United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 18-1307**
	)	**Issued: March 27, 2019**
DEPARTMENT OF THE AIR FORCE, AIR FORCE NATIONAL GUARD-TITLE 32, Tacoma, WA, 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 June 19, 2018 appellant filed a timely appeal from a May 17, 2018 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]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the May 17, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

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

FACTUAL HISTORY

On February 16, 2017 appellant, then a 29-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that he dislocated his right shoulder on February 15, 2017 when he was loading aircraft jacks onto a transport trailer, slipped on a wet floor, and fell to the ground while in the performance of duty.

On May 2, 2017 OWCP accepted the claim for unspecified dislocation of the right shoulder. Preexisting or concurrent medical conditions included prior right shoulder Bankart repair in 2001 and an open anterior capsule labral construction in 2002. On June 14, 2017 appellant underwent OWCP-approved arthroscopic lavage and debridement and open lateral transfer of the coracoid with capsular repair.[3] He stopped work on June 14, 2017 and received wage-loss compensation for temporary total disability through September 17, 2017, when he returned to work in a full-time, light/limited-duty capacity.

On September 26, 2017 appellant filed a schedule award claim (Form CA-7).

By development letter dated October 5, 2017, OWCP informed appellant that no medical evidence had been received in support of his schedule award claim. It advised him of the evidence necessary to support his schedule award claim including a detailed narrative medical report from his treating physician, based on a recent examination, setting forth an opinion on maximum medical improvement (MMI), and a rating of permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

In a November 15, 2017 report, Dr. Ryan Barnes, a neurosurgeon, provided range of motion findings. For the right shoulder, he related 15 degrees for external rotation and 30 degrees for internal rotation.

A November 28, 2017 memorandum of telephone call, indicates that appellant informed OWCP that his treating physician would not provide a permanent impairment rating.

On November 30, 2017 OWCP referred appellant, a statement of accepted facts, and a list of questions, to Dr. Eric Rudd, a Board-certified orthopedic surgeon, for a second opinion evaluation.

[3] Dr. Russel Vanderwilde, a Board-certified orthopedic surgeon, performed the procedures.

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

In a December 12, 2017 report, Dr. Rudd noted appellant's history of injury and medical treatment. He utilized the A.M.A., *Guides* and explained that based on the diagnosis-based impairment (DBI) method for rating permanent impairment, appellant did not have shoulder instability and therefore did not qualify for a permanent impairment rating. Dr. Rudd employed the range of motion (ROM) method, provided one set of measurements, and opined that appellant had 10 percent right upper extremity permanent impairment.[5]

Dr. David J. Slutsky, a Board-certified orthopedic hand surgeon serving as an OWCP district medical adviser (DMA), reviewed Dr. Rudd's report on January 17, 2018. He disagreed with Dr. Rudd's right shoulder ROM permanent impairment rating, since he had not provided three sets of range of motion measurements. Dr. Slutsky instead relied on the "preferred" DBI methodology.[6] He explained that appellant had zero percent right upper extremity permanent impairment under Table 15-5 of the Shoulder Regional Grid[7] because he had no shoulder instability, minimal shoulder pain, no subjective instability, minimal palpatory findings, and a limited loss of motion.

On January 19, 2018 OWCP requested clarification from Dr. Rudd with regard to appellant's right shoulder ROM findings.

In a March 14, 2018 report, Dr. Rudd explained that it was unnecessary to provide three sets of measurements, as he found that appellant to be "straight forward" and "the gain would not be worth the added steps."

In a March 20, 2018 letter, appellant was advised that he was referred for a second opinion examination with Dr. Kenneth Bode, a Board-certified orthopedic surgeon.

In a March 26, 2018 report, Dr. Bode noted appellant's examination findings and provided three sets of measurements for loss of ROM. He noted that appellant had: 175 degrees of flexion; 175 degrees of abduction; 60 degrees adduction; 60 degrees extension; 90 degrees external rotation; and only 40 degrees of internal rotation. Dr. Bode explained his ROM measurements, noting that he had appellant perform each test three times for all of the degrees of ROM, but the only consistent deficit, through three measurements was 40 degrees of internal rotation. He referred to Table 15-34 of the A.M.A, *Guides*[8] and explained that appellant's 40 degrees of internal rotation was a moderate deficit, and correlated to four percent upper extremity permanent impairment.

Dr. Bode also explained that he evaluated appellant's permanent impairment under the DBI methodology. He related that appellant had a functional history of 0 based on a *Quick*DASH score of only 4.5. Dr. Bode determined that appellant had no residual shoulder instability following

[5] Dr. Rudd noted that he was aware that appellant had two prior nonoccupational injuries and two prior nonoccupational surgeries. He explained that appellant indicated that his ROM worsened after his work injury.

[6] Dr. Slutsky explained that there was a lack of validated upper extremity ROM measurements.

[7] A.M.A., *Guides* 401-10.

[8] *Id.* at 475.

surgery, and therefore had no ratable permanent impairment utilizing that method. He found a mild problem for physical examination, due to loss of ROM, which he was using as a standalone measurement. Dr. Bode determined that appellant was at MMI on the date of his last examination.

Dr. Slutsky reviewed Dr. Bode's March 26, 2018 report on May 12, 2018. He concluded that appellant had four percent right upper extremity permanent impairment, based upon loss of as it was the greater award percentage. Dr. Slutsky advised that there were no discrepancies between their evaluations. He also noted that he had rated appellant's permanent impairment under the DBI method, which resulted in zero percent right upper extremity permanent impairment. Dr. Slutsky referred to Table 15-5 of the A.M.A., *Guides,* and found that there was no shoulder instability, warranting a class 0 and a zero percent impairment.[9] He advised that MMI was reached on December 27, 2017.

By decision dated May 17, 2018, OWCP granted appellant a schedule award for four percent permanent impairment of the right upper extremity. The award covered a period of 12.48 weeks, from December 27, 2017 to March 24, 2018.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement FECA program with the Director of OWCP.[10] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[11] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[12]

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[13] 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.[14]

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

[9] *Id.* at 401.

[10] *See* 20 C.F.R. §§ 1.1-1.4.

[11] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[12] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak,* 53 ECAB 130 (2001).

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.5 (March 2017).

[14] *Isidoro Rivera,* 12 ECAB 348 (1961).

examination (GMPE), and clinical studies (GMCS).[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16]

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).
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> "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."* (Emphasis in the original).[17]
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> The Bulletin further advises:
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> "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."[18]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than four percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

OWCP received a November 15, 2017 report from Dr. Barnes, who provided one set of ROM measurements of appellant's right shoulder, but he did not otherwise attempt to rate appellant's permanent impairment of the right shoulder. The Board has found that, when an attending physician fails to provide a rating that conforms to the A.M.A., *Guides,* his opinion is of limited probative value.[19]

[15] A.M.A., *Guide*s, 383-492

[16] *Id.* at 411.

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

[18] *Id.*

[19] *See R.I.,* Docket No. 17-0920 (issued July 21, 2017).

In a December 12, 2017 report, Dr. Rudd opined that appellant had 10 percent right upper extremity impairment. He indicated that he had used the ROM method; however, he did not provide three sets of measurements.[20] As a result, Dr. Rudd's report did not comply with the A.M.A., *Guides* and his report is of limited probative value.[21]

The Board finds that Dr. Bode and Dr. Slutsky properly determined that appellant had no more than four percent permanent impairment of his right upper extremity. Both Dr. Bode and Dr. Slutsky utilized Table 15-34 on page 475 of the A.M.A., *Guide*s for rating loss of ROM of the shoulder and concluded that appellant had four percent permanent impairment of his right upper extremity due to his loss of internal rotation of the right shoulder.

Furthermore, after rating appellant's permanent impairment based upon loss of range of motion, Dr. Slutsky followed OWCP's procedures and properly determined that the DBI method did not establish permanent impairment of appellant's right shoulder. He properly calculated the impairment using both the ROM and DBI methods and properly chose the higher rating.[22] Dr. Slutsky explained that appellant's diagnosis of unspecified dislocation of his right shoulder resulted in a finding of no permanent impairment based upon no shoulder instability, minimal shoulder pain, minimal palpatory findings, and some loss of motion under Table 15-5, Shoulder Regional Grid.[23]

The Board finds that appellant has not established more than four percent permanent impairment of his right upper extremity, for which he previously received a 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 met his burden of proof to establish more than four percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

[20] *Supra* note 17.

[21] *See J.G.*, Docket No. 09-1128 (issued December 7, 2009) (an attending physician's report is of little probative value if the A.M.A., *Guides* are not properly followed).

[22] *Supra* note 18.

[23] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the May17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2019
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