

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

P.T., Appellant)	
)	
and)	Docket No. 20-0040
)	Issued: May 17, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Milwaukee, WI, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 4, 2019 appellant filed a timely appeal from an April 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 10, 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 23 percent permanent impairment of her right upper extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

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

OWCP accepted that on October 21, 1997 appellant, then a 42-year-old mail handler, sustained a right rotator cuff tear, right biceps rupture, disorder of right shoulder bursae/tendons, right shoulder/rotator cuff/arm sprain, right shoulder joint pain, and right rotator cuff repair due to lifting heavy mailbags she was carrying while in the performance of duty.⁴

By decision dated August 1, 2008, OWCP granted appellant a schedule award for seven percent permanent impairment of her right upper extremity. The award ran for 21.84 weeks from January 3 through June 4, 2002 with an effective date of pay rate and a date of maximum medical improvement (MMI) of January 3, 2002. The weekly pay rate effective January 3, 2002 was \$757.50 which, when adjusted to reflect the augmented pay for a claimant with at least one dependent as defined under FECA, yielded an adjusted weekly pay rate of \$568.13.⁵

The schedule award was based on the July 23, 2008 report of Dr. Amon Ferry, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), who applied the diagnosis-based impairment (DBI) rating method and determined that appellant had seven percent permanent impairment of her right upper extremity under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ He based his permanent impairment calculations on the physical examinations findings by Dr. Carole Vetter, an attending Board-certified orthopedic surgeon.

On August 8, 2017 appellant filed a claim (Form CA-7) alleging entitlement to increased schedule award compensation due to the right upper extremity conditions she sustained in

³ Docket No. 18-0968 (issued October 23, 2018).

⁴ The medical evidence of record references the fact that appellant underwent OWCP-authorized right rotator cuff repair surgery on an unspecified date. Appellant worked in limited-duty positions for the employing establishment without wage loss.

⁵ Section 8110(b) of FECA provides that total disability compensation will equal three-fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b). Section 8105(a) of FECA provides that, in the absence of a qualifying dependent: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability." 5 U.S.C. § 8105(a).

⁶ A.M.A., *Guides* (5th ed. 2001).

connection with her October 21, 1997 employment injury. On the Form CA-7 she advised that she was not making support payments for a dependent.

On March 19, 2018 OWCP referred appellant's case to Dr. David Garelick, a Board-certified orthopedic surgeon serving as a DMA, and requested that he review the case record and provide an opinion on the permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*. In a March 22, 2018 report, Dr. Garelick determined that, utilizing the DBI rating method, she had seven percent permanent impairment of her right upper extremity due to her right rotator cuff tear. He then indicated that he was providing an assessment of appellant's right upper extremity permanent impairment under the range of motion (ROM) rating method, but found that he could not calculate such a rating because Dr. Vetter only measured appellant's right shoulder ROM one time for each motion. Dr. Garelick asserted that FECA Bulletin No. 17-06 required three independent measurements of each shoulder motion to be taken in order to qualify for a permanent impairment rating under the ROM method.

By decision dated March 26, 2018, OWCP found that appellant did not meet her burden of proof to establish more than seven percent permanent impairment of her right upper extremity, for which she previously received a schedule award. It based its determination on Dr. Garelick's March 22, 2018 report.

Appellant appealed the case to the Board and, by decision dated October 23, 2018,⁷ the Board set aside OWCP's March 26, 2018 decision and remanded the case to OWCP for further development. The Board directed OWCP to further develop the medical evidence in accordance with the relevant standards, including FECA Bulletin No. 17-06 (issued May 8, 2017), and to issue a *de novo* decision regarding appellant's permanent impairment.

On remand OWCP sent Dr. Vetter a February 13, 2019 letter requesting that she provide updated ROM findings for appellant's right shoulder, including obtaining three measurements for each type of ROM per the standards of FECA Bulletin No. 17-06. It afforded Dr. Vetter 30 days to respond.

In a February 21, 2019 report, Dr. Vetter indicated that she obtained new ROM findings for appellant's right shoulder, which included obtaining three measurements for each type of ROM. She reported the following ROM findings: flexion to 65, 60, and 60 degrees; extension to 15, 10, and 10 degrees; abduction to 70, 70, and 65 degrees; internal rotation to 40, 40, and 40 degrees; and external rotation to 20, 20, and 20 degrees.

On March 11, 2019 OWCP referred the case to Dr. Garelick, in his role as a DMA, and requested that he review the medical evidence of record, including Dr. Vetter's February 21, 2019 report, and provide an opinion on the permanent impairment of appellant's right upper extremity under the sixth edition of the A.M.A., *Guides*.

In a March 13, 2019 report, Dr. Garelick indicated that he had reviewed the medical evidence of record, including Dr. Vetter's February 21, 2019 report. He referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 15-5

⁷ *Supra* note 3.

(Shoulder Regional Grid), page 503, the class of diagnosis (CDX) for appellant's full-thickness tear of the right rotator cuff (functional with normal motion) resulted in a class 1 impairment with a default value of five. Dr. Garelick assigned a grade modifier for functional history (GMFH) of 2 and a grade modifier for physical examination (GMPE) of 2. He found that a grade modifier for clinical studies (GMCS) was not applicable. Dr. Garelick utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in a grade E or seven percent permanent impairment of the right upper extremity. He noted that Table 15-5 allowed for utilization of the ROM rating method for appellant's right shoulder condition and referenced Table 15-34 (Shoulder Range of Motion), page 475, to find the following impairment rating for deficits upon various types of ROM of the right shoulder: nine percent for 60 degrees of flexion; two percent for 20 degrees of extension; six percent for 70 degrees of abduction; four percent for 40 degrees of internal rotation; and two percent for 20 degrees of external rotation. Dr. Garelick combined these values to equal 23 percent permanent impairment of the right upper extremity. He concluded that appellant had 23 percent permanent impairment of the right upper extremity given that she had a higher rating for permanent impairment under the ROM rating method. Dr. Garelick advised that, since appellant had previously received a schedule award for 7 percent permanent impairment of the right upper extremity, she was now entitled to an additional schedule award for 16 percent permanent impairment of that extremity.

By decision dated March 22, 2019, OWCP granted appellant a schedule award for an additional 16 percent permanent impairment of her right upper extremity. The award was based on the February 21, 2019 report of Dr. Vetter and the March 13, 2019 impairment rating of Dr. Garelick, serving as the DMA. It ran for 49.92 weeks from June 5, 2002 to May 20, 2003 with an effective date-of-pay rate of January 3, 2002 and a date of MMI of February 21, 2019. OWCP indicated that the weekly pay rate effective January 3, 2002 was \$757.50 which, when adjusted to reflect the augmented 75 percent pay rate for a claimant with at least one dependent as defined under FECA, yielded an adjusted weekly pay rate of \$568.13.⁸ It noted on the face of the schedule award that the total amount of schedule award compensation that appellant was entitled to receive was \$28,517.37.

On April 10, 2019 OWCP amended its March 22, 2019 decision and issued a corrected decision in which it granted appellant a schedule award for an additional 16 percent permanent impairment of her right upper extremity which ran for 49.92 weeks.⁹ The award was also based on the February 21, 2019 report of Dr. Vetter and the March 13, 2019 impairment rating of Dr. Garelick, serving as DMA. However, OWCP corrected its March 22, 2019 decision to reflect that appellant was not entitled to the augmented pay rate because she did not have at least one dependent as defined under FECA. It noted that adjusting the weekly pay rate of \$757.50 (effective date January 3, 2002) to reflect her nonaugmented 66 2/3 percent pay rate yielded an adjusted weekly pay rate of \$505.00.¹⁰ OWCP also corrected its prior decision to reflect that the award ran

⁸ OWCP indicated that cost-of-living adjustments (COLAs) raised the weekly compensation at the augmented rate to \$581.75.

⁹ OWCP advised appellant that it had issued the March 22, 2019 decision before "certification of your schedule award benefit."

¹⁰ OWCP indicated that COLAs did not apply.

from February 21, 2019 to February 5, 2020 with a date of MMI of February 21, 2019.¹¹ It paid appellant \$25,135.32 in connection with the April 10, 2019 schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA,¹² and its implementing federal regulations,¹³ 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, 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.¹⁴ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁵

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁶ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹⁷

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 23 percent permanent impairment of her right upper extremity, for which she previously received schedule award compensation.

OWCP properly determined that appellant had 23 percent permanent impairment of her right upper extremity based on the March 13, 2019 report of Dr. Garelick, the DMA interpreting the February 21, 2019 clinical findings of Dr. Vetter. Dr. Garelick properly applied the standards of the sixth edition of the A.M.A., *Guides* to the examination findings of record, including those

¹¹ February 21, 2019 was the date of the most recent examination by Dr. Vetter.

¹² 5 U.S.C. § 8107.

¹³ 20 C.F.R. § 10.404.

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁶ See A.M.A., *Guides* (6th ed. 2009) 405-12. 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. *Id.* at 401-05, 475-78.

¹⁷ *Id.* at 23-28.

of Dr. Vetter, an attending physician. He correctly utilized the DBI rating method to find that, under Table 15-5 (Shoulder Regional Grid), page 503, the CDX for appellant's full-thickness tear of the right rotator cuff (functional with normal motion) resulted in a class 1 impairment with a default value of five.¹⁸ Dr. Garelick assigned a GMFH of 2 and a GMPE of 2, and found that a GMCS was not applicable. He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in a grade E or seven percent permanent impairment of the right upper extremity.¹⁹ Dr. Garelick properly noted that Table 15-5 allowed for utilization of the ROM rating method for appellant's right shoulder condition and referenced Table 15-34 (Shoulder Range of Motion), page 475, to find the following impairment rating for deficits upon various types of ROM of the right shoulder: nine percent for 60 degrees of flexion; two percent for 20 degrees of extension; six percent for 70 degrees of abduction; four percent for 40 degrees of internal rotation; and two percent for 20 degrees of external rotation.²⁰ He combined these values to equal 23 percent permanent impairment of the right upper extremity and properly concluded that she had 23 percent permanent impairment of the right upper extremity given that she had a higher rating for permanent impairment under the ROM rating method.²¹ Dr. Garelick advised that, since appellant previously received a schedule award for 7 percent permanent impairment of the right upper extremity, she was now entitled to an additional schedule award for 16 percent permanent impairment of that extremity, for a total 23 percent permanent impairment. The Board also finds that OWCP properly found that the date of MMI was February 21, 2019, the date of Dr. Vetter's most recent examination.²²

On appeal, appellant argues that she should have received \$28,517.37 in schedule award compensation, rather than the \$25,135.32 she actually received. However, she was not entitled to receive \$28,517.37 in schedule award compensation because that calculation, referenced in the March 22, 2019 schedule award decision, was based on the improper assumption that she was entitled to receive schedule award compensation at the augmented 75 percent rate for a claimant with at least one dependent as defined under FECA. OWCP amended the March 22, 2019 schedule award decision after it was discovered that appellant was not entitled to receive schedule award compensation at the augmented 75 percent rate because she no longer had at least one dependent as defined under FECA.²³ It then issued an April 10, 2019 schedule award decision in which it properly calculated that she was entitled to \$25,135.32 in schedule award compensation based on

¹⁸ See A.M.A., *Guides* 503, Table 15-5.

¹⁹ See *supra* note 16.

²⁰ See A.M.A., *Guides* 475, Table 15-34.

²¹ See *T.B.*, Docket No. 20-0642 (issued September 30, 2020).

²² *Supra* note 15 at Chapter 3.700.3a(1)(c) (January 2010) (the date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP).

²³ On August 8, 2017 appellant filed a Form CA-7 claiming entitlement to increased schedule award compensation. On the Form CA-7, she advised that she was not making support payments for a dependent.

the fact that she was only entitled to receive schedule award compensation at the nonaugmented rate of 66 2/3 percent.²⁴

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 greater than 23 percent permanent impairment of her right upper extremity, for which she previously received schedule award compensation.

²⁴ See *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board