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

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| **R.A., Appellant** | ) | |
| **and** | ) | **Docket No. 19-1798** |
| | ) | **Issued: November 4, 2020** |
| **U.S. POSTAL SERVICE, NORTH OAKLAND POST OFFICE, Oakland, CA, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On August 27, 2019 appellant, through counsel, filed a timely appeal from a May 23, 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 her burden of proof to establish more than six percent permanent impairment of the left upper extremity and six percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On October 6, 2010 appellant, then a 41-year-old sales and service associate and distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed pain in her upper extremities and tingling in her hands due to factors of her federal employment.[4] She noted that she first became aware of her claimed condition and realized its relationship to her federal employment on July 2, 2010. Appellant stopped work on October 4, 2010. OWCP accepted her claim for bilateral medial epicondylitis and bilateral lateral epicondylitis.

On January 30, 2012 appellant filed a claim for a schedule award (Form CA-7).

OWCP developed the claim and referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation in order to determine whether she had sustained a ratable permanent impairment due to her accepted bilateral upper extremity injuries under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] In a May 8, 2012 report, Dr. Swartz indicated that he had reviewed the SOAF and noted that her claim was accepted for bilateral medial epicondylitis and bilateral lateral epicondylitis. He conducted an examination and reported that range of motion (ROM) testing of appellant's elbows measured zero degrees extension, 115 degrees flexion, 90 degrees pronation, and 90 degrees supination. Referencing Table 15-33, ROM, page 474, of the A.M.A., *Guides*, Dr. Swartz indicated that he was using the ROM method for rating impairment of her elbows and determined that she had eight percent permanent impairment of each upper extremity. He noted April 23, 2012 as the date of maximum medical improvement (MMI).

[3] Docket No. 16-0016 (issued August 21, 2017); *Order Dismissing Appeal*, Docket No. 17-1659 (issued March 8, 2018).

[4] Appellant has two previously accepted claims. Under OWCP File No. xxxxxx542, she filed a Form CA-2 on May 12, 2006 alleging that she sustained neck, upper back, and shoulder pain due to factors of her federal employment. Appellant stopped work on May 2, 2006 and returned to work in a full-time, limited-duty capacity on June 1, 2007. OWCP accepted her claim for neck strain, thoracic strain, and bilateral shoulder strain. Under OWCP File No. xxxxxx253, appellant filed a traumatic injury claim (Form CA-1) alleging that on September 21, 2010 she injured her back when she slid off a sliding scale while in the performance of duty. She stopped work on October 4, 2010. OWCP accepted that claim for thoracic strains and paid appellant wage-loss compensation on the supplemental rolls from November 6, 2010 to March 22, 2013. OWCP File Nos. xxxxxx542, xxxxxx253, and xxxxxx084 have been administratively combined by OWCP with the latter serving as the master file.

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

In a December 6, 2012 report, Dr. Ellen Pichey, Board-certified in occupational medicine and an OWCP district medical adviser (DMA), explained that, although Dr. Swartz provided an impairment rating based on ROM, the A.M.A., *Guides* made clear that the best method of rating was diagnosis-based impairment (DBI). Dr. Swartz determined that appellant had two percent permanent impairment of each upper extremity for her bilateral medial and lateral epicondylitis conditions pursuant to Table 15-4, page 399 and four percent permanent impairment of each upper extremity for bilateral cubital and carpal tunnel syndrome pursuant to Table 15-23, page 449. The DMA concluded that she had a combined total of six percent permanent impairment of each upper extremity and noted a date of MMI of May 8, 2012.

By decision dated May 17, 2013, OWCP granted appellant a schedule award for six percent permanent impairment of each upper extremity. The award ran for 37.44 weeks from April 23, 2012, the date of MMI as declared by Dr. Swartz, to January 10, 2013. OWCP noted that the schedule award was based on the December 6, 2012 DMA report.

On August 25, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

In a development letter dated September 8, 2014, OWCP advised appellant of the type of evidence needed to establish her claim for an increased schedule award utilizing the appropriate portions of the sixth edition of the A.M.A., *Guides.* It afforded her 30 days to submit the necessary evidence. No response was received by OWCP.

By decision dated December 3, 2014, OWCP denied appellant's claim for an increased schedule award. It found that she had not submitted medical evidence demonstrating greater than the six percent permanent impairment for each upper extremity previously awarded.

On December 10, 2014 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on May 20, 2015.

Appellant submitted a September 17, 2014 report by Dr. Michael E. Hebrard, Board-certified in physical medicine and rehabilitation. Dr. Hebrard noted that she accepted conditions of bilateral medial epicondylitis and lateral epicondylitis and indicated that she had reached MMI as of September 17, 2014. He referenced Table 15-4, page 399 and determined that appellant had two percent permanent impairment of each upper extremity due to the diagnosis of lateral or medial epicondylitis.

By decision dated July 24, 2015, an OWCP hearing representative affirmed the December 3, 2014 schedule award decision.[6]

Appellant timely filed an appeal to the Board. By decision dated August 21, 2017, the Board set aside OWCP's July 24, 2015 decision.[7] The Board found that OWCP had inconsistently

[6] Following the July 24, 2015 decision, OWCP continued to develop the schedule award claim and referred appellant to a DMA. In an August 3, 2015 report, the DMA reviewed Dr. Hebrard's impairment evaluation and agreed that she had two percent permanent impairment of each upper extremity in accordance with the A.M.A., *Guides* due to her accepted bilateral medial and lateral epicondylitis condition.

[7] Docket No. 16-0016 (issued August 21, 2017).

applied Chapter 15 of the A.M.A., *Guides* regarding the proper use of either the ROM or DBI method in assessing the extent of permanent impairment. It remanded the case for OWCP to issue a *de novo* decision following development of a consistent method for calculating permanent impairment of the upper extremity.

On remand OWCP referred appellant, along with an updated SOAF and the medical record, to Dr. Moshe M. Lewis, Board-certified in physical medicine and rehabilitation, for a second-opinion examination in order to determine whether she had sustained additional permanent impairment due to her accepted bilateral upper extremity conditions in accordance with the A.M.A., *Guides*. In an October 5, 2018 report, Dr. Lewis reviewed appellant's history and noted that her claim was accepted for bilateral lateral and bilateral medial epicondylitis. He related that her complaints of continued right and left elbow pain travelling down the hands to her ulnar innervated digits. Upon examination of appellant's elbows, Dr. Lewis observed tenderness to palpation over the medial epicondyle and lateral epicondyle and in the extensor tendons. He reported that ROM was full and pain-free. Neurovascular examination revealed 5/5 strength, intact sensation bilaterally, and positive deep tendon reflexes. Dr. Lewis diagnosed bilateral elbow lateral and medial epicondylitis.

Dr. Lewis reported October 5, 2018 as the date appellant reached MMI. First, he utilized the DBI method to determine the degree of her permanent impairment. Utilizing Table 15-4, *Elbow Regional Grid*, page 399, of the A.M.A., *Guides*, Dr. Lewis indicated that a condition of left elbow lateral or medial epicondylitis equated to a class of diagnosis (CDX) of 1 with a default value of one percent upper extremity impairment.[8] He assigned a grade modifier for functional history (GMFH) of 2 due to appellant's history of pain with activities involving the use of her elbow.[9] Dr. Lewis assigned a grade modifier for physical examination (GMPE) of 1 due to consistent palpatory findings without observed abnormalities.[10] He indicated that there was no grade modifier for clinical studies (GMCS) as none were available. Applying the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Lewis calculated an adjustment of +1,[11] which moved the default value up to two percent permanent impairment.

For appellant's right elbow lateral or medial epicondylitis, Dr. Lewis determined that she was a class 1 impairment with a default value of one percent upper extremity impairment.[12] He assigned a GMFH of 2,[13] a GMPE of 1,[14] and a GMCS of zero, which resulted in a net adjustment of +1 and moved the default value up to two percent permanent impairment.

[8] A.M.A., *Guides* 399, Table 15-4.

[9] *Id.* at 406, Table 15-7.

[10] *Id.* at 408, Table 15-8.

[11] *Id.* at 411.

[12] *Supra* note 8.

[13] *Supra* note 9.

[14] *Supra* note 10.

Regarding the ROM method to determine the degree of appellant's permanent impairment, Dr. Lewis explained that, as she had full ROM of both elbows, no ROM impairment calculations were conducted. He provided a ROM worksheet for the right and left elbows and noted that the ROM was measured three times after warm up. Dr. Lewis reported the maximum ROM calculations were 135 degrees forward flexion and 180 degrees extension. He concluded that appellant had a total of four percent bilateral upper extremity impairment, which converted to two percent whole person impairment.

OWCP forwarded the case record to a DMA on October 25, 2018. In an October 26, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reviewed the case file and indicated that he agreed with Dr. Lewis' impairment evaluation for two percent permanent impairment of each upper extremity due to a diagnosis of bilateral epicondylitis. Utilizing the DBI rating method, he referenced Table 15-4, page 399, of the A.M.A., *Guides* and assigned a CDX of 1 for a default impairment rating of one percent due to residual symptoms of lateral or medial epicondylitis. The DMA noted a GMFH of 2 and a GMPE of 1. After applying the net adjustment formula, he calculated that appellant had a final upper extremity impairment of two percent permanent impairment of each upper extremity. The DMA also referenced FECA Bulletin No. 17-06[15] and related that the diagnosis of lateral or medial epicondylitis allowed for an alternative impairment evaluation under the ROM method. He related that, since Dr. Lewis documented normal ROM for appellant's bilateral elbows, there was no calculable ROM impairment. The DMA reported a date of MMI of October 5, 2018 the date of Dr. Lewis' examination. He concluded that appellant had a final permanent impairment of two percent for each upper extremity. The DMA explained that, since appellant had a previous schedule award based on the same condition, there was no additional award due.

By decision dated November 6, 2018, OWCP denied appellant's claim for an increased schedule award. It found that Dr. Lewis' October 5, 2018 second-opinion report and the October 26, 2018 DMA report of Dr. Katz, did not demonstrate greater than the six percent permanent impairment previously awarded for each upper extremity.

On November 12, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. In a letter dated March 11, 2019, appellant, through counsel, requested that the telephonic hearing be changed to a review of the written record.

By decision dated May 23, 2019, OWCP's hearing representative affirmed the November 6, 2018 decision.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[16] and its implementing regulations[17] 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

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

[16] 5 U.S.C. § 8107.

[17] 20 C.F.R. § 10.404.

specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[18] As of May 1, 2009, the sixth edition of the A.M.A., *Guides,* published in 2009, is used to calculate schedule awards.[19]

In addressing impairment of the upper extremities, the sixth edition of the A.M.A., *Guides* requires identifying the impairment for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[20] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[21] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[22]

The A.M.A., *Guides* also provide that the ROM impairment is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.[23] 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.[24] 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.[25]

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

> "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.,]

[18] *Id*. at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

[20] A.M.A., *Guides* 383-492; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[21] *Id.* at 411.

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

[23] A.M.A., *Guides* 461.

[24] *Id.* at 473.

[25] *Id.* at 474.

*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.)[26]

The Bulletin further advises:

"If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allows 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."[27]

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[28] The medical evidence must include a detailed description of the permanent impairment.[29]

## ***ANALYSIS***

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

On remand from the Board's August 21, 2017 decision, OWCP referred appellant's schedule award claim to Dr. Lewis for a second opinion examination and to provide a permanent impairment of her upper extremities in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06. In an October 5, 2018 report, Dr. Lewis reviewed her history and conducted an examination. He provided a ROM worksheet, which indicated that he performed ROM testing three times after warm-up and found that ROM of appellant's elbows was full. Dr. Lewis reported a diagnosis of bilateral elbow lateral and medial epicondylitis. First, he utilized Table 15-4, *Elbow Regional Grid*, of the sixth edition of the A.M.A., *Guides* and determined that appellant had two percent permanent impairment of each upper extremity for the diagnosis of lateral or medial epicondylitis. Regarding the ROM methodology, Dr. Lewis explained that as she had full ROM of both left and right elbows, no ROM impairment calculations were conducted. He concluded that appellant had two permanent impairment for each upper extremity. Dr. Lewis noted that she had reached MMI on October 5, 2018.

In accordance with its procedures, following the second opinion evaluation, OWCP properly referred the evidence of record to a DMA, Dr. Katz, for review. On October 26, 2018 the DMA reviewed the medical evidence of record, including the October 5, 2018 report of Dr. Lewis, and concluded that the rating provided by Dr. Lewis for two percent permanent impairment of each upper extremity was appropriate. Utilizing Table 15-4, page 399, of the A.M.A., *Guides*, Dr. Lewis assigned a class 1 CDX for left elbow lateral or medial epicondylitis,

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

[27] *Id.*

[28] *See Rose V. Ford*, 55 ECAB 449 (2004).

[29] *See Vanessa Young*, 55 ECAB 575 (2004).

which equated with a default value of one percent upper extremity impairment. He found GMFH of 2 and GMPE of 1. There was no GMCS provided. After applying the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), the DMA calculated an adjustment of +1, which moved the default value up to two percent permanent impairment. For appellant's right elbow, he utilized Table 15-4 and assigned the same class 1 value for lateral or medial epicondylitis and grade modifiers and concluded that she had two percent permanent impairment of the right upper extremity. The DMA also referenced FECA Bulletin No. 17-06 and explained that, since Dr. Lewis documented normal ROM for her bilateral elbows, there was no calculable ROM impairment. He noted a date of MMI of October 5, 2018.

The Board finds that the DMA correctly applied the appropriate tables and grading schedules of the A.M.A., *Guides* and FECA Bulletin No. 17-06 to Dr. Lewis' physical examination findings.[30] First, he calculated permanent impairment based on DBI and determined that appellant had two percent permanent impairment of each upper extremity due to a diagnosis of lateral or medial epicondylitis. The DMA's calculations were in accordance with the rating provided by the October 5, 2018 second opinion report of Dr. Lewis. Second, he indicated that, since Dr. Lewis found full ROM findings during his October 5, 2018 evaluation, appellant had no ratable impairment based on the ROM rating method. Both the DMA and Dr. Lewis determined that appellant had two percent permanent impairment of each upper extremity. Accordingly, OWCP properly found that she was not entitled to greater than the six percent permanent impairment of each upper extremity previously awarded.[31]

On appeal, counsel argues that the May 23, 2019 OWCP decision was contrary to law and fact. As explained above, there is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment of each upper extremity.[32] Accordingly, appellant has not met her burden of proof to establish her increased schedule award claim.

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 six percent permanent impairment of each upper extremity, for which she previously received a schedule award.

[30] *See J.T.*, Docket No. 18-1757 (issued April 19, 2019).

[31] *See L.T.*, Docket No. 18-1031 (issued March 5, 2019).

[32] *See C.S.*, Docket No. 18-0920 (issued September 23, 2019).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 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