

**United States Department of Labor
Employees' Compensation Appeals Board**

C.P., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF INVESTIGATION, Miami, FL,)
Employer)

**Docket No. 19-0151
Issued: May 22, 2019**

Appearances:
Appellant, pro se
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 October 26, 2018 appellant filed a timely appeal from an August 27, 2018 merit decision and a September 12, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish more than five percent permanent impairment of his right upper extremity, for which he previously received

¹ The Board notes that appellant submitted additional evidence on appeal. 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 additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

schedule award compensation; and (2) whether OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 28, 2017 appellant, then a 44-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on November 24, 2017 he injured his right shoulder while in the performance of duty. OWCP accepted the claim for a right shoulder rotator cuff tear. It assigned OWCP File No. xxxxxx032. Appellant stopped work on March 5, 2018. On March 6, 2018 Dr. Fernando A. Moya, a Board-certified orthopedic surgeon, performed a rotator cuff repair, subacromial decompression, and debridement resurfacing chondroplasty of the glenoid and humerus. On April 17, 2018 appellant resumed his usual employment.

OWCP previously accepted that appellant had sustained sprains of the right shoulder, upper arm, and rotator cuff, a disorder of the bursae and tendons of the right shoulder, and a right supraspinatus tear due to a September 14, 2012 employment injury. That prior claim had been assigned OWCP File No. xxxxxx021.³

In a progress report dated June 1, 2018, Dr. Moya discussed appellant's complaints of less than full right shoulder strength and motion. He measured range of motion (ROM) of the right shoulder as 120 degrees flexion, 150 degrees abduction, 35 degrees external rotation, and 40 degrees internal rotation. Dr. Moya found 4/5 strength of the right shoulder with no impingement signs. He diagnosed status post acromion decompression.

On June 13, 2018 Dr. Moya opined that appellant had reached maximum medical improvement on June 1, 2018. Citing Table 15-5 on page 402-05 of the sixth edition of the A.M.A., *Guides*, he found 7 percent impairment due to his rotator cuff tear, 2 percent impairment due to impingement syndrome, and 9 percent impairment due to post-traumatic joint degeneration, for a combined right upper extremity permanent impairment rating of 18 percent, or 11 percent whole person permanent impairment.

On June 22, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated June 28, 2018, OWCP advised appellant that FECA did not provide for whole person impairment ratings in schedule award claims. It requested that Dr. Moya evaluate appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. OWCP related that, if the A.M.A., *Guides* allowed a rating using both the diagnosis-based impairment (DBI) and ROM methods, the impairment should be independently calculated using both methods. It advised that the evaluator must obtain three independent ROM measurements

³ On February 5, 2013 appellant underwent a right rotator cuff repair. On January 9, 2014 an OWCP district medical adviser (DMA) found that he had four percent permanent impairment of the right upper extremity due to his rotator cuff tear using Table 15-5 on page 404 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). By decision dated January 14, 2014, OWCP granted appellant a schedule award for four percent permanent impairment of the right upper extremity under OWCP File No. xxxxxx021.

and use the greatest of the measurements to determine the extent of impairment. OWCP afforded appellant 30 days to submit the requested evidence.

In a report dated July 23, 2018, Dr. Moya again found that appellant had 18 percent permanent impairment of the right upper extremity using the DBI method due to his rotator cuff tear, impingement syndrome, and post-traumatic joint degeneration. He found that appellant had a glenohumeral articular cartilage injury and shoulder joint injury due to employment and aggravated by the November 24, 2017 employment injury. Dr. Moya provided ROM measurements for appellant's right shoulder of 120 degrees flexion, 150 degrees abduction, 35 degrees external rotation, and 40 degrees internal rotation. He advised that appellant had 4/5 strength of the biceps, supraspinatus, and subscapularis tendons; and objective findings on diagnostic studies of a rotator cuff tear; surgical findings of articular cartilage damage; problems with the acromioclavicular joint and acromion; and a rotator cuff tear.

On August 9, 2018 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a DMA, reviewed the evidence. He noted that page 390 of the A.M.A., *Guides* instructed the evaluator, in use of the DBI rating method, to select the most significant diagnosis given multiple shoulder pathologies. Dr. Garelick opined that appellant had five percent permanent impairment due to post-traumatic degenerative joint disease under Table 15-5 of page 405. He found that he could not provide an impairment due to ROM as Dr. Moya had not obtained three independent ROM measurements. Dr. Garelick noted that appellant had previously received a schedule award for four percent impairment of the right upper extremity due to a rotator cuff tear using the DBI method under OWCP File No. xxxxxx021.

By decision dated August 27, 2018, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right upper extremity, for a total of five percent right upper extremity permanent impairment. The period of the award ran for 3.12 weeks from June 13 to July 4, 2018.

On September 7, 2018 appellant requested reconsideration. He resubmitted Dr. Moya's July 23, 2018 report with his reconsideration request.

By decision dated September 12, 2018, OWCP denied appellant's request for reconsideration, finding that he had not raised substantive legal arguments or submitted relevant and pertinent new evidence sufficient to warrant reopening his case for further merit review pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁴ and its implementing federal regulation,⁵ 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

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404.

determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁶ 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.⁷

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).⁸ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

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 DBI sections are applicable.¹² 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.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

⁶ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁹ *Id.* at 494-531.

¹⁰ *Id.* 411.

¹¹ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹² A.M.A., *Guides* 461.

¹³ *Id.* at 473.

¹⁴ *Id.* at 474.

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.*”¹⁵ (Emphasis in the original.)

ANALYSIS -- ISSUE 1

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

In a report dated June 13, 2018, Dr. Moya, citing Table 15-5 of the A.M.A., *Guides*, found that appellant had 7 percent impairment due to his rotator cuff tear, 2 percent impairment due to impingement syndrome, and 9 percent impairment for post-traumatic joint degeneration, for a total right upper extremity permanent impairment of 18 percent.

On June 28, 2018 OWCP advised Dr. Moya that, if applicable, he should rate appellant’s impairment using both the DBI and ROM methods, and noted that ROM should be measured three independent times and the greatest measurement used to determine the extent of impairment.

In a July 23, 2018 report, Dr. Moya again found 18 percent permanent impairment of the right upper extremity after combining impairment ratings using the diagnosis of rotator cuff tear, impingement syndrome, and post-traumatic joint degeneration. He measured ROM as 120 degrees flexion, 150 degrees abduction, 35 degrees external rotation, and 40 degrees internal rotation and found 4/5 muscle strength of the right shoulder.

In accordance with OWCP’s procedures Dr. Garelick, the DMA, reviewed the evidence on August 9, 2018 and opined that Dr. Moya should have rated the extent of appellant’s permanent impairment using one shoulder diagnosis. The A.M.A., *Guides* provides, “In the shoulder, it is not uncommon for rotator cuff tears, a superior labral lesion from anterior to posterior (SLAP) lesion or other labral lesions, and biceps tendon pathology to all be present simultaneously. The evaluator is expected to choose the most significant diagnosis and to rate only that diagnosis using the DBI method that has been described.”¹⁶ The DMA found the diagnosis of post-traumatic

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

¹⁶ A.M.A., *Guides* 390.

degenerative joint disease as the most significant diagnosis. He opined, using the DBI rating method, that appellant had five percent permanent impairment due to the diagnosis of post-traumatic degenerative joint disease under Table 15-5 of page 405. The DMA determined that a diagnosis for ROM was not applicable in this case as Dr. Moya had not provided three independent ROM measurements. Neither Dr. Moya nor the DMA, however, applied grade modifiers or the net adjustment formula as required by the A.M.A., *Guides*.¹⁷ Consequently, the Board finds that their opinions are insufficient to determine the extent of appellant's right upper extremity impairment using the DBI method.¹⁸

The Board further finds that OWCP did not properly development the medical evidence pursuant to FECA Bulletin No. 17-06, which requires that it should instruct an evaluating physician to obtain three independent measurements of ROM loss, if they have not been provided into the record.¹⁹ It was incumbent upon the DMA, when performing the ratings under both the ROM and DBI methods to obtain the necessary ROM measurements to complete the full rating.²⁰

The case must therefore be remanded. On remand, the DMA should first request that Dr. Moya provide three independent ROM measurements and complete a supplement ROM impairment rating. If, Dr. Moya does not provide the requested information OWCP shall refer appellant for a second opinion examination to obtain the necessary ROM measurements as outlined in the A.M.A., *Guides*. Only after proper development of the medical record should the case record be rerouted to the DMA to apply grade modifiers in determining the extent of appellant's permanent impairment rating under the DBI method of rating permanent impairment. After such further development as is deemed necessary, OWCP shall issue a *de novo* decision.²¹

CONCLUSION

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

¹⁷ *Supra* notes 8, 9; *see also D.G.*, Docket No. 17-0600 (issued July 5, 2017).

¹⁸ *R.B.*, Docket No. 17-1995 (issued August 13, 2018).

¹⁹ *V.H.*, Docket No. 18-0848 (issued February 25, 2019); *T.R.*, Docket No. 17-1961 (issued December 20, 2018)

²⁰ *See M.D.*, Docket No. 18-1073 (issued January 18, 2019) (finding that a DMA should advise as to the medical evidence necessary to complete the ROM method of rating if the medical evidence of record is insufficient to rate appellant's impairment using loss of ROM).

²¹ In view of the Board's disposition of the merits of this case, the issue of whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) is moot.

ORDER

IT IS HEREBY ORDERED THAT the September 12 and August 27, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 22, 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