

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

_____)	
J.L., Appellant)	
)	
and)	Docket No. 19-1684
)	Issued: November 20, 2020
U.S. POSTAL SERVICE, JACKSON)	
PROCESSING & DISTRIBUTION CENTER,)	
Jackson, MS, 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 August 6, 2019 appellant filed a timely appeal from a July 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated November 13, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1684 (issued November 13, 2020).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On March 10, 2011 appellant, then a 48-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained right rotator cuff tear and cyst, as well as bone spurs to her left shoulder due to factors of her federal employment including repetitive reaching and lifting motions. She first became aware of her condition(s) on April 12, 2006. OWCP accepted the claim for bilateral rotator cuff sprains and bilateral supraspinatus sprains of the shoulders and upper arms. It paid appellant wage-loss compensation on the supplemental rolls as of October 6, 2011 and on the periodic rolls as of October 23, 2011.

On October 6, 2011 appellant underwent an OWCP-authorized right shoulder partial thickness rotator cuff tear and superior labral tear arthroplasty which was performed by Dr. J. Randall Ramsey, a Board-certified orthopedic surgeon.

By decision dated October 16, 2012, OWCP granted appellant a schedule award for 10 percent permanent impairment of her right upper extremity.³ Appellant subsequently requested reconsideration of that decision and, by decision dated May 22, 2013, OWCP denied modification.

On March 16, 2018 appellant underwent an OWCP-authorized arthroscopic procedure for right rotator cuff repair, subacromial decompression, and arthroscopic labral debridement, which was performed by Dr. Daniel P. Dare, a Board-certified orthopedic surgeon.

On September 6, 2018 appellant filed a Form CA-7 claim for an increased right upper extremity schedule award.

In a development letter dated September 24, 2018, OWCP informed appellant of the requirements and evidence necessary to establish an increased schedule award under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ It afforded appellant 30 days to submit the required evidence.

In a September 28, 2018 report, Dr. Dare noted appellant's March 16, 2018 surgical history. He indicated that appellant's right shoulder examination revealed a well-healed incision, with intact supraspinatus and infraspinatus. Dr. Dare noted one set of passive range of motion (ROM) measurements as: "abduction (110 degrees), forward flexion (170 degrees), external rotation (90 degrees), internal rotation (90 degrees), and abduction (45 degrees).

³ By decision dated October 4, 2012, OWCP issued a schedule award for 10 percent permanent impairment of the left upper extremity. Appellant subsequently requested reconsideration of that decision and on October 16, 2012 OWCP denied modification.

⁴ A.M.A., *Guides* (6th ed. 2009).

Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as district medical adviser (DMA), reviewed the medical record several times. In an October 10, 2018 report, the DMA advised that appellant's right shoulder had reached maximum medical improvement (MMI) on September 4, 2018, the date of Dr. Dare's evaluation. He concluded that appellant had 10 percent permanent impairment of the right upper extremity. In an October 27, 2018 report, the DMA noted that appellant had no more than 10 percent permanent impairment of the right upper extremity for which she had previously received a schedule award. Under the diagnosed-based impairment (DBI) method, he opined that appellant had 10 percent upper extremity impairment for excision of distal clavicle under Table 15-5, page 403. The DMA indicated that there was insufficient information in the case record to calculate impairment under the range of motion (ROM) methodology, noting that Dr. Dare's September 4, 2018 report did not contain complete measurements for the right shoulder and there was no documentation of retained shoulder extension.

On November 19, 2018 OWCP requested that appellant share the DMA's October 27, 2018 report with her physician. On December 4, 2018 Dr. Dare indicated that appellant's right shoulder extension was 30 degrees. A copy of his September 28, 2018 report was resubmitted.

In a December 7, 2018 report, the DMA noted that appellant had reached MMI on September 4, 2018. For the right shoulder, he opined that appellant had DBI of 10 percent for excision of distal clavicle under Table 15-5, page 403. The DMA also opined that appellant had nine percent ROM upper extremity permanent impairment. He noted that, pursuant to the A.M.A., *Guides*, appellant had three percent upper extremity impairment for loss of shoulder flexion under Table 15-34, page 475, one percent upper extremity impairment for loss of shoulder extension, three percent upper extremity impairment for loss of shoulder abduction, and two percent upper extremity impairment for loss of shoulder internal rotation, which totaled nine percent permanent impairment of the right upper extremity. The DMA opined that as appellant had previously received a schedule award for 10 percent permanent impairment of the right upper extremity, she was not entitled to an additional schedule award for permanent impairment of the right upper extremity.

By decision dated January 18, 2019, OWCP denied appellant's claim for an increased schedule award.

On February 1, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated April 16, 2019, OWCP's hearing representative set aside OWCP's January 18, 2019 decision, finding that the DMA was provided a SOAF with incorrect dates relating to appellant's surgical procedures. It indicated that the updated SOAF should indicate all of appellant's shoulder surgeries, with correct dates of the procedures and a clear indication of the extremity involved.

OWCP issued an updated SOAF dated May 28, 2019, which properly listed appellant's surgical procedures. In a May 30, 2019 report, Dr. Harris, again serving as the DMA, re-reviewed the medical evidence using the diagnoses established in his December 7, 2018 report. He requested clarification regarding the percentage of permanent impairment previously awarded.

In a June 19, 2019 letter, OWCP referred the DMA to the May 28, 2019 SOAF and to a previous June 19, 2012 DMA report of record. In a June 25, 2019 addendum report, the DMA noted all of appellant's accepted procedures and diagnoses. He responded with "N/A" to the questions set forth by the claims examiner in OWCP's June 19, 2019 memorandum regarding rating appellant's permanent impairment based on loss of ROM. The DMA noted that appellant was previously awarded 10 percent permanent impairment of the right upper extremity and that there had been no increase in appellant's right upper extremity impairment.

By decision dated July 10, 2019, OWCP again denied appellant's claim for an additional schedule award.

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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁷ 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 a grade modifier for function history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹¹ Evaluators are directed

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

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 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* (6th ed. 2009) 3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹⁰ *Id.* at 383-492.

¹¹ *Id.* at 411.

to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.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 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.,] 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 provides:

“If the medical evidence of record is [in]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.¹⁴

“Upon receipt of such a report, and if the impairment evaluation was provided from the claimant’s physician, the CE should write to the claimant advising of the medical evidence necessary to complete the impairment assessment and provide 30 days for submission. Any evidence received in response should then be routed back to the DMA for a final determination. Should no evidence be received within 30 days of the date of the CE’s letter, the CE should proceed with a referral for a second opinion medical evaluation to obtain the medical evidence necessary to complete the rating. After receipt of the second opinion physicians evaluation, the CE should route that report to the DMA for a final determination.”¹⁵

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

¹³ FECA Bulletin No. 17-06 (May 8, 2017); *see also W.H.*, Docket No. 19-0102 (issued June 21, 2019).

¹⁴ *Id.*, *R.L.*, Docket No. 19-1793 (issued August 7, 2020); *E.P.*, Docket No. 19-1708 (issued April 15, 2020).

¹⁵ *Id.*

ANALYSIS

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

In his September 28, 2018 report, Dr. Dare provided one set of passive ROM measurements for the right shoulder, and failed to provide ROM measurements of retained shoulder extension. OWCP referred Dr. Dare's report to Dr. Harris, its DMA, who opined that appellant had 10 percent upper extremity impairment for excision of distal clavicle under the DBI methodology. Dr. Harris advised that Dr. Dare's report did not contain complete ROM measurements for the right shoulder and that there was no documentation of retained shoulder extension.

While OWCP did forward the DMA's report to appellant on November 19, 2018, it did not ask that Dr. Dare clarify whether appellant had a loss of ROM of the right shoulder and, if so, provide three measurements of appellant's right shoulder ROM. Dr. Dare therefore responded on December 4, 2018, but only provided a measurement of appellant's retained shoulder extension. The DMA then rated appellant's permanent impairment on December 7, 2018 under the ROM methodology based upon the one set of ROM measurements provided.

Pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, after review of the DBI rating, and the ROM findings are incomplete, the DMA should advise as to the medical evidence necessary to complete the ROM method of rating if the medical evidence of record is insufficient to rate appellant's impairment using ROM.¹⁶

Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 after the DMA advised that the measurements for the right shoulder were incomplete and there was no documentation of retained shoulder extension to rate appellant's permanent impairment utilizing the ROM methodology.¹⁷ OWCP did not advise appellant in clear and unambiguous language that Dr. Dare was to verify that appellant's loss of ROM had been measured three times.

On remand OWCP shall obtain the necessary evidence as required under FECA Bulletin No. 17-06 from Dr. Dare.¹⁸ After it obtains the evidence necessary to complete the rating as described above, the case shall be referred to an appropriate medical specialist to independently calculate impairment to the right upper extremity using both ROM and DBI methods and identify the higher rating.¹⁹ If Dr. Dare does not provide the necessary evidence, OWCP shall refer appellant for a second opinion evaluation. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.²⁰

¹⁶ *R.L.*, *supra* note 14.

¹⁷ *R.L.*, *supra* note 14; *C.T.*, Docket No. 18-1716 (issued May 16, 2019).

¹⁸ *J.S.*, Docket No. 19-0483 (issued October 10, 2019).

¹⁹ *See J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

²⁰ *J.F.*, Docket No. 17-1726 (issued March 12, 2018).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this order.

Issued: November 20, 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