United States Department of Labor
Employees' Compensation Appeals Board

M.A., Appellant	)	
and	)	**Docket No. 19-1732**
	)	**Issued: September 9, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Pahrump, NV, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 15, 2019 appellant filed a timely appeal from a July 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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] The Board notes that, following the July 2, 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.*

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On December 31, 2015 appellant, then a 53-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left shoulder injury when carrying a package while in the performance of duty. OWCP accepted the claim for left rotator cuff tear. On March 3, 2016 appellant underwent OWCP-approved left shoulder arthroscopy for rotator cuff tear, impingement syndrome, and tear of the labrum. She stopped work from March 3 to 25, 2016 and OWCP paid her compensation on the supplemental rolls. On December 15, 2016 appellant underwent OWCP-approved arthroscopic left shoulder surgery with subacromial decompression, arthroscopic rotator cuff repair, and debridement of labrum of left shoulder. OWCP again paid her compensation from December 15 through 19, 2016 on the supplemental rolls.

On October 17, 2017 OWCP prepared a statement of accepted facts in which it noted that, in addition to this present claim, appellant had sustained a June 24, 2007 traumatic right shoulder injury, accepted under OWCP File No. xxxxxx260, for right shoulder impingement and a right rotator cuff tear.

On October 25, 2017 appellant filed a claim for a schedule award (Form CA-7).

On February 21, 2018 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of her permanent impairment of her left upper extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In his April 24, 2018 report, Dr. Swartz discussed appellant's medical history and provided findings on physical examination. He noted that she sustained a left rotator cuff tear on December 31, 2005 as a result of a work-related injury, and that she had sustained a right rotator cuff tear on June 24, 2007 due to another work-related injury. Dr. Swartz noted that range of motion (ROM) of appellant's right shoulder and left shoulders were measured in three trials. He recorded the average measurements and findings regarding ROM of the left shoulder, pursuant to Table 15-34, page 475 of the A.M.A., *Guides*, indicating that flexion of 95 degrees equaled three percent impairment; extension of 50 degrees equaled zero percent impairment; abduction of 90 degrees equaled three percent impairment; adduction of 40 degrees equaled zero percent impairment; internal rotation of 35 degrees would advance to 40 degrees and equaled four percent permanent impairment; and external rotation of 95 degrees would advance to 100 degrees and equaled zero percent impairment. Dr. Swartz combined his findings to equate to 10 percent permanent impairment. He noted that appellant's grade modifier functional history (GMFH) was 1 and that her *Quick*DASH score of 40 confirmed the grade modifier of 1. Thus, Dr. Swartz' final

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

rating was 10 percent permanent impairment of the left upper extremity, pursuant to the ROM methodology and Table 35, page 477 of the A.M.A., *Guides.* He reported that the diagnosis-based impairment (DBI) method would utilize an impairment class for rotator cuff injury full-thickness tear or impingement syndrome. Dr. Swartz explained, however, that while there was residual loss of function in the left shoulder, the DBI method could not be used as examination findings revealed "abnormal motion."

On September 17, 2018 Dr. Herbert White, a Board-certified occupational medicine specialist serving as a district medical adviser (DMA), reviewed Dr. Swartz' report and the medical evidence of record in order to evaluate the nature and extent of appellant's permanent partial impairment due to her complete rotator cuff tear or rupture of left shoulder. Utilizing the DBI method for the diagnosis of full thickness rotator cuff tear, the DMA calculated seven percent permanent impairment of the left upper extremity. He explained that the class of diagnosis (CDX) was class 1 for mild objective findings, pursuant to Table 15-5, page 403 of the A.M.A., *Guides*; GMFH was 1, for a *Quick*DASH score of 40 at Table 15-7, page 406; the grade modifier physical examination (GMPE) was Grade 2 for moderate tenderness and mild ROM decreases pursuant to Table 15-8, page 408 and Table 15-34, page 475; and the grade modifier clinical studies (GMCS) was Grade 2 pursuant to Table 15-9, page 410. Dr. White applied the net adjustment formula and explained that the default impairment at class 1 grade C was five percent pursuant to Table 15-5, page 402, the net adjustment formula would move the impairment up 2 grades to grade E for seven percent permanent impairment rating. Then, utilizing the ROM methodology, he calculated six percent permanent impairment of the left upper extremity. Dr. White explained that he utilized Table 15-34, page 475 for rating loss of ROM of the left shoulder. He provided ROM findings for the left and right shoulders and compared the two to find a total of six percent permanent impairment of the left shoulder. Dr. White noted that flexion of the left shoulder of 95 degrees equaled three percent impairment; flexion of the right shoulder of 175 degrees equaled zero percent impairment and; therefore, appellant had a total of three percent impairment due to loss of flexion. He noted that extension of her left shoulder of 50 degrees equaled zero percent impairment, while 75 degrees of extension of the right shoulder equaled zero percent impairment and; therefore, appellant had zero percent impairment due to loss of extension. Appellant had 90 degrees of abduction of the left shoulder for three percent impairment, while she had 170 degrees of abduction of the right shoulder for zero percent impairment and; therefore, appellant had three percent impairment due to loss of abduction. She had 35 degrees of internal rotation of the left shoulder which equaled four percent impairment, while she had 25 degrees of internal rotation of the right shoulder which equaled four percent impairment; therefore, she had zero percent impairment of the shoulder for loss of internal rotation. Appellant had 95 degrees of external rotation of the left shoulder which equaled zero percent impairment, while she had 105 degrees of external rotation of the right shoulder which equaled zero percent impairment for loss of external rotation. The DMA concluded that she had a total six percent permanent impairment of the left shoulder under the ROM methodology. He then noted that the DBI method should be used as it provided the higher rating percentage of permanent impairment. The DMA also commented on the report from Dr. Swartz, who he noted had calculated 10 percent permanent impairment rating utilizing the ROM method. He noted that, while he calculated only six percent permanent impairment, the values differed because Dr. Swartz had not compared the ROM findings to the unaffected right shoulder motions. The DMA referenced page 461 of the A.M.A., *Guides* which provides, "If the opposite extremity is neither involved nor previously injured, it must be used to define normal for

that individual; any losses should be made in comparison to the opposite normal extremity."[4] He concluded that the final impairment rating was seven percent based on the DBI methodology.

On December 6, 2018 OWCP requested Dr. Swartz review the DMA's September 17, 2018 report which differed from his calculation of permanent impairment. It requested that he provide a supplemental report with his opinion as to the percentage of appellant's permanent impairment. Dr. Swartz did not respond.

By decision dated July 2, 2019, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. The period of award ran from April 24 through September 23, 2018. OWCP found that the DMA determined that Dr. Swartz had incorrectly applied the A.M.A., *Guides* to the examination findings. It found, therefore, that the weight of the medical evidence regarding the percentage of permanent impairment rested with the DMA, as he had correctly applied the A.M.A., *Guides* to the examination findings.

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

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by the 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

[4] *Id.*

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

[6] *Id*. at § 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); *id*. at Chapter 2.808.5 (March 2017).

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

[9] *Id*. at 411.

[10] *Id.* at 461.

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:

> "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.)[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 [claims examiner]."[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 OWCP's DMA providing rationale for the percentage of impairment specified.[16]

ANALYSIS

The Board finds that the case is not in posture for decision.[17]

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[11] *Id.* at 473.

[12] *Id.* at 474.

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

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

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

[16] *See supra* note 7 at Chapter 2.808.6(f) (March 2017).

[17] *A.R.*, Docket No. 19-1284 (issued January 14, 2020); *D.B.*, Docket No. 18-0409 (issued October 28, 2019).

On April 24, 2018 OWCP referred appellant for a second-opinion evaluation with Dr. Swartz. Utilizing the ROM method, Dr. Swartz calculated 10 percent permanent impairment of the left upper extremity.[18] He recorded three trials of measurements for both shoulders and then utilized the average findings for the left shoulder alone to conclude appellant's 10 percent permanent impairment of the left shoulder, pursuant to the ROM methodology. Dr. Swartz determined that appellant's left shoulder permanent impairment could not be evaluated under the DBI methodology as she had ROM findings. Consistent with its procedures,[19] OWCP referred the matter to a DMA for an opinion regarding her permanent impairment in accordance with the A.M.A., *Guides*. Dr. White, serving as the DMA, reviewed Dr. Swartz' report and disagreed with his impairment evaluation. In his September 17, 2018 report, he opined that appellant sustained six percent permanent impairment of the left upper extremity using the ROM method, stating that Dr. Swartz failed to compare the left shoulder motion measurements to that of the "unaffected" right shoulder. Dr. Swartz determined that the DBI method could be used and that it provided the higher impairment rating at seven percent permanent impairment for a left shoulder rotator cuff full thickness tear injury.[20]

The Board finds that the DMA's report indicates that he does not have a complete and accurate understanding of appellant's medical history, as indicated by his impairment evaluation. Dr. White reported that Dr. Swartz failed to compare left shoulder motion measurements to the "unaffected" right shoulder which would warrant a lower six percent impairment rating. The DMA correctly noted that the A.M.A., *Guides* provide that, if the opposite member is not involved or previously injured, any losses should be made in comparison to the opposite normal extremity.[21] The Board has previously noted that the sixth edition of the A.M.A., *Guides* emphasizes that both extremities should be compared. If the contralateral joint is uninjured it may serve as defining normal for the individual.[22] However, the record reflects that appellant's right shoulder may not be unaffected as stipulated by the DMA, because she had a prior right shoulder impingement and rotator cuff tear which was accepted under OWCP File No. xxxxxx260. Dr. White did not explain that her right shoulder ROM findings were unaffected by her accepted right shoulder impingement and rotator cuff tear injury and; therefore, the left shoulder ROM should be compared with the unaffected right shoulder. Without an accurate description of appellant's medical history, his report cannot serve as a basis for the schedule award.[23]

The Board also finds that, while the DMA evaluated appellant's left shoulder permanent impairment utilizing both the DBI and ROM methodologies, he did not appropriately explain why Dr. Swartz should not have ruled out the DBI methodology as a basis for her permanent impairment rating.

[18] A.M.A., *Guides* 475, Table 15-34.

[19] *Supra* note 16.

[20] *Supra* note 18 at 403, Table 15-5.

[21] *Id.* at 461.

[22] *See also K.P.*, Docket No. 13-2079 (issued February 18, 2014).

[23] *V.H.*, Docket No. 18-0848 (issued February 25, 2019).

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[24] While it began to develop the evidence, it failed to complete its obligation to secure a proper evaluation regarding permanent impairment of the left shoulder based upon the ROM methodology.[25] Therefore, OWCP failed to resolve the issue in the case.[26]

The Board finds that further development of the medical evidence is required to determine the extent of appellant's permanent impairment for schedule award purposes.[27] The Board will therefore remand the case for another second opinion evaluation. The second opinion physician should determine whether appellant has loss of ROM of the right shoulder from her accepted employment injury. If so, the examiner should obtain ROM findings based upon three ROM trials of just the left shoulder. If appellant has no loss of ROM of the right shoulder from the accepted employment injury, the second opinion examiner should provide ROM findings comparing the ROM loss of the left shoulder to the right shoulder. The second opinion physician should also determine appellant's entitlement to a schedule award utilizing the DBI methodology. OWCP should thereafter refer the record to a new DMA for review. Following such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[24] The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done. *See E.W.*, Docket No. 17-0707 (issued September 18, 2017).

[25] *B.B.*, Docket No. 17-1949 (issued October 16, 2018).

[26] *See X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

[27] *J.M.*, Docket No. 19-0114 (issued June 12, 2019).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated July 2, 2019 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 9, 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