United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 18-1308**
	)	**Issued: January 10, 2019**
DEPARTMENT OF THE ARMY, CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX, Employer	)	

Appearances:
Randy Wilson, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 19, 2018 appellant, through his representative, filed a timely appeal from a February 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 13 percent permanent impairment of his left upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On May 18, 2009 appellant, then a 62-year-old material expediter, filed a traumatic injury claim (Form CA-1) alleging that, on May 12, 2009, he injured his left shoulder in the performance of duty. OWCP accepted the claim, assigned File No. xxxxxx812, for a sprain of the left shoulder and upper arm at the rotator cuff, a disorder of the bursae and tendons of the left shoulder, and a left shoulder and upper arm sprain.

OWCP had previously accepted that appellant sustained a crush injury to the fingers of his left hand under File No. xxxxxx259. By decision dated July 10, 2003, it granted him a schedule award for six percent permanent impairment of the left upper extremity due to the crush injury to his left fingers under File No. xxxxxx259.[3]

In a June 2, 2011 report, Dr. Charles W. Breckenridge, a Board-certified orthopedic surgeon, diagnosed status post repeat left shoulder rotator cuff repairs. He opined that appellant had five percent permanent impairment of the left upper extremity using Table 15-5 on page 403 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

An OWCP district medical adviser (DMA) reviewed the evidence on July 1, 2011. He identified the diagnosis as a class one full-thickness tear of the rotator cuff, which yielded a default value of five percent according to Table 15-5 on page 403 of the A.M.A., *Guides*. OWCP's medical adviser applied grade modifiers and concluded that appellant had seven percent permanent impairment of the left upper extremity.

By decision dated August 11, 2011, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. The period of the award ran for 21.84 weeks from June 13 to November 12, 2011.

In a report dated July 28, 2016, Dr. T. Bradley Edwards, a Board-certified orthopedic surgeon, opined that appellant had 22 percent permanent impairment of the left upper extremity due to reduced shoulder motion.

Dr. Herbert White, Jr, an occupational medicine specialist serving as a DMA, reviewed the evidence and submitted a report dated October 3, 2016. He found that Dr. Edwards failed to

[3] The record also contains a September 24, 1998 decision granting appellant a schedule award for six percent permanent impairment of the left arm under OWCP File No. xxxxxx443. That claim has been retired and is not currently accessible.

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

measure appellant's range of motion of the shoulder three times as required under the A.M.A., *Guides* and that his report was thus insufficient to support a permanent impairment rating.

OWCP, on October 17, 2016, referred appellant to Dr. James E. Butler, III, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of any permanent impairment of the left upper extremity.

In a November 30, 2016 impairment evaluation, Dr. Butler discussed appellant's complaints of pain, weakness, tingling, and numbness in his left arm. He measured range of motion for his left shoulder three times and found 110 degrees flexion, 30 degrees extension, 100 degrees abduction, 40 degrees adduction, 60 degrees internal rotation, and 60 degrees external rotation. Dr. Butler diagnosed a left shoulder sprain, rotator cuff tear, labral tear, impingement syndrome, joint arthrosis of the acromioclavicular (AC) joint, and status post two rotator cuff tears with distal clavicle resections. He indicated that he was rating appellant's impairment using the diagnosis-based impairment (DBI) methodology rather than range of motion (ROM) methodology due to inconsistencies between his measurements and the measurements previously obtained by Dr. Edwards. Dr. Butler identified the diagnosis as a class 1 left shoulder sprain, rotator cuff tear/labral tear, impingement syndrome, AC joint arthrosis, and status post rotator cuff repair, and distal clavicle resection using Table 15-5 on page 403, which yielded a default value of 10 percent. He applied grade modifiers and concluded that appellant had 12 percent permanent impairment of the left upper extremity.

Dr. White reviewed the evidence on December 27, 2016 and noted that the DBI method was "the preferred method for calculating impairments of the upper extremity" under the A.M.A., *Guides*. He identified the diagnosis using Table 15-5, the shoulder regional grid, as a class 1 distal clavicle resection, which yielded a default value of 10 percent. Dr. White adjusted the permanent impairment rating to 12 percent after applying grade modifiers.

By decision dated March 8, 2017, OWCP found that appellant had not established that he was entitled to an increased schedule award. It noted that the evidence demonstrated that he had 12 percent permanent impairment of the left upper extremity, which was less than the previous awards that totaled 13 percent permanent impairment.

In an August 2, 2017 report, Dr. Edwards reviewed appellant's history of injury treated with multiple shoulder surgeries. He diagnosed a left rotator cuff tear. Dr. Edwards provided grip strength measurements on the left and the results of bilateral manual muscle testing for the shoulders, elbows, and wrists. He measured range of motion for the left shoulder. Dr. Edwards opined that appellant had 11 percent permanent impairment of the left upper extremity due to loss of range of motion of the shoulder utilizing the ROM methodology.

Appellant, on December 4, 2017, requested reconsideration.

By decision dated February 2, 2018, OWCP denied modification of its March 8, 2018 decision. It found that Dr. Edwards' report was not probative as he did not indicate that he had used the sixth edition of the A.M.A., *Guides* and did not provide three separate range of motion measurements for the left shoulder. OWCP further noted that Dr. Edwards' permanent impairment

rating was less than that previously awarded to appellant, and thus was insufficient to support a greater schedule award.

On appeal appellant questions why OWCP combined a schedule award for a smashed finger with his shoulder award. He notes that he had a prosthetic right arm and thus performs all activities with his left upper extremity.

LEGAL PRECEDENT

The schedule award provisions 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]

In addressing upper extremity impairments, the sixth edition requires identification of 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). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of permanent impairment specified.[10]

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.[11] If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.[12] Adjustments for functional history may be made if the evaluator

[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* 411.

[10] *See P.R.*, Docket No. 18-0022 (issued April 9, 2018); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (March 2017).

[11] A.M.A., *Guides* 461.

[12] *Id*. at 473.

determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[13]

Regarding the application of ROM or DBI 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 an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*"[14] (Emphasis in the original.)

ANALYSIS

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

OWCP accepted that appellant sustained a sprain of the left shoulder and upper arm at the rotator cuff, a left shoulder and upper arm sprain, and a disorder of the bursae and tendons of the left shoulder due to a May 12, 2009 employment injury under File No. xxxxxx812. It had previously accepted a crush injury to the fingers of appellant's left hand under File No. xxxxxx259, and, on July 10, 2003, granted him a schedule award for six percent permanent impairment of the left upper extremity as a result of the crush injury.

By decision dated August 11, 2011, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity due to his left rotator cuff tear. Appellant subsequently requested an increased schedule award, which OWCP denied on March 8, 2017.

Appellant requested reconsideration and submitted an August 2, 2017 report from Dr. Edwards. Dr. Edward provided findings on examination, including range of motion measurements for the left shoulder. He determined that appellant had 11 percent permanent impairment of the left upper extremity due to loss of range of motion of the shoulder. OWCP denied the claim as Dr. Edward had not provided three range of motion measurements as required by the A.M.A., *Guides* and as he did not reference the provisions of the A.M.A., *Guides* in reaching his impairment determination. It further found that Dr. Edwards' report did not demonstrate that

[13] *Id*. at 474.

[14] FECA Bulletin No. 17-06 (issued May 8, 2017); *A.G*., Docket No. 18-0329 (issued July 26, 2018).

appellant had more than 13 percent permanent left upper extremity impairment for which he had previously received schedule awards.

The Board finds that OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06. As noted above, FECA Bulletin No. 17-06 provides detailed instructions for obtaining sufficient evidence to conduct a complete impairment evaluation.[15] It indicates that, if the rating physician provides an assessment using the ROM method, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating. FECA Bulletin No. 17-06 further provides that the evaluator should obtain three independent measurements for range of motion and that the greatest measurement should be used to determine the extent of impairment.[16] FECA Bulletin No. 17-06 indicates that OWCP should instruct the physician to obtain three independent measurements.[17]

As OWCP did not inform Dr. Edwards of the provisions of FECA Bulletin No. 17-06 and attempt to obtain a supplemental report containing three independent measurements of range of motion in accordance with the procedures set forth in the A.M.A., *Guides* and FECA Bulletin No. 17-06, the Board will remand the case for OWCP to obtain the evidence necessary to complete the rating as described above.[18] Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

On appeal appellant contends that the schedule award he received for his smashed finger should not be included in rating his shoulder impairment. OWCP regulations provide that benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: "(1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) OWCP finds that the later impairment in whole or in part would duplicate the compensation payable for the preexisting impairment."[19]

OWCP determined that Dr. Edward's finding of 11 percent permanent impairment of the left upper extremity was insufficient to support an increased schedule award as it was less than the previously awarded 13 percent left upper extremity impairment. Appellant previously received a schedule award for six percent permanent impairment of the left upper extremity as a result of a crush injury to the fingers of his left hand under File No. xxxxxx259. He also received a schedule award in 2011 for seven percent permanent impairment of the left upper extremity due to his rotator cuff injury. The Board finds that OWCP did not explain why appellant's current impairment rating for the shoulder duplicated his previous schedule award compensation, in particular the rating issued for his crushed finger. The Board has explained that simply comparing the prior percentage

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

[16] *Id*.

[17] *Id*.

[18] *See J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

[19] 20 C.F.R. § 10.404(d); *see also A.T.*, Docket No. 17-1806 (issued January 12, 2018).

of impairment awarded to the current impairment for the same member is not always sufficient.[20] The issue is not whether the current impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.[21] On remand, after properly calculating the extent of appellant's current left upper extremity impairment, OWCP should determine whether the impairment rating duplicates, in whole or in part, appellant's prior award.[22]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2018 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: January 10, 2019
Washington, DC

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

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

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

[20] *See T.S.*, Docket No. 16-1406 (issued August 9, 2017).

[21] *Id*.

[22] *See J.V.*, Docket No. 17-1766 (issued April 3, 2018).