

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

_____)	
D.S., Appellant)	
)	
and)	Docket No. 19-0025
)	Issued: September 3, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Milwaukee, WI, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

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

On October 2, 2018 appellant filed a timely appeal from a September 13, 2018 decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Board's docketed the appeal as No. 19-0025.

This matter has previously been before the Board.² The facts and circumstances of the previous decision of the Board are incorporated herein by reference. The relevant facts are as follows.

¹ Appellant also filed a timely request for oral argument. By order dated April 4, 2019, the Board, after exercising its discretion, denied his request as his arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0025 (issued April 4, 2019).

² Docket No. 17-1631 (issued January 3, 2018).

OWCP accepted that on October 29, 2009 appellant, then a 56-year old mail handler, sustained a right complete rotator cuff rupture, cervicalgia, and degeneration of a cervical intervertebral disc while in the performance of duty.³

On October 18, 2013 appellant filed a claim for a schedule award (Form CA-7).

OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of his right upper extremity permanent impairment. In a December 20, 2016 report, Dr. Brecher determined that appellant had reached maximum medical improvement and had 10 percent permanent impairment of the right upper extremity based on the range of motion (ROM) methodology. On January 23, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP District Medical Adviser (DMA), agreed with Dr. Brecher's permanent impairment rating.

By decision dated March 9, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of his right upper extremity.

Appellant filed an appeal with the Board on July 24, 2017. By decision dated January 3, 2018, the Board set aside OWCP's March 9, 2017 schedule award decision and remanded the case for further development.⁴ The Board found that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. The Board noted that following OWCP's development of a consistent method for calculating permanent impairment for upper extremities, OWCP would issue a *de novo* decision.

Following remand, on April 24, 2018, OWCP referred appellant to Dr. Brecher for a supplemental evaluation in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06.⁵

In an April 24, 2018 supplemental report, Dr. Brecher provided examination findings and noted that he could not provide a spinal nerve rating until appellant underwent an electromyogram (EMG) study. Utilizing the ROM method, he calculated 13 percent permanent impairment of the right upper extremity.

Following Dr. Brecher's April 24, 2018 evaluation, OWCP authorized and scheduled appellant for an EMG and nerve conduction velocity (NCV) study on May 22, 2018.

In a May 22, 2018 report, Dr. C. Johnson, a Board-certified radiologist, indicated that appellant's bilateral EMG/NCV study revealed bilateral carpal tunnel syndrome and bilateral mid-cervical root irritation.

³ Under subsidiary claim OWCP File No. xxxxxx171, OWCP granted appellant a schedule award for 18 percent permanent impairment of the left upper extremity. OWCP administratively combined OWCP File No. xxxxxx171 with the present claim, with the latter serving as the master file.

⁴ *Supra* note 2.).

⁵ FECA Bulletin No. 17-06 (May 8, 2017).

On June 18, 2018 Dr. Brecher resubmitted his April 24, 2018 report with an accompanying addendum. He reported that he reviewed the May 22, 2018 EMG and his opinion was unchanged, noting that it was not possible to provide appellant a true permanent impairment rating until his carpal tunnel syndrome was addressed and further treatment was provided.

On July 30, 2018 OWCP referred Dr. Brecher's April 24, 2018 report and a statement of accepted facts (SOAF) back to Dr. Katz for an opinion in accordance with the Board's January 3, 2018 decision.

In an August 3, 2018 report, Dr. Katz noted review of Dr. Brecher's initial December 20, 2016 report and supplemental April 24, 2018 report. Utilizing the DBI method, he calculated 12 percent permanent impairment of the right upper extremity based on an acromioclavicular (AC) joint injury status post distal clavicle resection. Dr. Katz further determined that the ROM method for the right shoulder established 13 percent permanent impairment of the right upper extremity. He concluded that appellant sustained 13 percent permanent impairment of the right upper extremity.

By decision dated September 13, 2018, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the right upper extremity.

Having reviewed the case record submitted by OWCP, the Board finds that this case is not in posture for decision.

The record reflects that subsequent to Dr. Brecher's April 24, 2018 examination, OWCP scheduled appellant for a May 22, 2018 EMG/NCV study of the bilateral upper extremities. In a June 18, 2018 addendum report, Dr. Brecher reviewed the findings of the EMG/NCV study and determined that his opinion regarding impairment had not changed, noting that he could not yet provide a spinal nerve impairment rating.

On July 30, 2018 OWCP referred Dr. Brecher's April 24, 2018 report and a SOAF to Dr. Katz for review and determination of the extent of permanent impairment for purposes of a schedule award. However the July 30, 2018 SOAF did not reflect the most recent diagnostic testing performed on May 22, 2018. OWCP procedures indicate that, when a DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁶ While Dr. Katz agreed with the impairment rating provided in Dr. Brecher's April 24, 2018 report, it does not appear that he had an opportunity to review the findings of the EMG/NCV study as his report made no reference to the May 22, 2018 diagnostic report or to Dr. Brecher's June 18, 2018 addendum report.⁷ As these reports contained findings pertinent to appellant's accepted conditions, the DMA was not provided a complete and accurate framework, rendering his opinion of limited probative

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.5 (September 2009); *see also A.C.*, Docket No. 07-2423 (issued May 15, 2008).

⁷ *T.R.*, Docket No. 17-1961 (issued December 20, 2018).

value.⁸ The Board therefore finds that further development is required. On remand, OWCP should prepare an updated SOAF and refer the case file and relevant reports to a DMA for a reasoned opinion regarding the extent of appellant's permanent impairment of the right upper extremity. Following such further development as deemed necessary, it shall issue a *de novo* decision.⁹ Accordingly,

IT IS HEREBY ORDERED THAT the September 13, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this order of the Board.

Issued: September 3, 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

⁸ *F.R.*, Docket No. 17-1711 (issued September 6, 2018); *L.J.*, Docket No. 14-1682 (issued December 11, 2015).

⁹ *D.D.*, Docket No. 16-0558 (issued August 5, 2016).