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

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| **I.L., Appellant** | ) | |
| **and** | ) | **Docket No. 20-0048** |
| | ) | **Issued: July 7, 2020** |
| **DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Barstow, CA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On October 6, 2019 appellant filed a timely appeal from an August 26, 2019 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.

### ***ISSUE***

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

### ***FACTUAL HISTORY***

On December 12, 2017 appellant, then a 39-year-old materials examiner and identifier (fork lift operator), filed a traumatic injury claim (Form CA-1) alleging that, on December 11,

[1] 5 U.S.C. § 8101 *et seq.*

2017, he injured his right shoulder when he attempted to pull out a stuck part from a tri-wall while in the performance of duty. He stopped work on December 12, 2017. OWCP accepted the claim for right shoulder sprain and right shoulder adhesive capsulitis. It paid appellant intermittent wage-loss compensation on the supplemental rolls effective January 26, 2018.[2]

On October 26, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a November 27, 2018 report, Dr. Ronny G. Ghazal, a Board-certified orthopedic surgeon, applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] to his November 7, 2018 examination findings. He indicated that appellant had reached maximum medical improvement (MMI). Dr. Ghazal opined that appellant had 13 percent right upper extremity permanent impairment for rotator cuff injury, partial thickness tear of the right shoulder. He set forth his impairment calculations. Regarding appellant's range of motion (ROM) of the right shoulder, Dr. Ghazal noted one set of measurements, but did not provide a rating based upon ROM methodology. He concluded that appellant's diagnosis of rotator cuff partial thickness tear, could be rated utilizing the diagnosis-based impairment (DBI) methodology under Table 15-5 page 402 and after applying the grade adjustment formula would result in a finding of 13 percent permanent impairment of the right upper extremity.

On December 10, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Ghazal's impairment rating. He found that MMI was reached on November 7, 2018, the date of Dr. Ghazal's impairment evaluation. The DMA opined that under Table 15-5 page 402 appellant had five percent impairment for a partial thickness rotator cuff tear under the DBI methodology for assigning permanent impairment. He explained the discrepancy between Dr. Ghazal's and his own calculation, noting that the default value for a partial thickness tear of the rotator cuff under Table 15-5 was three percent, applying the grade adjustment modifiers, appellant had five percent permanent impairment, the maximum allowable permanent impairment. The DMA explained that Dr. Ghazal had improperly concluded that appellant's diagnosis resulted in 13 percent permanent impairment of appellant's right shoulder. He also noted that the A.M.A., *Guides* allowed for an alternative ROM impairment methodology for the diagnosis in question, but found Dr. Ghazal's ROM findings were not sufficient to render an impairment as he failed to document three independent ROM measurements of each arc.

In a January 10, 2019 letter, OWCP requested that Dr. Ghazal indicate, within 30 days, whether he concurred with its DMA's impairment conclusion and assessments. Dr. Ghazal did not respond to this request.

[2] Appellant has a prior claim under OWCP File No. xxxxxx252, in which OWCP accepted that appellant sustained left shoulder contusion and left shoulder rotator cuff tendinitis conditions as a result of an April 26, 2016 trip and fall. By decision dated October 18, 2017, OWCP granted him a schedule award for nine percent permanent impairment of the left upper extremity. The award ran 28.08 weeks for the period September 12, 2017 through March 27, 2018. Appellant's claims have not been administratively combined.

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

OWCP referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon for a second opinion impairment evaluation. In a June 12, 2019 report, Dr. Ma reviewed appellant's medical records, the statement of accepted facts (SOAF), and noted examination findings. He opined that appellant had reached MMI on November 7, 2018. Dr. Ma opined that, under Table 15-5 of the A.M.A., *Guides,* appellant had five percent permanent impairment for partial thickness tear of the rotator cuff, the maximum permanent impairment value for the diagnosis. He indicated that appellant's ROM was obtained three times and reported the maximum measurements, including 140 degrees flexion, 40 degrees extension, 140 degrees abduction, 40 degrees adduction, 80 degrees internal rotation, and 45 degrees external rotation. Under the ROM methodology, Dr. Ma found that, under Table 15-34, 140 degrees flexion was three percent impairment; 40 degrees extension was one percent impairment, 140 degrees abduction was three percent impairment, 40 degrees adduction was zero percent impairment, 80 degrees internal rotation was zero percent impairment, and 45 degrees external rotation was two percent impairment, for a total nine percent right upper extremity impairment. He opined that as the nine percent ROM impairment rating was greater than the five percent DBI impairment rating, the greater impairment should be used for schedule award purposes.

On August 1, 2019 the DMA re-reviewed the SOAF and appellant's medical records. He indicated that Dr. Ghazal's November 17, 2018 impairment evaluation was not probative, noting that there were no probative ROM measurements to calculate a ROM impairment rating and Dr. Ghazal's 13 percent impairment rating based on DBI methodology was not in accordance with the A.M.A, *Guides*. The DMA noted that using Dr. Ghazal's examination findings he had calculated five percent impairment rating based on DBI methodology. He then utilized Dr. Ma's examination findings to find appellant's impairment rating under the A.M.A., *Guides*. Utilizing the DBI methodology under Table 15-5 for the class of diagnosis (CDX) of rotator cuff injury partial thickness tear, the DMA opined that appellant had class 1 impairment. Citing to Table 15-7, Table 15-8, and Table 15-9, he assigned: a grade modifier for functional history (GMFH) of 1; a grade modifier for physical examination (GMPE) of 1; and a grade modifier for clinical studies (GMCS) of 2, which yielded a net adjustment of 1. The DMA found this resulted in class 1, grade D for four percent final permanent impairment. He concurred with Dr. Ma's nine percent right upper extremity impairment rating based on ROM methodology, noting that the shoulder ROM had been measured three times. The DMA further found that under Table 15-35, a grade modifier resulting from ROM was 1. Under Table 15-36, a GMFH adjustment was 1. As the total difference was zero, the DMA found that no further adjustment was indicated. He opined that the ROM impairment of nine percent represented the greater of the two impairment calculations. The DMA also found that appellant reached MMI on June 12, 2019, the date of Dr. Ma's impairment evaluation.

By decision dated August 26, 2019, OWCP granted appellant a schedule award for nine percent permanent right upper extremity impairment. The award ran for 28.08 weeks for the period June 12 through December 25, 2019.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA and its implementing regulations 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.[4] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be 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.[5] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (6th ed. 2009).[6]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by grade modifiers or GMFH, GMPE, and GMCS.[7] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[8]

The A.M.A., *Guides* also provide that ROM impairment methodology 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.[9] 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.[10] 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.[11]

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology *versus* the ROM methodology for rating of upper extremity impairments.[12] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "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

[4] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404; *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

[7] A.M.A., *Guides* 383-492.

[8] *Id.* at 411.

[9] *Id.* at 461.

[10] *Id.* at 473.

[11] *Id.* at 474.

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

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.*" (Emphasis in the original.)[13]

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."[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with the DMA providing rationale for the percentage of impairment specified.[15]

## ***ANALYSIS***

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

OWCP initially received a report from Dr. Ghazal, who rated appellant's permanent impairment of the right upper extremity and opined that appellant had 13 percent right upper extremity permanent impairment due to rotator cuff injury, partial thickness tear of the right shoulder. In accordance with its procedures, OWCP properly routed Dr. Ghazal's report to its DMA who found that appellant had five percent DBI based permanent impairment, the maximum allowable for partial thickness rotator cuff tear under Table 15-5, and indicated that a permanent impairment could not be assessed under the ROM methodology as three ROM measurements were not provided. Therefore OWCP properly found that Dr. Ghazal's report was of diminished probative value as it was not in compliance with the A.M.A., *Guides.*[16]

[13] A.M.A., *Guides* 477.

[14] *Id.*; Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[15] *See* Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.808.6(f) (March 2017).

[16] *See R.P.*, Docket No. 19-1601 (issued April 8, 2020).

OWCP referred appellant to Dr. Ma for a second opinion evaluation and opinion regarding permanent impairment of his right upper extremity under both the DBI and ROM methodologies. In his June 12, 2019 report, Dr. Ma opined that appellant had five percent permanent impairment under the DBI methodology and nine percent permanent impairment under the ROM methodology. He concluded that the ROM methodology yielded the greater impairment.

In accordance with its procedures, OWCP properly again routed the case record to the DMA, who provided permanent impairment ratings using both the DBI and ROM methodologies. The DMA concurred with Dr. Ma's nine percent right upper extremity permanent impairment rating based upon the ROM methodology. He also opined that the ROM methodology represented the greater right upper extremity permanent impairment rating.

The Board has reviewed the DMA's ROM impairment rating under Table 15-34, page 475 of the A.M.A., *Guides*, based on the findings of Dr. Ma, and finds that appellant has nine percent permanent impairment of the right upper extremity based upon the ROM methodology. Pursuant to Table 15-34, 140 degrees flexion equals three percent impairment, 40 degrees extension equals one percent impairment, 140 degrees abduction equals three percent impairment, 40 degrees adduction equals zero percent impairment, 80 degrees internal rotation equals zero percent impairment, and 45 degrees external rotation equals two percent impairment, for a total nine percent right upper extremity permanent impairment. Under Table 15-35, page 477, the DMA properly found grade modifier resulting from ROM was one. Under Table 15-36, page 477, he also properly found functional history adjustment was one. As the net modifier was zero, the DMA properly found that there was no increase to the total ROM impairment. He also properly indicated that appellant's impairment finding under the ROM methodology represented the greater right upper extremity permanent impairment.[17]

There is no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* addressing a greater than nine percent permanent impairment of the right upper extremity. Accordingly, appellant has not met his burden of proof to establish greater than nine percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

On appeal appellant contends that Dr. Ghazal's 13 percent right upper extremity permanent impairment rating should be given deference as he has been under Dr. Ghazal's care since he was injured. He also noted that the DMA never examined him. For the reasons set forth above, the Board has explained why Dr. Ghazal's impairment rating is not probative and that appellant has not established greater than nine percent permanent impairment of his right upper extremity.

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.

[17] *See E.R.*, Docket No. 19-1574 (issued March 24, 2020).

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board