

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On January 5, 2015 appellant, then a 67-year-old social worker, filed an occupational disease claim (Form CA-2) alleging that she sustained a bilateral shoulder injury in the performance of duty.³ On February 15, 2015 OWCP accepted the claim for bilateral shoulder adhesive capsulitis, bilateral shoulder impingement, and aggravation bilateral shoulder arthritis.⁴

On February 23, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a December 30, 2014 report, Dr. Daniel A. Brzusek, a treating Board-certified physiatrist, provided a history of injury and physical examination findings. He diagnosed bilateral shoulder adhesive capsulitis, bilateral shoulder impingement, and aggravation of bilateral shoulder arthritis, caused or aggravated by appellant's employment. Dr. Brzusek used the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ to rate appellant's bilateral shoulder impairment using the range of motion (ROM) methodology. Using Table 15-34, page 475 and Figures 15-28, page 475; Table 15-29, page 475; and Table 15-30, page 476, he determined that appellant had a total right upper extremity permanent impairment of 35 percent. Next, Dr. Brzusek calculated appellant's left upper extremity impairment. Again, using the ROM methodology, he calculated a total left upper extremity permanent impairment rating of 12 percent.

On March 5, 2015 Dr. Kenneth D. Sawyer, a physician Board-certified in orthopedic surgery and occupational medicine serving as an OWCP district medical adviser (DMA), reviewed Dr. Brzusek's impairment rating and determined that the rating should be calculated using the ROM method as it provided a higher rating than a diagnosis-based impairment (DBI) method rating. He found, however, that Dr. Brzusek had incorrectly applied Table 15-34 of the A.M.A., *Guides*. Dr. Sawyer determined that appellant had 23 percent right upper extremity permanent impairment and 13 percent left upper extremity permanent impairment.

On April 20, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Josef K. Eichinger, a Board-certified orthopedic surgeon, to determine the extent of appellant's bilateral upper extremity permanent impairment.

² Docket No. 16-0585 (issued March 27, 2017).

³ Appellant retired from the employing establishment, effective June 28, 2014.

⁴ Under OWCP File No. xxxxxx178 OWCP accepted appellant's occupational disease claim for other specified disorder of right shoulder region bursae and tendons, right shoulder impingement syndrome, and left shoulder impingement syndrome. By decision dated November 16, 2012, OWCP granted appellant a schedule award for 34 percent right upper extremity permanent impairment and 12 percent left upper extremity permanent impairment under OWCP File No. xxxxxx178. The date of maximum medical improvement was determined to be July 12, 2012. OWCP File No. xxxxxx178 has been combined with OWCP File No. xxxxxx012, with the latter designated as the master file.

⁵ A.M.A., *Guides* (6th ed. 2009).

In a June 15, 2015 report, Dr. Eichinger, based on a review of the statement of accepted facts (SOAF) and the medical evidence and following a physical examination, noted the accepted conditions were bilateral shoulder impingement, bilateral shoulder arthritis aggravation, and bilateral shoulder adhesive capsulitis. Using the A.M.A., *Guides*, he also rated appellant's bilateral shoulder impairment using the ROM methodology and concluded that appellant had 14 percent right upper extremity permanent impairment and 16 percent left upper extremity permanent impairment.

By letter dated August 12, 2015, OWCP referred appellant to Dr. Lance Brigham, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion between Dr. Eichinger, an OWCP referral physician; Dr. Sawyer, the DMA; and Dr. Brzusek, appellant's treating physician, regarding the extent of appellant's bilateral upper extremity permanent impairment.

In a September 2, 2015 report, Dr. Brigham, following his review of medical evidence the SOAF, and a physical examination, diagnosed bilateral shoulder impingement, adhesive capsulitis, and aggravation of arthritis. He measured range of motion using Table 15-34, page 475, for both upper extremities and for appellant's right shoulder found 3 percent permanent impairment for 105 degrees flexion, 1 percent permanent impairment for 42 degrees extension, 3 percent permanent impairment for 98 degrees abduction, 0 percent permanent impairment for 35 degrees adduction, 0 percent permanent impairment for 65 degrees external rotation, and 4 percent permanent impairment for 10 degrees internal rotation, resulting in a combined 11 percent permanent impairment of the right upper extremity. For the left upper extremity, Dr. Brigham found appellant had 3 percent permanent impairment for 94 degrees flexion, 1 percent permanent impairment for 41 degrees extension, 3 percent permanent impairment for 91 degrees abduction, 0 percent permanent impairment for 40 degrees adduction, 0 percent permanent impairment for 60 degrees external rotation, and 4 percent permanent impairment for 18 degrees internal rotation, resulting in a combined 11 percent permanent impairment.

Using the A.M.A., *Guides*, Dr. Brigham calculated 11 percent permanent impairment of each upper extremity.

On November 15, 2015 Dr. L. Jean Weaver, a DMA, reviewed and concurred with Dr. Brigham's impairment determination.

By decision dated December 15, 2015, OWCP denied appellant's claim for a schedule award. The denial was based on the finding that appellant had previously received a schedule award under OWCP File No. xxxxxx178 and was not entitled to an additional schedule award for her bilateral upper extremities under the current claim number.

On February 8, 2016 appellant appealed to the Board. By decision dated March 27, 2017,⁶ the Board set aside OWCP's December 15, 2015 decision and remanded the case to OWCP for development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly followed by a *de novo* decision on appellant's claim for an upper extremity schedule award claim.

⁶ *Supra* note 2.

Following the Board's March 27, 2017 decision, OWCP requested review by a DMA to consider a permanent impairment rating in accordance with the A.M.A., *Guides*, including both the ROM and DBI methods.

In a September 15, 2017 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical record, including the reports from Drs. Brzusek, Eichinger, and Brigham. Based on Dr. Brigham's September 2, 2015 report, he agreed that ROM was the appropriate method for rating appellant's upper extremity permanent impairment. Using Table 15-34, page 475, Dr. Garelick determined that for the right upper extremity appellant had 3 percent permanent impairment for 105 degrees flexion, 1 percent permanent impairment for 42 degrees extension, 3 percent permanent impairment for 98 degrees abduction, 0 percent permanent impairment for 35 degrees adduction, 0 percent permanent impairment for 65 degrees external rotation, and 4 percent permanent impairment for 10 degrees internal rotation, resulting in a combined 11 percent permanent impairment of the right upper extremity. For the left upper extremity, he found appellant had 3 percent permanent impairment for 94 degrees flexion, 1 percent permanent impairment for 41 degrees extension, 3 percent permanent impairment for 91 degrees abduction, 0 percent permanent impairment for 40 degrees adduction, 0 percent permanent impairment for 60 degrees external rotation, and 4 percent permanent impairment for 18 degrees internal rotation, resulting in a combined 11 percent permanent impairment. Dr. Garelick found September 2, 2015, the date of Dr. Brigham's report, to be the date of maximum medical improvement (MMI).

On October 25, 2017 OWCP requested clarification from Dr. Garelick regarding whether the prior impairment rating should be modified after considering permanent impairment including both the ROM and DBI methods.

Dr. Garelick, in a supplemental report dated October 25, 2017, noted that appellant had been granted a schedule award for 34 percent permanent impairment of her right upper extremity and 12 percent permanent impairment of her left upper extremity under OWCP File No. xxxxxx178, and thus, no additional schedule award was warranted. However, he advised that the date of MMI should be modified to September 2, 2015.

On October 31, 2017 OWCP placed a copy of an August 9, 2012 report from Dr. William Stewart, a DMA, from OWCP File No. xxxxxx178 into the record for OWCP File No. xxxxxx012. Dr. Stewart had found 34 percent right upper extremity permanent impairment based on the medical evidence of record and a diagnosis of frozen shoulder.

In a March 14, 2018 supplemental report, Dr. Garelick reviewed the medical evidence of record and a SOAF. He noted that, regarding applying ROM or DBI in rating an upper extremity impairment, that, if the loss of range of motion had an organic basis, the range of motion should be measured three times and the greatest measurement used to determine impairment, and that the evaluator should determine whether the ROM or DBI method yields the greater impairment. Dr. Garelick noted that the most that could be awarded under the DBI method, based on post-traumatic degenerative arthritis (which he found the most appropriate diagnosis) was nine percent. Thus, he determined that ROM was the proper method to evaluate appellant's upper extremity permanent impairment. As appellant's range of motion had been properly measured three times, he used Table 15-34, page 475 to find a total 11 percent left upper extremity permanent impairment

and 11 percent right upper extremity permanent impairment. Dr. Garelick concluded that there was no basis for an increased award given the prior awards that appellant had received. He advised that the date of MMI should be modified to September 2, 2015.

By decision dated March 14, 2018, OWCP denied appellant's claim for an increased schedule award, finding that appellant had not established more than the 34 percent permanent impairment of her right upper extremity and 12 percent permanent impairment of her left upper extremity previously awarded.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

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).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹²

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. 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 combined.¹³ Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.¹⁴

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at 10.404(a).

¹⁰ 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).

¹¹ A.M.A., *Guides* 383-492.

¹² *Id.* at 411.

¹³ *Id.* at 473.

¹⁴ *Id.* at 473-74.

Regarding the application of the 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.*”¹⁵ (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.”¹⁶

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 34 percent permanent impairment of the right upper extremity and 12 percent permanent impairment of the left upper extremity, for which she previously received schedule award compensation.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP’s December 15, 2015 decision because the Board considered that evidence in its March 27, 2017 decision when it reviewed the evidence of

¹⁵ FECA Bulletin No. 17-06 (May 8, 2017); *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

¹⁶ *Id.*

record for the schedule award claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁷

On prior appeal, the Board remanded the case for OWCP to reevaluate the extent of appellant's permanent impairment of her right and left upper extremities, applying a consistent method for rating upper extremity impairment under the A.M.A., *Guides*. On remand, the DMA, Dr. Garelick, reviewed the evidence and noted that FECA Bulletin No. 17-06 provided guidance for consistently rating upper extremity impairments. Pursuant to the Bulletin, if the A.M.A., *Guides* allowed for both the ROM and DBI methodologies in calculating permanent impairment of the upper extremity, the method that yielded the higher impairment rating should be used. Dr. Garelick concurred with the impairment rating made by Dr. Brigham, the impartial medical examiner selected to resolve the conflict in the medical opinion evidence.

Dr. Brigham, in his September 2, 2015 report, measured range of motion for both upper extremities and determined that, for the right shoulder, appellant had 3 percent permanent impairment for 105 degrees flexion, 1 percent permanent impairment for 42 degrees extension, 3 percent permanent impairment for 98 degrees abduction, 0 percent permanent impairment for 35 degrees adduction, 0 degree permanent impairment for 65 degrees external rotation, and 4 percent permanent impairment for 10 degrees internal rotation, resulting in a total 11 percent permanent impairment of the right upper extremity. For the left upper extremity, he found appellant had 3 percent permanent impairment for 94 degrees flexion, 1 percent permanent impairment for 41 degrees extension, 3 percent permanent impairment for 91 degrees abduction, 0 percent permanent impairment for 40 degrees adduction, 0 degree permanent impairment for 60 degrees external rotation, and 4 percent permanent impairment for 18 degrees internal rotation, resulting in a total 11 percent permanent impairment.

In reports dated September 15 and October 25, 2017 and March 14, 2018, Dr. Garelick determined that the ROM method yielded a higher impairment rating than the DBI method. He therefore concurred with Dr. Brigham's bilateral shoulder permanent impairment rating using Table 15-34, page 475. He determined that appellant's bilateral upper extremity impairment due to her shoulder conditions was appropriately rated using the ROM method, which yielded a greater impairment rating than the DBI method. The current right upper extremity permanent impairment rating of 11 percent and the current left upper extremity permanent impairment rating of 11 percent is less than the 34 percent permanent impairment rating for right upper extremity and 12 percent permanent impairment rating for the left upper extremity previously awarded.

As noted, it is appellant's burden of proof to establish increased permanent impairment.¹⁸ Because her current right upper extremity permanent impairment and left upper extremity permanent impairment is less than that previously awarded, the Board finds that she is not entitled to an increased schedule award.¹⁹

¹⁷ See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

¹⁸ See *D.F.*, Docket No. 17-1474 (issued January 26, 2018); *A.T.*, Docket No. 16-0738 (issued May 19, 2016).

¹⁹ See *D.F.*, *id.*; *M.B.*, Docket No. 16-1826 (issued May 15, 2017).

On appeal appellant contends that since her condition has worsened that she is entitled to an additional schedule award for her bilateral shoulder conditions. For the reasons discussed above, appellant has not established entitlement to a greater schedule award.

Appellant may request a schedule award, or increased schedule award, at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established more than 34 percent permanent impairment of her right upper extremity and 12 percent permanent impairment of her left upper extremity, for which she has previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 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