United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 19-1588**
	)	**Issued: March 10, 2020**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 19, 2019 appellant filed a timely appeal from a June 28, 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.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the June 28, 2019 decision, OWCP received additional evidence. 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 more than 11 percent permanent impairment of her right upper extremity for which she previously received a schedule award.

FACTUAL HISTORY

On August 4, 2015 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder injury when she pushed a mail container on July 29, 2015 while in the performance of duty. She stopped work on July 30, 2015.

OWCP accepted that appellant sustained right shoulder bursitis; strain of muscles, fascia, and tendons of the right shoulder/upper arm; and unspecified right rotator cuff tear or rupture, and it paid her appropriate wage-loss compensation benefits for periods of disability. On September 20, 2016 appellant underwent OWCP-authorized right shoulder surgery, including distal clavicle excision/resection, rotator cuff repair, acromioplasty, and subacromial decompression.[3] She later filed a claim for a schedule award (Form CA-7) due to her accepted employment injuries.

OWCP referred appellant to Dr. Jacob Rabinovich, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he provide an opinion on the nature and extent of her permanent impairment of her right upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] In a January 21, 2019 report, Dr. Rabinovich discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that, for the right shoulder, she had passive range of motion (ROM) of 120 degrees for flexion, 25 degrees for extension, 100 degrees for abduction, 40 degrees for adduction, 50 degrees for internal rotation, and 90 degrees for external rotation. Dr. Rabinovich diagnosed status post right distal clavicle resection, rotator cuff repair, and subacromial decompression.

Dr. Rabinovich provided an evaluation of the permanent impairment of appellant's right upper extremity utilizing the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides*. He indicated that, under Table 15-5 on page 403, her acromioclavicular (AC) joint disease/distal clavicle resection fell under Class 1 for the class of diagnosis (CDX), a designation which warranted a default value of 10 percent permanent impairment of the right upper extremity. Dr. Rabinovich referenced Table 15-6, Table 15-7, and Table 15-8 on pages 406 and 408 and found that appellant had a grade modifier for functional history (GMFH) of 3 (based on a *Quick*DASH score of 68), a grade modifier for physical examination (GMPE) of 2 (based on limited ROM and right deltoid motor weakness), and a grade modifier for clinical studies (GMCS) of 2 (based on right rotator cuff tear seen on diagnostic testing). Application of the net adjustment formula resulted in movement two spaces to the right of the default value on Table 15-5 to the

[3] On March 6, 2017 appellant returned to work for the employing establishment as a consumer affairs agent, a position which involved answering calls and complaints from customers.

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

value of 12 percent permanent impairment. Therefore, Dr. Rabinovich concluded that appellant had 12 percent permanent impairment of her right upper extremity under the DBI rating method.[5]

Dr. Rabinovich then applied the ROM rating method to the right upper extremity under Table 15-34, Table 15-35, and Table 15-36 on pages 475 and 477. He indicated that appellant had three percent permanent impairment due to loss of flexion of the right shoulder, one percent due to loss of extension, three percent due to loss of abduction, and two percent due to loss of internal rotation. Dr. Rabinovich combined these values to equal 9 percent permanent impairment of the right upper extremity, but noted that, under Table 15-36, appellant's GMFH dictated that the final value for right upper extremity permanent impairment was 10 percent under the ROM rating method. He concluded that appellant had 12 percent permanent impairment of her right upper extremity given that she had a higher rating for permanent impairment under the DBI rating.

On February 7, 2019 OWCP requested that Dr. James W. Butler, Board-certified in occupational medicine and serving as a district medical adviser (DMA), review the case record, including Dr. Rabinovich's January 21, 2019 report, and provide an opinion as to the nature and extent of appellant's permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*.

In a March 28, 2019 report, the DMA indicated that he was unable to provide a complete assessment of the permanent impairment of appellant's right upper extremity because he could not perform the calculations under the ROM rating method due to the fact that the A.M.A., *Guides* requires an evaluation of active ROM findings and Dr. Rabinovich only provided passive ROM findings for appellant's right shoulder. The DMA advised that he could not provide a permanent impairment rating due to this circumstance.

OWCP referred the case back to Dr. Rabinovich and requested that he provide clarification regarding the ROM findings for appellant's right shoulder. In a supplemental report dated May 7, 2019, Dr. Rabinovich clarified that the reference to passive ROM findings for her right shoulder in his January 21, 2019 report was a typographical error and that the ROM findings described in the report actually were active ROM findings. He indicated that, as explained in his January 21, 2019 report, appellant had 12 percent permanent impairment of her right upper extremity.

OWCP requested that the DMA provide a supplemental report regarding the permanent impairment of appellant's right upper extremity. In a report dated June 21, 2019, the DMA indicated that he had reviewed Dr. Rabinovich's supplemental report and he then evaluated the permanent impairment of her right upper extremity under the DBI rating method of the sixth edition of the A.M.A., *Guides*. He noted that, under Table 15-5, appellant's right distal clavicle condition fell under Class 1 for the CDX, a designation which warranted a default value of 10 percent permanent impairment of the right upper extremity. The DMA referenced Table 15-6, Table 15-7, and Table 15-8 and determined that she had a GMPE of 1 (limited ROM of the right shoulder) and a GMCS of 2 (based on right rotator cuff tear seen on diagnostic testing). He found that the GMFH was unreliable and should be excluded, noting that appellant fell under Class 1 for CDX, but had a GMFH of 3 which was two grades higher (based on a *Quick*DASH score of 68).

[5] Dr. Rabinovich noted that appellant reached maximum medical improvement (MMI) on January 21, 2019, the date of his examination.

Application of the net adjustment formula resulted in movement one space to the right of the default value on Table 15-5 to the value of 11 percent permanent impairment. Therefore, the DMA concluded that appellant had 11 percent permanent impairment of her right upper extremity under the DBI rating method.

The DMA then applied the ROM rating method to the right upper extremity under Table 15-34, Table 15-35, and Table 15-36. He noted that appellant had three percent permanent impairment due to loss of flexion of the right shoulder, one percent due to loss of extension, three percent due to loss of abduction, and two percent due to loss of internal rotation. The DMA combined these values and concluded that she had nine percent permanent impairment of her right upper extremity under the ROM rating method. Because appellant had a higher rating for permanent impairment under the DBI rating method (11 percent) than under the ROM rating method (9 percent), the DMA concluded that she had 11 percent permanent impairment of her right upper extremity.[6]

By decision dated June 28, 2019, OWCP granted appellant a schedule award for 11 percent permanent impairment of her right upper extremity. The award ran for 34.32 weeks from January 21 to September 18, 2019 and was based on the permanent impairment evaluation of the DMA.

LEGAL PRECEDENT

The schedule award provision of FECA,[7] and its implementing federal regulations,[8] 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.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment

[6] The DMA indicated that appellant reached MMI on January 21, 2019, the date of Dr. Rabinovich's examination.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.*

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, including AC joint disease, permanent impairment may alternatively be assessed using section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating.[12]

The A.M.A., *Guides* provides that, when the GMFH differs by two or more grades from that described by the GMPE or GMCS, it should be assumed to be unreliable. If the functional history is determined to be unreliable or inconsistent with other documentation, it is excluded from the grading process.[13]

The A.M.A., *Guides* provides that, when two methods of impairment evaluation are appropriate, the method which yields the highest impairment rating should be used.[14] Moreover, FECA Bulletin No. 17-06 provides that if the A.M.A., *Guides* allows 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]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than 11 percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

The Board notes that OWCP properly relied on the opinion of the DMA in granting appellant a schedule award for 11 percent permanent impairment of her right upper extremity.

In a report dated June 21, 2019, the DMA properly found that appellant had 11 percent permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*. He evaluated her permanent impairment under the DBI rating method and noted that, under Table 15-5, her right distal clavicle condition fell under Class 1 for the CDX, with a default value of 10 percent permanent impairment. The DMA correctly evaluated the medical evidence, including the findings of Dr. Rabinovich, OWCP's referral physician, to find that appellant had a GMPE of 1 (limited ROM of the right shoulder) and a GMCS of 2 (based on right rotator cuff tear seen on diagnostic testing). He properly found that the GMFH was unreliable and should be excluded as she fell under Class 1 for CDX with a GMPE of 1, and the provisional GMFH of 3 was two grades higher per her *Quick*DASH score of 68.[16] Application of the net adjustment formula resulted in movement one space to the right of the default value on Table 15-5 to the value of 11 percent permanent impairment. The DMA then applied the ROM rating method to find that appellant had

[11] *See* A.M.A., *Guides* (6th ed. 2009) 405-12.

[12] *Id.* at 401-05, 475-78.

[13] *Id.* at 406-07.

[14] *Id.* at 526-27.

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

[16] *See supra* note 13.

nine percent permanent impairment of her right upper extremity under this method.[17] He properly found that, because she had a higher rating for permanent impairment under the DBI rating method (11 percent) than under the ROM rating method (9 percent), that she had 11 percent permanent impairment of her right upper extremity.[18]

Appellant has not submitted medical evidence to establish entitlement to additional schedule award compensation and OWCP properly found that she had not established more than 11 percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

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 her burden of proof to establish more than 11 percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

[17] Due to the DMA's finding that the GMFH should be excluded, the standards of Table 15-36 provide that there would be no modification of the nine percent rating. A.M.A., *Guides* 477, Table 15-36.

[18] The DMA complied with the appropriate standards, including those described in FECA Bulletin No. 17-06, by conducting both DBI and ROM ratings and choosing the method which yielded the higher permanent impairment rating. *See supra* notes 12, 14, and 15.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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