United States Department of Labor
Employees' Compensation Appeals Board

B.J., Appellant	)	
and	)	**Docket No. 20-0930**
	)	**Issued: July 2, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Jeffrey P. Zealander, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 18, 2020 appellant, through counsel, filed a timely appeal from a March 2, 2020 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 eight percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On February 2, 2012 appellant, then a 48-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 31, 2012 he sustained a right shoulder injury when the drivers-side door of his postal vehicle slammed against his right shoulder while in the performance of duty. OWCP accepted his claim for several right shoulder conditions, including supraspinatus sprain, rotator cuff tear/sprain, impingement syndrome, and adhesive capsulitis. Appellant underwent right rotator cuff repair on April 2, 2012 right shoulder capsular release on September 24, 2012 and right shoulder arthroscopy on March 31, 2014. These procedures were authorized by OWCP.

Appellant filed a claim for a schedule award (Form CA-7) on May 18, 2015.

By decision dated November 18, 2019, OWCP granted him a schedule award for eight percent permanent impairment of his right upper extremity as calculated under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] On December 9, 2019 OWCP amended the November 18, 2019 decision to correct a typographical error regarding the pay rate information delineated in the November 8, 2019 decision. The period of the award ran 24.96 weeks from September 16, 2019 through March 8, 2020, and was based on a November 2, 2019 report of Dr. Herbert White, Jr., a Board-certified occupational medicine specialist serving as an OWCP district medical adviser (DMA), who evaluated the September 16, 2019 findings of Dr. Neil Allen, an attending Board-certified internist and neurologist.

On December 30, 2019 appellant, through counsel, requested reconsideration of the December 9, 2019 decision.[4] In support thereof, counsel submitted a December 23, 2019 report from Dr. Allen, who determined that appellant had 13 percent permanent impairment of his right upper extremity based on the range of motion (ROM) rating method found on Table 15-34, on page 475, of the sixth edition of the A.M.A., *Guides*. Dr. Allen advised that he utilized the ROM method to assess appellant's permanent impairment because it resulted in a higher rating for the right upper extremity than the seven percent rating obtained under the diagnosis-based impairment (DBI) rating method.[5] For the right shoulder, he found that appellant had three percent permanent impairment due to 120 degrees of flexion, one percent permanent impairment due to 40 degrees of extension, three percent permanent impairment due to 90 degrees of abduction, four percent

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

[4] Appellant did not challenge the pay rate used for the schedule award, but rather challenged the percent of permanent impairment found for the right upper extremity.

[5] The Board notes that 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. *See* A.M.A., *Guides* 526-27.

permanent impairment due to 40 degrees of internal rotation, and two percent permanent impairment due to 50 degrees of external rotation.[6] Dr. Allen concluded that these separate ratings added up to 13 percent permanent impairment of the right upper extremity.[7]

In a February 11, 2020 report, Dr. Herbert White, Jr., a Board-certified occupational medicine specialist serving as DMA, determined that appellant had eight percent permanent impairment of his right upper extremity under the ROM rating method. He noted that he utilized the findings of the ROM rating method for appellant's permanent impairment because it resulted in a higher rating for the right upper extremity than the seven percent rating obtained under the DBI rating method. Dr. White asserted that Dr. Allen erred in the manner in which he rounded ROM findings under Table 15-34. He noted that, according to text on page 464 of the sixth edition of the A.M.A., *Guides*, joint ROM measurements are rounded to the nearest whole number ending in zero (*e.g.*, 20 degrees instead of 24 degrees and 30 degrees instead of 25 degrees). Dr. White indicated that application of this method to Dr. Allen's findings would decrease the external rotation deficits rating provided by Dr. Allen from two percent to zero percent. He also opined that Dr. Allen improperly rated right shoulder flexion of 120 degrees as a three percent impairment. Dr. White noted that appellant's flexion on the left side (*i.e.*, the unaffected side) was 170 degrees, which also was three percent impairment. He opined that, given the same degree of impairment on both sides, the A.M.A., *Guides* provided on page 461 that there was no impairment of the right shoulder due to flexion of 120 degrees. Therefore, Dr. White concluded that Dr. Allen's assessment of right upper extremity impairment should be reduced from 13 percent to 8 percent permanent impairment.

By decision dated March 2, 2020, OWCP denied modification of the December 9, 2019 decision, finding that the weight of the medical opinion evidence regarding permanent impairment rested with the opinion of Dr. White.

LEGAL PRECEDENT

The schedule award provisions of FECA,[8] and its implementing federal regulations,[9] 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,

[6] In his December 23, 2019 rating report, Dr. Allen utilized the examination findings that he obtained on September 16, 2019. The sixth edition of the A.M.A., *Guides* provides that the maximum measurement (out of the required three) is chosen for assessing impairment and that rounding procedures are applied to each measurement. *See* A.M.A., *Guides* 464. The maximum measurement obtained by Dr. Allen for each type of right shoulder motion is as follows: 121 degrees of flexion; 36 degrees of extension; 94 degrees of abduction; 55 degrees of adduction; 39 degrees of internal rotation; and 55 degrees of external rotation. The maximum measurement obtained for each type of shoulder motion for the unaffected left side is as follows: 171 degrees of flexion; 72 degrees of extension; 177 degrees of abduction; 87 degrees of adduction; 80 degrees of internal rotation; and 77 degrees of external rotation.

[7] Dr. Allen asserted that he considered the ROM findings of appellant's "unaffected" left shoulder in calculating appellant's permanent impairment. He indicated, without further explanation, that appellant's right shoulder flexion represented a "29 [percent loss] compared to the 'unaffected' side."

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

With respect to calculating impairment under the DBI method for the right shoulder, reference is made to Table 15-5 (Shoulder Regional Grid).[12] Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, 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.[13]

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.[14] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulleting 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.)[15]

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 [claims examiner].[16]

> "OWCP s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and

[10] *Id.*

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

[12] *See* A.M.A., *Guides* 401-05, Table 15-5.

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

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

[15] *Id.*

[16] *Id.*; *see also H.H.*, Docket No. 19-1530 (issued June 26, 2020); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

percentage of impairment in accordance with the A.M.A., [*Guides*], with the DMA providing rationale for the percentage of impairment specified."[17]

ANALYSIS

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

Appellant submitted a December 23, 2019 report, of Dr. Allen who determined that appellant had 13 percent permanent impairment of his right upper extremity based on the ROM rating method found on Table 15-34 of the sixth edition of the A.M.A., *Guides.*[18] For the right shoulder, Dr. Allen found that appellant had three percent permanent impairment due to 120 degrees of flexion, one percent permanent impairment due to 40 degrees of extension, three percent permanent impairment due to 90 degrees of abduction, four percent permanent impairment due to 40 degrees of internal rotation, and two percent permanent impairment due to 50 degrees of external rotation.

The Board finds, however, that in a February 11, 2020 report, Dr. White, the DMA, properly determined that appellant had eight percent permanent impairment of his right upper extremity.[19] Dr. White found that Dr. Allen made an error in the manner in which he rounded ROM findings under Table 15-34. According to the sixth edition of the A.M.A., *Guides*, joint ROM measurements are rounded to the nearest whole number ending in zero (*e.g.*, 20 degrees instead of 24 degrees and 30 degrees instead of 25 degrees). The application of this method to Dr. Allen's findings would decrease the external rotation deficits rating provided by Dr. Allen from two percent to zero percent. The Board notes that, when applying this principle, Dr. Allen's two percent impairment rating for external rotation deficits would not be valid because he should have rounded the 55 degree measurement for external rotation up to 60 degrees, equaling zero percent impairment, instead of improperly rounding it down to 50 degrees.[20] Dr. Allen also incorrectly rated right shoulder flexion of 120 degrees as a three percent impairment. Appellant's shoulder flexion on the unaffected left side was 170 degrees, which also was three percent impairment. Given the same degree of impairment on both sides, the A.M.A., *Guides* provided on page 461 that there was no impairment due to right shoulder flexion of 120 degrees.[21] The Board notes that Dr. White concurred with the other individual ROM ratings calculated by Dr. Allen and

[17] *Supra* note 11 at Chapter 2.808.6(f); *P.W.*, Docket No. 19-1493 (issued August 12, 2020).

[18] *See id*. at 475, Table 15-34.

[19] The Board notes that Dr. White properly used the findings of the ROM rating method for appellant's permanent impairment because it resulted in a higher rating for the right upper extremity than the seven percent rating obtained under the DBI rating method. *See supra* note 5. Table 15-5 provides for use of the ROM rating method in appellant's case given his right rotator cuff diagnosis. *See* A.M.A., *Guides* 403, Table 15-5.

[20] *See id.* at 464.

[21] The A.M.A., *Guides* provides that, 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. *See id*.

that these ratings added up to eight percent. Therefore, Dr. White properly concluded that appellant had eight percent permanent impairment of his right upper extremity. As such, the Board finds that appellant had no more than the eight percent permanent impairment of his right upper extremity previously awarded.

Appellant may request a schedule award or increase 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 eight percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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