relevant standards and identified the higher rating for the claims examiner.[15] Pursuant to FECA Bulletin No. 17-06, if the medical evidence of record is not sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating.[16]

[11] FECA Bulletin No. 17-06 (issued May 8, 2017).

[12] *Id.*

[13] *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[14] *Supra* note 11.

[15] A.M.A., *Guides* 475.

[16] *Supra* note 13

The Board also notes that OWCP did not forward Dr. Tepper's impairment rating to Dr. Slutsky. Thus, Dr. Slutsky did not address Dr. Tepper's reports wherein he rated appellant's left shoulder permanent impairment for loss of ROM under the six edition of the A.M.A., *Guides.*

The Board will therefore remand the case for OWCP for preparation of a SOAF and referral of the medical evidence to a second opinion physician for an impairment evaluation pursuant to FECA Bulletin No. 17-06.[17] Following any necessary further development, it shall issue a *de novo* decision with regard to appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 2, 2018
Washington, DC

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

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

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

[17] *See generally C.J.*, Docket No. 17-1570 (issued February 9, 2018). The Board also notes that OWCP accepted the claim for left shoulder impingement syndrome and arthroscopic decompression and partial acromioplasty. However, in its May 9, 2017 clarification request to the DMA, OWCP failed to properly specify the accepted condition, noting other affections of left shoulder region not elsewhere classified. On remand OWCP should clarify and properly identify the accepted conditions.