United States Department of Labor
Employees' Compensation Appeals Board

P.U., Appellant	)	
and	)	**Docket No. 21-0382**
	)	**Issued: July 13, 2021**
U.S. POSTAL SERVICE, NATIONAL DISTRIBUTION CENTER, Jersey City, NJ, Employer	)	

Appearances:
Michael D. Overman, *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 January 19, 2021 appellant, through counsel, filed a timely appeal from an August 13, 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 seven percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On December 31, 2016 appellant, then a 59-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2016 he injured his back and the front of his right shoulder while in the performance of duty. OWCP accepted the claim for a tear of the right rotator cuff. Appellant stopped work on December 31, 2016 and resumed his regular employment on March 1, 2017.

On May 19, 2017 Dr. Jeffrey Augustin, a Board-certified orthopedic surgeon, performed an OWCP-authorized arthroscopic right rotator cuff repair, labral repair, and subacromial decompression. On June 3, 2017 appellant underwent a right shoulder irrigation and debridement due to an infection. OWCP accepted that he had sustained a recurrence of disability beginning May 19, 2017. Appellant returned to his regular employment without restrictions on November 1, 2017.

In a report dated March 29, 2018, updated on May 7, 2018, Dr. Munir Ahmed, a Board-certified internist, discussed appellant's history of a December 29, 2016 injury to his right shoulder and a prior injury to his right biceps surgically treated in 1996. He noted that appellant had daily symptoms of right shoulder and arm pain with stiffness that fluctuated in intensity and weakness of the right upper extremity. Dr. Ahmed found a *Quick*DASH score of 65 for the right side. On examination, he measured range of motion (ROM) of the right shoulder three times and found forward elevation of 140 degrees, abduction of 140 degrees, adduction of 60 degrees, internal rotation of 90 degrees, and external rotation of 90 degrees. Dr. Ahmed found positive Hawkins impingement and tenderness of the anterior cuff and bicipital groove of the right shoulder, but no joint effusion, tenderness, or instability. He opined that appellant had six percent permanent impairment of the right shoulder for loss of ROM according to Table 15-34 on page 475 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), which he increased to seven percent based on the *Quick*DASH score.[3] Using the diagnosis-based impairment (DBI) rating method, Dr. Ahmed identified the class of diagnosis (CDX) according to Table 15-5 on page 403 as class 1 full thickness rotator cuff tear with residual loss, which yielded a default value of five percent. He applied a grade modifier for functional history (GMFH) of three based on appellant's *Quick*DASH score, a grade modifier for physical examination (GMPE) of two, and a grade modifier for clinical studies (GMCS) of four, for a net adjustment of six and a right upper extremity impairment of seven percent. Dr. Ahmed advised that he would use the DBI rating method as it yielded the same impairment as using the ROM impairment rating method.

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

For the right elbow, Dr. Ahmed measured ROM of the right elbow as 0 to 145 degrees flexion and extension, pronation of 80 degrees, and supination of 80 degrees.[4] He found no joint effusion, tenderness, or instability and a well-healed scar over the biceps from the surgery. Dr. Ahmed identified the CDX as a right distal biceps tendon rupture using Table 15-4 on page 399 of the A.M.A., *Guides*, which yielded a default value of five percent. He found a GMFH was not applicable and applied a GMPE of two and a GMCS of two, for a net adjustment of two, yielding seven percent permanent impairment of the right upper extremity. Dr. Ahmed combined the impairment ratings for the right shoulder and the right elbow to find 14 percent permanent impairment of the right upper extremity.

On June 20, 2018 appellant filed a schedule award claim (Form CA-7).

On August 15, 2018 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), concurred with Dr. Ahmed's finding of seven percent permanent impairment of the right upper extremity due a full-thickness rotator cuff tear using Table 15-5 on page 403 of the A.M.A., *Guides*. He noted that ROM of the right elbow was normal and that Dr. Augustin, in a prior report, had measured normal ROM findings of the right shoulder except for internal rotation, which Dr. Ahmed also found was normal. Dr. Garelick determined that the DBI method yielded a higher award for rating appellant's shoulder impairment and found seven percent permanent impairment of the right upper extremity. He asserted that appellant had reached maximum medical improvement (MMI) on March 29, 2018.

By decision dated November 19, 2018, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The period of the award ran for 21.84 weeks from March 28 to August 28, 2018.

On November 29, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 11, 2019.

By decision dated May 21, 2019, OWCP's hearing representative vacated the November 19, 2018 decision. She instructed OWCP to request that the DMA address Dr. Ahmed's finding that appellant had seven percent impairment due to his right distal biceps tendon rupture.

On May 30, 2019 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, advised that appellant had no residual objective findings of his biceps tendon rupture and, thus, no elbow impairment according to Table 15-4 on page 399 of the A.M.A., *Guides.*

OWCP, on June 11, 2019, requested that Dr. Ahmed review and discuss the DMA's May 30, 2019 report and to submit a response within 30 days. No response was received within the time allotted.

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[4] Dr. Ahmed's ROM measurements for appellant's right elbow yielded normal findings. *Id*. at Table 15-33, page 474.

By decision dated July 15, 2019, OWCP found that appellant had no more than the previously awarded seven percent permanent impairment of the right upper extremity.

On July 23, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated July 24, 2019, Dr. Ahmed asserted that appellant had complaints of daily right arm pain, weakness, and stiffness. He indicated that the physical findings consisted of the scar from the biceps repair. Dr. Ahmed again identified the CDX as a right distal biceps tendon rupture, which a default value of five percent. He found that the GMPE was one due to minimal physical examination findings and that a GMCS was not applicable as it was used to identify the CDX. Dr. Ahmed opined that appellant had 5 percent permanent impairment due to appellant's right distal biceps tendon rupture, which he combined with the 7 percent impairment due to appellant's rotator cuff tear to find 12 percent permanent impairment of the right upper extremity.

A telephonic hearing was held on November 8, 2019.

By decision dated January 17, 2020, OWCP's hearing representative vacated the July 15, 2019 decision. He remanded the case for OWCP to refer Dr. Ahmed's July 24, 2019 report to a DMA for review.

On January 31, 2020 Dr. Katz again concurred with Dr. Ahmed's finding of seven percent permanent impairment due to a right rotator cuff tear. He opined that appellant had no impairment due to appellant's distal biceps tendon rupture, noting that Dr. Ahmed had found no tenderness, atrophy, reduced motion, or loss of strength.

On February 25, 2020 OWCP requested that Dr. Ahmed review Dr. Katz' January 31, 2020 report and provide an addendum to his July 24, 2019 report within 30 days. No response was received within the time allotted.

By decision dated April 6, 2020, OWCP found that appellant had no greater than the previously awarded seven percent permanent impairment of the right upper extremity.

On April 18, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an addendum report dated May 1, 2020, Dr. Ahmed again noted that appellant complained of "some residual intermittent right arm pain as well as weakness" and also had a scar on the right arm. He again opined that appellant had 5 percent permanent impairment of the right upper extremity due to appellant's biceps tendon rupture, for a total right upper extremity impairment of 12 percent.

A telephonic hearing was held on July 9, 2020. Counsel contended that a conflict existed between Dr. Katz and Dr. Ahmed regarding whether appellant had a ratable permanent impairment of the right upper extremity due to his biceps tendon rupture.

On August 13, 2020 OWCP's hearing representative affirmed the April 6, 2020 decision.

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 diagnosis-based 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 GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

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 percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

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[5] *Supra* note 2.

[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 Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* 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), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[10] *Id.* at 494-531.

[11] *Id.* 411.

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

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

ANALYSIS

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

In support of his schedule award claim, appellant submitted a report from Dr. Ahmed dated March 29, 2018 and updated May 7, 2018. Dr. Ahmed noted that appellant had undergone surgery in 1996 to repair a torn right biceps tendon and had injured his right shoulder on December 29, 2016. He found a *Quick*DASH score of 65 on the right side. For the right shoulder, Dr. Ahmed found positive findings of Hawkins impingement and tenderness of the bicipital groove and anterior cuff. He measured ROM of the right shoulder and found 140 degrees flexion yielded three percent impairment and 140 degrees abduction yielded three percent impairment, for a total impairment due to ROM of six percent using table 15-34 on page 475 of the A.M.A., *Guides*.[14] Dr. Ahmed adjusted the ROM impairment rating based on the *Quick*DASH score to find seven percent permanent impairment of the right shoulder due to reduced motion.

Using the DBI method, Dr. Ahmed identified the CDX for the right shoulder as a class 1 full thickness rotator cuff tear with residual loss, which yielded a default value of five percent under Table 15-5 on page 403 of the A.M.A., *Guides*. He applied a GMFH of three, a GMPE of two, and a GMCS of three, for a net adjustment of six and a right upper extremity impairment of seven percent.[15] Dr. Ahmed advised that he would use the DBI impairment rating method as it had yielded the same result as the ROM impairment rating method.

For the right elbow, Dr. Ahmed measured normal ROM and found no joint effusion, tenderness, or instability and a well-healed scar over the biceps from the surgery.[16] Using Table 15-4 on page 399, he identified the CDX as a right distal biceps tendon rupture, which yielded a default value of five percent. Dr. Ahmed applied grade modifiers to find seven percent permanent impairment of the right upper extremity due to appellant's biceps tendon rupture. He combined the impairment rating for the right shoulder and the impairment rating for the right arm to find 14 percent permanent impairment of the right upper extremity.

On August 15, 2018 Dr. Garelick, a DMA, reviewed Dr. Ahmed's report and concurred that appellant had seven percent permanent impairment of the right upper extremity due to his full-thickness rotator cuff tear according to Table 15-5. He found that the ROM impairment method yielded a lower result. The Board finds that Dr. Garelick properly applied the provisions of the A.M.A., *Guides* in finding that appellant had seven percent permanent impairment due to his right rotator cuff tear.[17] Dr. Ahmed and Dr. Garelick further properly explained that appellant's right

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[14] The remaining ROM measurements for the elbow yielded no impairment rating pursuant to Table 15-34.

[15] Utilizing the net adjustment formula discussed above, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (3-1) + (2-1) + (4-1) = 6, yielded an adjustment to the highest value provided for a class 1 impairment, seven percent.

[16] Dr. Ahmed's ROM measurements for appellant's right elbow yielded normal findings. *Id*. at Table 15-33, page 474.

[17] *See T.D.*, Docket No. 20-0972 (issued January 28, 2021).

shoulder impairment should be rated based on DBI methodology as it yielded the same or higher permanent impairment than using the ROM methodology.[18]

In a report dated May 30, 2019, Dr. Katz, a DMA, advised that appellant had no impairment due to his biceps tendon rupture based on the lack of objective findings.

In a July 24, 2019 report, Dr. Ahmed indicated that appellant had a healed scar from his biceps repair as a physical finding and complaints of pain, weakness, and stiffness in the right arm. Using the CDX of a distal bicep tendon rupture, with a default value of five percent, he found a GMPE of one based on the minimal findings and that a GMCS was inapplicable, for a total permanent impairment due to the biceps tendon rupture of 5 percent, which he combined with the 7 percent impairment due to his rotator cuff tear to find 12 percent permanent impairment of the right upper extremity.

On January 31, 2020 Dr. Katz reviewed Dr. Ahmed's report and opined that appellant had no impairment due to appellant's biceps tendon rupture as the examination findings had revealed no tenderness, atrophy, loss of motion, or reduced strength. The Board finds that Dr. Katz properly determined that appellant had no impairment of the right elbow. Table 15-4 on page 399 of the A.M.A., *Guides* provides that a distal biceps tendon rupture with no residual findings, either with or without surgical treatment, yields a zero percent permanent impairment rating. The A.M.A., *Guides* further provides, "Subjective complaints without objective physical findings or significant clinical abnormalities are assigned class 0 and have usually no ratable impairment."[19] The Board, thus, finds that Dr. Katz' opinion represents the weight of the evidence as he properly applied the appropriate standards of the A.M.A., *Guides* and establishes that appellant had no ratable impairment of the right elbow.[20]

Dr. Ahmed provided an addendum report on May 1, 2020 again advising that appellant complained of pain and weakness of the right arm and had a scar on the right arm. He provided the same impairment rating. Dr. Ahmed's findings and conclusions duplicated those from his July 24, 2019 report, which was reviewed by the DMA. There is no probative medical evidence in accordance with the provisions of the A.M.A., *Guides* demonstrating that appellant has greater than seven percent permanent impairment of the right upper extremity previously awarded.[21]

On appeal counsel asserts that Dr. Ahmed properly applied the A.M.A., *Guides* in rating appellant's elbow impairment. He contends that Dr. Ahmed's opinion constitutes the weight of the evidence. As noted, however, Dr. Ahmed improperly applied the provision of the A.M.A., *Guides*, which requires objective residuals findings, in rating appellant's impairment of the elbow.

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[18] FECA Bulletin No. 17-06 (May 8, 2017). *See J.S.*, Docket No. 19-1567 (issued April 1, 2020); *K.S.*, Docket No. 19-1588 (issued March 10, 2020).

[19] A.M.A., *Guides* 387.

[20] *See M.D.*, Docket No. 20-1459 (issued February 26, 2021).

[21] *See J.M.*, Docket No. 18-1334 (issued March 7, 2019).

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 his burden of proof to establish greater than seven percent permanent impairment of the right upper extremity for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2021
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