United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
	)	**Docket No. 19-0893**
and	)	**Issued: October 10, 2019**
	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Fayetteville, NC, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 21, 2019 appellant filed a timely appeal from a September 26, 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 to review the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] 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*.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 10 percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

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

OWCP accepted that on November 14, 2011 appellant, then a 44-year-old medical technician, sustained right rotator cuff syndrome of the shoulder and allied disorders while in the performance of duty. It paid her wage-loss compensation on the supplemental rolls commencing January 9, 2012 and on the periodic rolls commencing March 11, 2012. OWCP subsequently expanded acceptance of the claim to include right shoulder and upper arm acromioclavicular (AC) sprain. It authorized right shoulder arthroscopic distal clavicle excision; right shoulder arthroscopic extensive debridement of a superior labral tear, rotator cuff tear, and bursitis of the right shoulder; and right shoulder open biceps tenodesis, which were performed on October 9, 2012 by Dr. Robert A. Creighton, an attending Board-certified orthopedic surgeon.

In a medical report dated June 2, 2015, Dr. Creighton diagnosed right shoulder partial thickness rotator cuff tear, superior labral tear, AC arthritis. He advised that appellant had reached maximum medical improvement (MMI) regarding her work-related conditions.

In a progress note dated April 28, 2017, Dr. Creighton indicated that appellant returned for follow-up evaluation of her continued neck and arm pain, and residual disability of her right shoulder which had already reached MMI.

On March 28, 2018 appellant filed a claim for a schedule award (Form CA-7).

On May 11, 2018 OWCP requested that Dr. Creighton provide a medical report indicating whether appellant had reached MMI and an impairment rating utilizing the appropriate portions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] It afforded him 30 days to submit the requested information.

OWCP thereafter received a January 3, 2018 letter from Dr. Douglas S. McFarlane, an orthopedic surgeon. Dr. McFarlane noted that appellant returned for a final disability evaluation of her right shoulder pain. He reviewed her medical record and provided a history of her accepted November 14, 2011 employment injuries, medical treatment, and diagnostic test results.

[3] Docket No. 16-0393 (issued June 24, 2016); Docket No. 18-0645 (issued October 26, 2018).

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

Dr. McFarlane found that she was at MMI and had 12 percent permanent impairment of the right upper extremity based on "residual lack of motion and weakness in this extremity."

Dr. Creighton responded to OWCP's May 11, 2018 letter on June 20, 2018 and noted that he last evaluated appellant on April 28, 2017 for continued neck and arm pain, and residual disability of the right shoulder, but that she had already reached MMI. He further noted her accepted November 14, 2011 employment injury and the authorized right shoulder procedures he performed on October 9, 2012. Dr. Creighton indicated that appellant subsequently suffered a fall on April 5, 2014 and that she continued to have residual shoulder disability with slight limited range of motion (ROM). He reported 150 degrees forward flexion, 50 degrees external rotation, and internal rotation to L1. Dr. Creighton further reported that a functional capacity evaluation showed that appellant was qualified for medium work with limited work above shoulder level. He found that she had 10 percent permanent impairment of the right shoulder under the sixth edition of the A.M.A., *Guides*.

On July 26, 2018 OWCP routed Dr. Creighton's report, a statement of accepted facts (SOAF), and the case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review.

In a report dated September 14, 2018, the DMA noted his review of the medical record and the SOAF. He utilized the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides* to calculate the extent of appellant's right shoulder permanent impairment. The DMA found that she had 10 percent permanent impairment of the right upper extremity based upon a class 1 distal clavicle excision under Table 15-5, page 403. He noted that there was "insufficient information in the case file to calculate an impairment rating utilizing the ROM rating method." The DMA noted that the report of Dr. Creighton had not documented the retained percentage of appellant's extension, abduction, or adduction. He determined that appellant had reached MMI on April 28, 2017.

By decision dated September 26, 2018, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right arm based on the opinions of Dr. Creighton and the DMA. OWCP found that appellant had reached MMI on April 28, 2017 and that the period of the award ran for 31.2 weeks (0.4 fraction of a day) from April 28 to December 2, 2017.

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. FECA, however, does not specify the manner in which the percentage loss of a member shall be 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.

[5] *Supra* note 1.

[6] 20 C.F.R. § 10.404.

OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[7] 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.[8]

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).[9] 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).[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[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.[13] If ROM is used as a stand-alone impairment rating method, the total of ROM impairment for all units of function must be calculated. All values for the joint are measured and combined.[14] 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.[15]

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

[7] 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); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[8] *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, ICF: A Contemporary Model of Disablement.

[10] *Id*. at 494-531.

[11] *Id*. at 411.

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

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

[14] *Id*. at 473.

[15] *Id*. at 474.

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*."[16] (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."[17]

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.[18]

ANALYSIS

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

OWCP accepted that appellant sustained rotator cuff syndrome of the right shoulder and allied disorders, and later expanded the claim to include AC sprain of the right arm and shoulder as employment related. It granted her a schedule award for 10 percent permanent impairment of her right upper extremity.

The Board finds, however, that OWCP did not follow the procedures set forth 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 of the upper

[16] FECA Bulletin No. 17-06 (May 8, 2018).

[17] *Id*.

[18] *See* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.808.6(f) (February 2013).

extremities.[19] It indicates that, if the rating physician provides an assessment using the ROM method, the DMA should independently calculate permanent 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.[20] It indicates that OWCP should instruct the physician to obtain three independent measurements.[21]

OWCP referred appellant's case to Dr. Harris, serving as a DMA. In his September 14, 2018 report, the DMA utilized the DBI rating method to calculate 10 percent permanent impairment of appellant's right upper extremity based upon a class 1 distal clavicle excision under Table 15-5, page 403. He noted that there was "insufficient information in the case file to calculate an impairment rating utilizing the ROM rating method." The DMA noted that the report of Dr. Creighton had not documented the retained percentage of appellant's extension, abduction, or adduction. He did not request that OWCP obtain from Dr. Creighton or other examining physician three independent measurements of appellant's ROM of the right shoulder as is required by a DMA. As OWCP failed to obtain a medical report containing three independent measurements of each ROM in accordance with the procedures set forth in the A.M.A., *Guides* and FECA Bulletin No. 17-06, the Board will set aside the schedule award decision. The case will be remanded for OWCP to obtain the evidence necessary to complete the rating process as described above.[22] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[19] *Supra* note 16.

[20] *Id*.

[21] *Id*.

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

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2018 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 10, 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