United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 18-0451**
	)	**Issued: February 21, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

On December 29, 2017 appellant filed for review of a September 1, 2017 merit decision and a December 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] The appeal was docketed as No. 18-0451.

This case has previously been before the Board. On August 1, 2013 appellant, then a 55-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed bicipital tenosynovitis as a result of loading his mail truck. OWCP accepted the claim for bilateral bicipital tenosynovitis and right complete rotator cuff rupture. Appellant sought treatment with Dr. R. Sean Churchill, a Board-certified orthopedic surgeon, and underwent right shoulder rotator cuff repair on April 16, 2015.

On December 15, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a January 1, 2016 report, Dr. Churchill stated that appellant had reached maximum medical improvement (MMI) on December 14, 2015. He reported that eight months prior appellant had a diagnostic arthroscopy of his right shoulder with acromioplasty and one centimeter

[1] Appellant also filed a timely request for oral argument in this case. By order dated April 20, 2018, the Board exercised its discretion and denied appellant's request for oral argument as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 18-0451 (issued April 20, 2018).

supraspinatus rotator cuff repair. Dr. Churchill reported his examination findings which he explained revealed loss of motion, continued discomfort, and loss of maximal power and endurance. He opined that appellant sustained 15 percent permanent impairment of the right upper extremity. Dr. Churchill explained that five percent was due to loss of motion, five percent for continued discomfort, and five percent for loss of maximal power and endurance.

On April 8, 2016 Dr. Nelson Saldua, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed Dr. Churchill's report and determined that appellant had reached MMI on December 14, 2015. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] he provided a diagnosis of a rotator cuff injury, partial thickness class 1 diagnosis, noting that review of the operative note showed this was a partial thickness tear.[3] Dr. Saldua noted that per the most recent notes, appellant had a "residual loss," which has a midrange default of three percent upper extremity impairment. He assigned a grade modifier of 1 for functional history due to ongoing discomfort and a grade modifier of 1 for physical examination due to loss of range of motion (ROM), continued discomfort, and loss of power/endurance. Dr. Saldua reported that a clinical studies grade modifier was not applicable. The DMA utilized the net adjustment formula and determined that class 1 grade C yielded a three percent upper extremity permanent impairment.

Dr. Saldua noted that Dr. Churchill's examination was significant for forward flexion of 140, external rotation of 40, and internal rotation to L5, as well as abduction strength of 4+/5. He explained that it did not appear that the physician utilized the A.M.A., *Guides* to rate permanent impairment.

By decision dated June 22, 2016, OWCP granted appellant a schedule award claim for three percent permanent impairment of the right upper extremity. The date of MMI was noted as February 14, 2015. The award covered a period of 9.36 weeks from December 14, 2015 through February 17, 2016.

On December 29, 2017 appellant appealed to the Board.

By decision dated March 1, 2017, the Board set aside OWCP's June 22, 2016 schedule award decision and remanded the case for further development.[4] The Board found that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims and that no consistent interpretation had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[5] The Board noted that following OWCP's development of a consistent method for calculating permanent impairment for upper extremities, and such other development as may be deemed necessary, OWCP would issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

[2] A.M.A., *Guides* (2009).

[3] *Id.*

[4] Docket No. 16-1530 (issued March 1, 2017).

[5] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

On remand, by letter dated June 13, 2017, OWCP requested Dr. Churchill provide an updated opinion about appellant's work-related condition and resulting permanent impairment.

By decision dated September 1, 2017, OWCP found that appellant was not entitled to more than three percent permanent impairment of the right upper extremity for which he previously received a schedule award.

In a medical report submitted on September 5, 2017, Dr. Churchill responded to OWCP's development letter and reiterated his findings that appellant sustained 15 percent permanent impairment of the right upper extremity.

On October 27, 2017 appellant requested review of the written record before an OWCP hearing representative.

By decision dated December 7, 2017, an OWCP hearing representative denied appellant's request for a review of the written record finding that his request was not made within 30 days of the September 1, 2017 OWCP decision. The hearing representative further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which established that he sustained a greater percentage of permanent impairment than previously awarded.

The Board, having duly considered the matter, concludes that the case is not in posture for decision. On prior appeal, the Board remanded the case for OWCP to reevaluate the extent of appellant's permanent impairment of his right upper extremity after it determined a consistent method for rating upper extremity impairments under the A.M.A., *Guides*. Following the Board's remand, OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology versus the ROM methodology for rating of upper extremity impairments.[6] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "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 an impairment rating for the diagnosis in question, the method producing the higher rating should be used."[7] (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

[6] FECA Bulletin No. 17-06. This Bulletin was effective for all decisions issued by OWCP on and after May 8, 2017.

[7] A.M.A., *Guides* 477.

should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the [claims examiner]."[8]

Because Dr. Churchill provided a rating based upon appellant's loss of ROM which was allowed under Table 15-5 of the A.M.A., *Guides*, the DMA should have independently calculated appellant's impairment using both the ROM and DBI methods and identified the higher rating for the claims examiner.[9] However, OWCP failed to properly develop the medical evidence by requesting the DMA to provide an impairment rating in accordance with the new guidance in FECA Bulletin No. 17-06 for consistently rating upper extremity impairments.[10]

This case will therefore be remanded for further development consistent with OWCP procedures found in FECA Bulletin No. 17-06.

Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.[11]

IT IS HEREBY ORDERED THAT the December 7 and September 1, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this order.

[8] *D.F.*, Docket No. 17-1474 (issued January 26, 2018).

[9] If the medical evidence of record is insufficient for the DMA to render a rating using the ROM methodology, the DMA should have advised as to the medical evidence necessary to complete the rating. *See* A.M.A., *Guides* 403, Table 15-5.

[10] *C.J.*, Docket No. 17-1570 (issued February 9, 2018).

[11] Given the disposition of the schedule award issue, the nonmerit issue is moot.

Issued: February 21, 2019
Washington, DC

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

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

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