United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
	)	
and	)	**Docket No. 19-1574**
	)	**Issued: March 24, 2020**
DEPARTMENT OF THE ARMY, SURFACE DEPLOYMENT & DISTRIBUTION COMMAND, Fort Bragg, NC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2019 appellant, through counsel, filed a timely appeal from a May 15, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

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

FACTUAL HISTORY

On March 17, 2016 appellant, then a 48-year-old braker/switcher, filed a traumatic injury claim (Form CA-1) alleging that on March 14, 2016 he injured his right shoulder while attempting to pull handbrakes off of a railcar while in the performance of duty. He stopped work on April 5, 2016. OWCP accepted the claim for right shoulder joint sprain. On August 31, 2016 appellant underwent an OWCP-approved right shoulder diagnostic arthroscopy, major glenohumeral debridement, superior labrum anterior posterior Type 2 tear debridement, long head of the biceps tenotomy, complete subacromial decompression of a Type 3 acromion and subacromial bursa and rotator cuff repair with one triple-loaded suture. OWCP placed him on the supplemental rolls effective August 31, 2016 and on the periodic rolls effective September 18, 2016. Appellant returned to full-time, light-duty capacity on January 18, 2017.

On April 27, 2017 appellant filed a claim for a schedule award (Form CA-7).

In an April 5, 2017 report, Dr. Chad M. Fortun, a Board-certified orthopedic surgeon, indicated that appellant had 11 percent right upper extremity permanent impairment. He noted that appellant had undergone right shoulder surgery and also had minor restrictions in range of motion (ROM) and occasional right shoulder pain.

On May 1, 2017 Dr. David Garelick, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), indicated that Dr. Fortun's April 5, 2017 impairment rating was not in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He opined, under Table 15-5, page 403 of the A.M.A., *Guides*, that appellant had five percent permanent impairment for a full-thickness rotator cuff tear under the diagnosis-based impairment (DBI) methodology for assigning permanent impairment. The DMA noted that there was no change using the net adjustment formula and that appellant had reached maximum medical improvement (MMI) on April 5, 2017.

By decision dated May 10, 2017, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity based on the DMA's report. The award ran 15.6 weeks for the period April 5 through July 23, 2017.

On May 18, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on November 9, 2017.

By decision dated January 9, 2018, OWCP's hearing representative set aside the May 10, 2017 decision and remanded the claim for further medical development and application of FECA

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

Bulletin No. 17-06.[4] The hearing representative instructed that the DMA consider both the DBI and the ROM methodology in determining the extent of permanent impairment.

In a January 12, 2018 supplemental report, the DMA advised that the ROM methodology could not be applied as appellant's right shoulder measurements were taken only one time and FECA Bulletin No. 17-06 required three independent measurements for use of the ROM methodology. He reiterated that appellant had five percent permanent impairment under the DBI methodology.

In a February 23, 2018 report, Dr. Fortun applied the sixth edition of the A.M.A., *Guides* to his April 5, 2017 examination findings. He indicated that MMI was reached on April 5, 2017. Using the DBI methodology under Table 15-5, page 403, Dr. Fortun opined that class 1 rotator cuff tear or tendon rupture, grade A, secondary to minor residual loss of ROM. He indicated that this would result in five percent right upper extremity impairment rating.

By decision dated March 5, 2018, OWCP denied appellant's claim for an increased schedule award.

On March 13, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

By decision dated July 9, 2018, OWCP's hearing representative set aside the March 5, 2018 decision and remanded the case for further development. OWCP was directed to request a supplemental report from Dr. Fortun to provide additional ROM measurements necessary to determine impairment under the ROM impairment methodology.

In a July 16, 2018 letter to Dr. Fortun, OWCP requested that he provide a supplemental impairment report in which he evaluated appellant's permanent impairment of the right upper extremity using both the DBI and ROM impairment methodology. Dr. Fortun was further advised that the ROM measurements must have an organic basis, that three independent measurements must be recorded, and that the greatest ROM finding should be used for determination of impairment under the ROM methodology.

In an August 8, 2018 report, Dr. Fortun advised that appellant did not have any ROM restrictions to qualify him for an impairment rating under the ROM methodology.

On August 21, 2018 OWCP referred appellant, along with a statement of accepted facts, the medical record and a list of questions, to Dr. Chason S. Hayes, a Board-certified orthopedic surgeon, for a second opinion evaluation and opinion regarding permanent impairment in accordance with FECA Bulletin No. 17-06 and the sixth edition of the A.M.A., *Guides.*

In an October 11, 2018 report, Dr. Hayes reviewed appellant's medical records and noted examination findings. Utilizing the DBI methodology under Table 15-5 for the diagnosis of rotator cuff injury partial thickness tear, he opined that appellant had a class 1 impairment. Dr. Hayes assigned a grade modifier for functional history (GMFH) of 1; a grade modifier for physical

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

examination (GMPE) of 1; and a grade modifier for clinical studies (GMCS) of 1. He indicated that the resulting grade was C for a final upper extremity impairment of one percent. Under the ROM methodology, Dr. Hayes reported three ROM measurements and reported the maximum measurement, including 150 degrees flexion; 40 degrees extension; 150 degrees abduction; 40 degrees adduction; 80 degrees external rotation; and 80 degrees internal rotation. He found that, flexion of 150 degrees was three percent impairment, extension of 40 degrees was one percent impairment, abduction of 150 degrees was three percent impairment, and appellant's other ROM findings were within normal limits, for a combined permanent impairment of seven percent. Dr. Hayes opined that the ROM methodology should be used as it resulted in the greater of the two impairment calculations.

In an updated November 5, 2018 report, the DMA reviewed Dr. Hayes' report. He found that MMI occurred on October 11, 2018 the date of Dr. Hayes' impairment rating. The DMA maintained his prior five percent right upper extremity impairment rating based on the DBI method. He also concurred with Dr. Hayes' seven percent right upper extremity impairment rating based on the ROM method, noting that shoulder ROM had been measured three times, and that it represented the greater impairment.

By decision dated November 20, 2018, OWCP granted appellant an additional two percent impairment of the right upper extremity, for a total seven percent permanent impairment. The increased schedule award ran for 6.24 weeks for the period October 11 through November 23, 2018.

On November 27, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held March 13, 2019.

By decision dated May 15, 2019, an OWCP hearing representative affirmed the November 20, 2018 decision.

LEGAL PRECEDENT

The schedule award provision 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.[5] 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

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

standard for evaluating schedule losses.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (6th ed. 2009).[7]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers or GMFH, GMPE, and GMCS.[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

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.[10] 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.[11] 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.[12]

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.[13] 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 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.*,

[6] 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).

[7] *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).

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

[9] *Id.* at 411.

[10] *Id.* at 461.

[11] *Id.* at 473.

[12] *Id.* at 474.

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

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.)[14]

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."[15]

OWCP 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.[16]

ANALYSIS

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

OWCP initially awarded appellant five percent right upper extremity impairment. Upon further development of the claim, it referred appellant to Dr. Hayes for a second opinion evaluation and opinion regarding permanent impairment of his right upper extremity under both the DBI and ROM impairment methodology. In his October 11, 2018 report, Dr. Hayes opined that appellant had one percent permanent impairment of the right upper extremity under the DBI methodology and seven percent permanent impairment of the right upper extremity under the ROM methodology. He concluded that the ROM methodology yielded the greater impairment.

In accordance with its procedures, OWCP properly routed the case record to its DMA who concurred with Dr. Hayes' seven percent right upper extremity permanent impairment finding based upon the ROM methodology and opined that it represented the greater right upper extremity impairment.

The Board has reviewed Dr. Hayes' ROM impairment rating under Table 15-34, page 475 of the A.M.A., *Guides* and concurs that appellant has seven percent permanent impairment of the right upper extremity based upon the ROM methodology. Pursuant to Table 15-34, appellant's right shoulder flexion of 150 degrees equals three percent impairment, extension of 40 degrees equals one percent impairment, and abduction of 150 degrees equals three percent impairment.

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

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

[16] *See* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.808.6(f) (March 2017).

Appellant's right shoulder permanent impairment under the ROM methodology therefore totals seven percent.

While the DMA did not discuss Dr. Hayes' impairment finding under the DBI methodology, the Board finds this is harmless error as it equated to five percent right upper extremity impairment previously calculated and awarded.

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

On appeal counsel contends that OWCP failed to give deference to appellant's attending physician. The Board does not find that assertion is meritorious and for the reasons set forth above it finds that appellant has not established greater than seven 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.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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