



## **FACTUAL HISTORY**

On August 6, 2016 appellant, then a 59-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder and upper back on August 6, 2016 when she reached to stop a package from falling while in the performance of duty.<sup>3</sup> She stopped work on August 6, 2016 and was released to modified duty. On the reverse side of the claim form, the employing establishment indicated that the injury occurred in the performance of duty and that she received medical care on August 6, 2016. OWCP accepted appellant's claim for right shoulder joint sprain. On August 17, 2016 appellant accepted a full-time modified job offer as a sales, services and distribution associate.<sup>4</sup>

On June 26, 2018 appellant filed a claim for a schedule award (Form CA-7).

Appellant submitted a May 8, 2018 impairment rating by, Dr. Mark A. Seldes, a Board-certified family practitioner. Dr. Seldes reviewed her medical records and related complaints of right shoulder pain and limited range of motion (ROM). Upon examination of appellant's right shoulder, he observed tenderness over the anterior, posterior, and lateral aspects of the right shoulder joint and tenderness to palpation over the bicipital groove and bicipital tendon. Neer's and Hawkin's tests were positive. Dr. Seldes indicated that ROM testing was completed after initial warm-up and performed three times. He explained that the findings were the same each time and reported 80 degrees flexion, 15 degrees extension, 70 degrees abduction, 10 degrees adduction, 40 degrees external rotation, and 10 degrees internal rotation. Dr. Seldes diagnosed right shoulder impingement syndrome, right shoulder early osteoarthritis, status post rotator cuff repair of the right shoulder, and depression. He opined that appellant had reached maximum medical improvement (MMI) as of May 8, 2018.

Referring to Table 15-5, Shoulder Regional Grid, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>5</sup> Dr. Seldes selected a class 1 diagnosis-based impairment (DBI) for a right shoulder impingement. He explained that the maximum impairment rating under the DBI methodology is five percent permanent impairment. Dr. Seldes related that, as an alternative, a ROM impairment method may be assessed using section 15.7. Utilizing Table 15-34, shoulder ROM, he reported that appellant had nine percent permanent impairment for 80 degrees flexion, two percent permanent impairment for 15 degrees extension, six percent permanent impairment for 70 degrees abduction, one percent permanent impairment for 10 degrees adduction, two percent permanent impairment for 40 degrees external rotation, and four percent permanent impairment for 10 degrees internal rotation.

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<sup>3</sup> Appellant was working a modified-duty position as a result of a previously accepted claim under OWCP File No. xxxxxx468. Under the previous claim, OWCP accepted that she sustained injuries to her back, thoracic spine, and right rotator cuff as a result of the factors of her employment in her capacity as a distribution window clerk. It accepted appellant's claim for back sprain, thoracic sprain, and right rotator cuff sprain. The current claim, OWCP File No. xxxxxx361, and previous claim, OWCP File No. xxxxxx468, were administratively combined by OWCP, with the previous claim serving as the master file.

<sup>4</sup> In an August 18, 2016 note, Dr. Matthew R. Schram, a Board-certified family practitioner, authorized appellant to return to work with restrictions of no lifting with right arm and no lifting more than 20 pounds with left arm.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Dr. Seldes calculated a combined 24 percent right upper extremity permanent impairment due to loss of ROM. As the ROM method resulted in 24 percent permanent impairment and the DBI method resulted in a maximum of 5 percent permanent impairment, he concluded that the higher impairment rating of 24 percent based on loss of ROM should be applied to appellant's case.

In a July 1, 2018 report, Dr. Jovito Estaris, Board-certified in preventive and occupational medicine, serving as a district medical adviser (DMA), noted that he had reviewed the statement of accepted facts (SOAF) and the medical record, including Dr. Seldes's May 8, 2018 impairment rating report. He indicated that under OWCP File No. xxxxxx468, a previous OWCP second-opinion examiner had provided an impairment rating of 16 percent of the right upper extremity based on ROM. The DMA requested an independent medical examination to confirm the ROM measurements of the right shoulder.

On October 23, 2018 OWCP referred appellant to Dr. Arthur S. Dinenberg, a Board-certified orthopedic surgeon, for a second-opinion examination in order to determine whether she had sustained a ratable permanent impairment due to her accepted August 6, 2016 employment injury in accordance with the sixth edition of the A.M.A., *Guides*.

In a November 14, 2018 report, Dr. Dinenberg reviewed appellant's history, including the SOAF, and noted that her current claim had been accepted for right shoulder sprain. He also referenced her previously accepted claims and conditions and recounted her current complaints of severe pain in the right shoulder. Dr. Dinenberg reported that upon physical examination of appellant's right upper extremity, she did not allow any palpation of the right upper extremity because it was too painful and was unable to withstand any palpation on the right arm or forearm. In response to OWCP's request for an impairment rating, he indicated that he was unable to determine MMI because "[appellant's] examination [was] equivocal." Dr. Dinenberg further responded that he was unable to provide a detailed description of objective and subjective findings because appellant could not complete ROM testing. He noted that "[s]ubjectively, she complains of severe pain and paresthesias in the right upper extremity." Consequently, Dr. Dinenberg concluded that no impairment rating could be performed that day.

In a December 31, 2018 report, Dr. Estaris, the DMA, explained that Dr. Dinenberg "discontinued his examination" and was "unable to provide any impairment rating." Therefore, the DMA noted that he was unable to complete an impairment rating because he had nothing to review regarding appellant's permanent impairment.

By decision dated January 10, 2019, OWCP denied appellant's claim for a schedule award finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member causally related to her accepted August 6, 2016 employment injury. It noted that neither Dr. Dinenberg nor Dr. Estaris were able to provide an impairment rating.

## LEGAL PRECEDENT

The schedule award provision of FECA<sup>6</sup> and its implementing federal regulations,<sup>7</sup> 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants.<sup>8</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.<sup>9</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>10</sup>

It is the claimant's burden of proof to establish a permanent impairment of the scheduled member or function as a result of an employment injury.<sup>11</sup> OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>12</sup>

## ANALYSIS

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

OWCP accepted that appellant sustained a right shoulder sprain as a result of an August 6, 2016 employment injury. On June 26, 2018 appellant filed a claim for a schedule award and submitted a May 8, 2018 impairment rating. OWCP subsequently referred appellant's claim to Dr. Dinenberg for a second opinion examination. In a November 14, 2018 report, Dr. Dinenberg indicated that he was unable to complete a physical examination due to appellant's complaints of severe pain, and thus, he could not provide an impairment rating. Upon review of Dr. Dinenberg's report, Dr. Estaris, the DMA, related in a December 31, 2018 report that he was unable to provide an impairment rating because Dr. Dinenberg discontinued his examination. Based on the reports of Dr. Estaris and Dr. Dinenberg, OWCP denied appellant's schedule award claim.

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a).

<sup>9</sup> 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).

<sup>10</sup> *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>11</sup> *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>12</sup> *Supra* note 9 at Chapter 2.808.5 (March 2017).

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>13</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>14</sup> Once OWCP undertakes development of the record, it must procure medical evidence that will resolve the relevant issues in the case.<sup>15</sup>

OWCP began to develop the evidence when it referred appellant to Dr. Dinenberg for an evaluation and assessment of her work-related condition and any resulting permanent impairment.<sup>16</sup> Both Dr. Dinenberg and the DMA were unable to provide an impairment evaluation due to appellant's complaints of severe pain and could not complete the examination because "[appellant's] examination [was] equivocal." The Board finds that OWCP did not make any finding regarding why appellant was unable to complete her second opinion examination and failed to consider whether appellant's compensation benefits should have been suspended pursuant to 5 U.S.C. § 8123(d) for obstruction of a medical examination.<sup>17</sup>

On remand OWCP should refer appellant back to Dr. Dinenberg or another appropriate specialist. Additionally, it should apprise appellant of the penalty provisions of section 8123(d) of FECA.<sup>18</sup> If applicable, OWCP should impose such sanctions, in the proper manner, upon making a finding that appellant malingered or otherwise obstructed the examination.<sup>19</sup> Following this and such further development deemed necessary, it shall issue a *de novo* decision regarding whether appellant has established employment-related right upper extremity permanent impairment, warranting a schedule award.

### CONCLUSION

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

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<sup>13</sup> See *Vanessa Young*, 55 ECAB 575 (2004).

<sup>14</sup> *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>15</sup> *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

<sup>16</sup> See *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

<sup>17</sup> See *Charles A. McNeely*, 40 ECAB 484 (1989). On remand, the Board directed OWCP to retest appellant and apprise him of the penalty provisions of 5 U.S.C. § 8123(d) and to impose said sanctions, if applicable, if there was a finding of malingering or obstruction of the examination).

<sup>18</sup> *Id.*; 5 U.S.C. § 8123(d).

<sup>19</sup> *Charles A. McNeely*, *supra* note 17.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 10, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 3, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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