

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

_____)	
Z.L.)	
)	
and)	Docket No. 18-0850
)	Issued: October 29, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Pittsburgh, PA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Leah Bachmeyer Kille, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On March 13, 2018 appellant, through counsel, filed a timely appeal from a September 28, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 12 percent permanent impairment of the left upper extremity and 5 percent permanent impairment of the right upper extremity, for which she previously received schedule award compensation.

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.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 15, 2007 appellant, then a 43-year-old window clerk, filed a notice of occupational disease claim (Form CA-2) alleging that she sustained a bilateral shoulder injury due to factors of her federal employment including repetitive motion. OWCP accepted the claim for bilateral sprains of shoulders, upper arms, and rotator cuff. It authorized a surgical arthroscopy of the right shoulder on February 7, 2007 and May 21, 2008 and the left shoulder on August 15, 2007 and September 26, 2008.

On June 9, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a December 23, 2013 report, Dr. Michael J. Platto, a Board-certified physiatrist, indicated that appellant was seen that day for an impairment rating evaluation. He determined that she had reached maximum medical improvement (MMI) for her accepted condition and conducted a physical examination, including obtaining a *QuickDASH* score of 83.33. Dr. Platto noted tenderness to palpation in the bilateral upper trapezius muscles and bilateral biceps tendons; motor strength was 5/5 in both upper extremities; sensation was intact; and deep tendon reflexes were absent in the upper extremities. He noted that active range of motion (ROM) measurements were done on three successive trials for each shoulder. Left shoulder flexion was 91, 90, and 83 degrees, extension 27, 30, and 20 degrees, abduction 71, 75, and 78 degrees, adduction 12, 25, and 27 degrees, internal rotation 90 degrees on first trial, and external rotation 88 degrees on first trial. Right shoulder flexion was 112, 108, and 67 degrees, extension 35, 30, and 33 degrees, abduction 92, 75, and 80 degrees, adduction 18, 25, and 23 degrees, internal rotation 47, 45, and 47 degrees on first trial, and external rotation 90 degrees on successive trials. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*),⁴ Dr. Platto explained that he used the ROM methodology for rating permanent impairment because appellant had ROM deficits. Under Table 15-34, page 475, he used the maximum obtained ROM for each range and found that appellant had 13 percent permanent impairment of the left upper extremity and 12 percent permanent impairment of the right upper extremity.

On April 7, 2015 Dr. Morley Slutsky, Board-certified in occupational medicine serving as a district medical adviser (DMA), reviewed the medical evidence of record and determined that appellant's date of MMI was December 23, 2013, the date of Dr. Platto's impairment examination. The DMA found, however, that Dr. Platto's measurements did not represent appellant's best effort. He therefore rated appellant's impairment using the "preferred" diagnosis-based impairment (DBI) method, whereas Dr. Platto had used the less-preferred ROM method. Regarding her left shoulder, the DMA found that her most impairing diagnosis was acromioclavicular joint disease status post distal clavicle excision, which was a class of diagnosis (CDX) of 1. He assigned a grade modifier

³ Docket No. 15-0117 (issued March 4, 2015).

⁴ A.M.A., *Guides* (6th ed. 2009).

of 2 for physical examination (GMPE) because there was tenderness to palpation. The DMA found that Dr. Platto's ROM measurements were inconsistent with the best effort by appellant and no other objective deficits were documented. He further found that her *QuickDASH* score of 83.3 was equal to a grade modifier of 4 for functional history (GMFH) and exceeded the GMPE by 2, as such the GMFH was not used because it was unreliable. The DMA assigned a grade modifier of 4 for clinical studies (GMCS). Using the net adjustment formula $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, he calculated that appellant had a net adjustment of $(n/a) + (2-1) + (4-1) = 4$, equaling a grade E. Based on these calculations, the DMA concluded that she had 12 percent permanent impairment of the left upper extremity.

Regarding appellant's right shoulder, the DMA found that her most impairing diagnosis was full thickness rotator cuff tear with residual dysfunction, which was a CDX of 1. He assigned a GMPE of 2 because there was tenderness to palpation for moderate underlying pathology. The DMA again noted that Dr. Platto's ROM measurements were inconsistent. He noted the *QuickDASH* score equated to a GMFH of 4 and exceeded the GMPE by 2, and as such the GMFH was not used because it was unreliable. The DMA assigned a GMCS of 2. Using the net adjustment formula $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, he calculated that appellant had a net adjustment of $(n/a) + (2-1) + (2-1) = 2$, equaling a grade E. Based on these calculations, the DMA concluded that she had seven percent permanent impairment of the right upper extremity.

By decision dated April 27, 2015, OWCP granted appellant a schedule award for 12 percent permanent impairment of the left upper extremity and 7 percent permanent impairment of the right upper extremity. The award ran for 59.28 weeks for the period December 23, 2013 to February 10, 2015.

On April 25, 2016 appellant requested reconsideration. On April 26, 2016 appellant, through counsel, again requested reconsideration.

In a March 29, 2016 report, Dr. David P. Fowler, a Board-certified orthopedic surgeon, noted that he had treated appellant in 2007 for her right rotator cuff.

On July 7, 2016 the DMA reviewed the medical evidence and revised his rating using the diagnosis of a full thickness rotator cuff tear to a partial thickness rotator cuff tear with residual findings based on the 2007 surgery and a 2012 magnetic resonance imaging (MRI) scan of the right shoulder which demonstrated "central cuff partial tear" and a "delaminating articular surface partial tear of infraspinatus with insertional hypertrophic edematous tendinopathy." He revised his rating to find that appellant had five percent permanent impairment of the right upper extremity.

OWCP requested that the DMA provide a supplemental report due to an error in the statement of accepted facts he had been provided. In an August 2, 2016 report, the DMA explained that he was not initially provided with the right shoulder surgical reports and he subsequently reviewed the surgery reports, as well as the 2012 MRI scan, which was performed postsurgery. He reiterated his opinion that appellant had only five percent permanent impairment of the right upper extremity based on his most impairing diagnosis of partial thickness rotator cuff tear with residual findings.

By decision dated September 22, 2016, OWCP denied modification of its prior schedule award decision. It further found that appellant had a decrease of two percent permanent impairment of the right upper extremity and, therefore, the claim would be reviewed to determine if there had been an overpayment of compensation due to the prior schedule award.⁵

On July 11, 2017 appellant, through counsel, requested reconsideration.

In an April 19, 2017 report, Dr. Platto indicated that he disagreed with the DMA's impairment rating. He indicated that the ROM method was the "preferred" method, not the DBI method used by the DMA, "because [he] was referred to it by the DBI grid." Dr. Platto also indicated that he closely followed procedures for rating impairment set forth in the A.M.A., *Guides*, page 464, where it provides that ROM should be measured at least three times. Finally, he argued that his use of the *QuickDASH* score was appropriate and explained the source cited by the DMA, page 406, of the A.M.A., *Guides* was appropriate only for the DBI method, not the ROM method which he had utilized.

By decision dated September 28, 2017, OWCP denied modification of its September 22, 2016 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁶ and its implementing federal regulations,⁷ 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.⁸ For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.⁹

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by grade modifiers of GMFH, GMPE, and GMCS.¹⁰ The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.¹¹

⁵ By decision dated December 28, 2016, OWCP found that appellant received a \$5,046.61 overpayment due to schedule award payments that were in error. It found that she was without fault in the creation of the overpayment, but denied waiver of recovery because her monthly income exceeded her monthly living expenses.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *see also* Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017).

¹⁰ *L.T.*, Docket No. 18-1031 (issued March 5, 2019); A.M.A., *Guides* 383-492.

¹¹ A.M.A., *Guides* 411.

OWCP's procedures provide that, after obtaining all necessary medical evidence, that file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of the permanent impairment specified.¹²

The A.M.A., *Guides* also provides that the ROM impairment method of calculating permanent functional impairment 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

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.

¹² *R.B.*, Docket No. 18-1308 (issued January 10, 2019); *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *supra* note 9 at Chapter 2.808.6f (March 2017).

¹³ A.M.A., *Guides* 473.

¹⁴ *Id.* at 473-74.

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).

“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

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁷

ANALYSIS

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

As noted above, FECA Bulletin No. 17-06 provides detailed instructions for obtaining sufficient evidence to conduct a complete impairment evaluation.¹⁸ 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 ROM of each affected body part and that the greatest measurement should be used to determine the extent of impairment.¹⁹ FECA Bulletin No. 17-06 further indicates that OWCP should instruct the physician to obtain three independent measurements.²⁰

Appellant’s attending physician provided an impairment rating report in which he relied upon the ROM methodology in finding 13 percent permanent impairment of the left upper extremity and 12 percent permanent impairment of the right upper extremity. OWCP then properly routed the case record to Dr. Slutsky, serving as a DMA, who determined that the ROM measurements obtained by Dr. Platto were inconsistent and therefore could not be used. As such, the DMA rated permanent impairment utilizing only the DBI method without requesting additional physical examination findings. Upon notification that the ROM measurements were inconsistent, OWCP did not request nor obtain a supplemental report from Dr. Platto or a second opinion physician.²¹

As OWCP did not obtain a supplemental report from the attending physician, Dr. Platto, or schedule a second opinion evaluation to obtain the necessary ROM measurements required for rating impairment in accordance with the procedures set forth in the A.M.A., *Guides* and FECA

¹⁶ *Id.*

¹⁷ *L.T., supra* note 10; *B.R., Docket No. 17-0294* (issued May 11, 2018).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See supra* note 17.

Bulletin No. 17-06, the case must be remanded to OWCP for further development. On remand it shall obtain the evidence necessary to complete the rating as prescribed in FECA Bulletin No. 17-06, including calculation under both ROM and DBI methodologies with an award based upon the higher rating.²² Following this such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 29, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²² *R.B.*, *supra* note 11; *J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 12, 2018).