United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
	)	**Docket No. 20-0274**
and	)	**Issued: May 13, 2021**
U.S. POSTAL SERVICE, EUSTIS POST OFFICE, Eustis, FL, 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 1, 2020 appellant, through counsel, filed a timely appeal from an October 28, 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 to consider 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 more than 18 percent permanent impairment of his right upper extremity and 2 percent permanent impairment of his left upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On March 6, 2014 appellant, then a 52-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 27, 2014 he injured both shoulders and his neck while in the performance of duty. He did not stop work. In an accompanying narrative statement dated March 6, 2014, appellant related that on February 27, 2014 he experienced pain in his right shoulder and neck when sorting and casing tubs of flats and letters and placing them into a hamper and cart for delivery on his route in a postal vehicle.

OWCP initially denied appellant's claim, but on April 27, 2015, accepted appellant's claim for aggravation of cervical spondylosis without myelopathy, sprain of neck, and aggravation of bilateral shoulder impingement.[3]

Appellant submitted an April 20, 2017 medical report from Dr. Samy Bishai, an orthopedic surgeon, who opined that appellant had 24 percent permanent impairment of each upper extremity under 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*),[4] due to loss of shoulder range of motion (ROM). Dr. Bishai determined that appellant reached maximum medical improvement (MMI) on the date of his impairment evaluation.

On July 13, 2017 appellant filed a claim for a schedule award (Form CA-7).

OWCP, by development letter dated July 26, 2017, requested that appellant submit a report from his attending physician which addressed whether he had reached MMI and, if so, to evaluate permanent impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*. It afforded him 30 days to submit the necessary evidence. No further evidence was submitted.

On August 25, 2017 OWCP referred the medical evidence and a statement of accepted facts (SOAF) to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to review the findings in the April 20, 2017 report by Dr. Bishai. On August 26, 2017 the DMA recommended that appellant undergo a second opinion evaluation with a Board-certified orthopedic surgeon because Dr. Bishai's ROM measurements conflicted with the ROM measurements contained in an April 30, 2014 report of Dr. Richard Blecha, a Board-certified orthopedic surgeon, and April 2, 2015 report of Dr. Richard C. Smith, a Board-certified orthopedic surgeon and prior OWCP referral physician.

On September 21, 2017 OWCP referred appellant, along with a SOAF and the medical record, to Dr. Norman B. Seltzer, a Board-certified orthopedic surgeon, for a new second opinion

[3] Appellant retired on disability from the employing establishment effective May 8, 2015.

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

impairment examination. In a November 9, 2017 report, Dr. Seltzer utilized the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides* and opined that appellant had two percent permanent impairment of each upper extremity. He determined that appellant had reached MMI on April 20, 2017, the date of Dr. Bishai's impairment evaluation.

On December 28, 2017 Dr. Katz, the DMA, reviewed the medical record and indicated that he agreed with Dr. Seltzer's rating of two percent permanent impairment of each upper extremity. He advised that appellant reached MMI on November 9, 2017, the date of Dr. Seltzer's evaluation.

On January 3, 2018 OWCP requested that the DMA provide a rationalized opinion explaining why he selected November 9, 2017 as the date of MMI. In response, the DMA submitted an amended report dated January 5, 2018 in which he reiterated the calculations he first presented in his December 28, 2017 report. Additionally, he explained that the definition of MMI was usually considered to be the date of the evaluation by an attending physician OWCP accepts as definitive. The DMA related that, Dr. Seltzer's November 9, 2017 evaluation formed the basis upon which he rendered his own impairment rating, November 9, 2017 met the described definition of MMI.

By decision dated January 11, 2018, OWCP granted appellant a schedule award for two percent permanent impairment of the right arm and two percent permanent impairment of the left arm based upon the opinions of Dr. Seltzer and its DMA. The period of the award ran for 12.48 weeks (87.36 days) from November 9, 2017 to February 3, 2018.

On January 19, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 26, 2018.

By decision dated September 6, 2018, OWCP's hearing representative set aside the January 11, 2018 decision and remanded the case for further medical development. He instructed OWCP to refer appellant back to Dr. Seltzer for an additional second opinion examination to determine whether he had permanent impairment of his upper extremities under the ROM rating method set forth in the sixth edition of the A.M.A., *Guides*.

On September 12, 2018 OWCP requested a supplemental report from Dr. Seltzer.

On September 26, 2018 OWCP referred appellant, together with a SOAF, the medical record, and list of questions, to Dr. Jeffrey T. O'Brien, a Board-certified orthopedic surgeon, for a new second opinion impairment evaluation. In a November 2, 2018 report, Dr. O'Brien reviewed appellant's medical records and noted examination findings, including ROM measurements for the right and left shoulders and cervical spine. He diagnosed right shoulder impingement syndrome and cervical degenerative disc disease. Dr. O'Brien determined that appellant reached MMI on April 2, 2015. Regarding impairment to the right upper extremity, he utilized the DBI rating method found at Table 15-5 of the sixth edition of the A.M.A., *Guides*, and found that appellant had a class of diagnosis (CDX) of 1 for shoulder impingement with a default value of one percent. Dr. O'Brien assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 2, and a grade modifier for clinical studies (GMCS) of 2. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS – CDX) = (2 - 1) + (2 - 1) + (2 - 1) = 0, resulting in a class 1, grade E, or five percent permanent impairment of the right upper extremity. Dr. O'Brien noted that the five percent DBI impairment rating was

higher than the ROM impairment rating. He further noted that there were no objective findings for the left shoulder and concluded that there was zero percent permanent impairment of the left upper extremity. Additionally, Dr. O'Brien indicated that there was no neck impairment rating for a diagnosis of cervical degenerative disc disease as there was no radiculopathy of the spine.

On December 12, 2018 Dr. Katz, the DMA, reviewed the medical record, including Dr. O'Brien's November 2, 2018 clinical findings. He noted that Dr. O'Brien only provided a permanent impairment rating for the right shoulder when both shoulders were involved in appellant's claim. Further, the DMA noted that Dr. O'Brien measured significant loss of ROM for the right shoulder, did not calculate a stand-alone motion rating using Table 15-34, and he concluded that the DBI permanent impairment for the right shoulder exceeded ROM permanent impairment. He related that if the ROM examination was reliable, it was likely that the ROM permanent impairment would far exceed the DBI permanent impairment. Therefore, for these reasons, the DMA recommended that OWCP obtain a supplemental report from Dr. O'Brien or a report from a Board-certified physiatrist or a Board-certified orthopedic surgeon addressing and calculating appellant's bilateral shoulder ROM permanent impairment using Table 15-34.

On December 14, 2018 and February 1, 2019 OWCP requested that Dr. O'Brien submit a supplemental report which addressed the concerns expressed by the DMA in his December 13, 2018 report.

In a February 1, 2019 supplemental report, Dr. O'Brien provided ROM measurements for appellant's right and left shoulders. Regarding permanent impairment to the right shoulder, he utilized Table 15-34 on page 475, and found that 40 degrees of abduction yielded six percent permanent impairment, 80 degrees of flexion yielded nine percent permanent impairment, 20 degrees of adduction yielded two percent permanent impairment, 30 degrees of extension yielded one percent permanent impairment, and 80 degrees of internal rotation and 60 degrees of external rotation yielded zero percent permanent impairment, totaling 18 percent permanent impairment of the right upper extremity. Regarding permanent impairment to the left shoulder, Dr. O'Brien again utilized Table 15-34 and found that 180 degrees of flexion, 45 degrees of extension, 170 degrees of abduction, 40 degrees of adduction, 80 degrees of internal rotation, and 60 degrees of external rotation yielded zero percent permanent impairment, totaling zero percent permanent impairment. He advised that there were no changes in ROM loss for the left shoulder, and thus, concluded that appellant had zero percent permanent impairment of his left upper extremity.

The DMA, in an April 2, 2019 report, reviewed Dr. O'Brien's February 1, 2019 findings and concurred with his 18 percent permanent total impairment of the right upper extremity, noting that the additional award would be for 16 percent permanent impairment of the right upper extremity after subtracting the 2 percent previously awarded. He also concurred that appellant had zero percent permanent impairment of the left upper extremity.

By decision dated April 4, 2019, OWCP granted appellant an additional schedule award for 16 percent permanent impairment of the right upper extremity (arm) for a total of 18 percent, with no additional permanent impairment of the left upper extremity (arm) beyond the 2 percent permanent impairment previously awarded based on the opinions of Dr. O'Brien and its DMA. The period of the award ran for 49.92 weeks (349.44 days) from November 2, 2018 to October 17, 2019.

On April 10, 2019 counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 13, 2019. No additional evidence was submitted.

By decision dated October 28, 2019, an OWCP hearing representative affirmed the April 4, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing 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. 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.[7] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[8] 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.[9]

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 regard 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).[10]

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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id. See also Ronald R. Kraynak,* 53 ECAB 130 (2001).

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

[9] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

[10] *See* A.M.A., *Guides* 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 assessment stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

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.,] 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.)"

* * *

"If the rating physician provided an assessment using the DBI 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.

"If the medical evidence of record is not sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[11]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 18 percent permanent impairment of his right upper extremity and two percent permanent impairment of his left upper extremity, for which he previously received schedule award compensation.

OWCP referred appellant for a second opinion evaluation with Dr. O'Brien who, in his November 2, 2018 report, found that appellant had reached MMI due to his accepted conditions of aggravation of cervical spondylosis without myelopathy, neck sprain, and aggravation of bilateral shoulder impingement. Regarding impairment to the right shoulder, he determined that, under the DBI method for rating permanent impairment, utilizing Table 15-5, page 402 appellant had a default value of one percent for the accepted right shoulder impingement syndrome. Dr. O'Brien then assigned a grade modifier 2 for GMFH, 2 for GMPE, and 2 for GMCS. After applying the net adjustment formula, he determined that the net adjustment of zero resulted in a

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

[12] *See supra* note 8 at Chapter 2.808.6(f) (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

class 1, grade E, five percent permanent impairment of the right upper extremity. Dr. O'Brien found that the five percent DBI impairment rating was higher than the ROM impairment rating, but did not provide a right shoulder ROM permanent impairment rating. He determined that appellant had zero percent permanent impairment of his left upper extremity based on no objective findings for his left shoulder. Dr. O'Brien further found that he had no permanent impairment of the neck based on his diagnosis of cervical degenerative disc disease in the absence of radiculopathy of the spine.

In accordance with its procedures,[13] OWCP properly referred the evidence of record to Dr. Katz, a DMA, who reviewed the clinical findings of Dr. O'Brien on December 12, 2018 and recommended that OWCP obtain a supplemental report from Dr. O'Brien as he only provided a permanent impairment rating for the right shoulder when both shoulders were involved in appellant's claim, did not provide a ROM permanent impairment rating for the right upper extremity although he found significant loss of ROM of the right shoulder, and concluded that the right shoulder permanent impairment under the DBI rating method was greater than the right shoulder permanent impairment under the ROM rating method.

In a February 1, 2019 supplemental report, Dr. O'Brien provided three ROM measurements of appellant's right and left shoulders. Regarding permanent impairment to the right shoulder, he utilized Table 15-34, page 475, of the sixth edition of the A.M.A., *Guides* and determined that 80 degrees of flexion represented 9 percent permanent impairment, 30 degrees of extension represented 1 percent permanent impairment, 40 degrees of abduction represented 6 percent permanent impairment, 20 percent of adduction represented 2 percent permanent impairment, and 80 degrees of internal rotation and 60 degrees of external rotation represented 0 percent permanent impairment, totaling 18 percent permanent impairment of the right upper extremity. Regarding permanent impairment to the left shoulder, Dr. O'Brien determined that 180 degrees of flexion, 45 degrees of extension, 170 degrees of abduction, 40 degrees of adduction, 80 degrees of internal rotation, and 60 degrees of external rotation yielded zero percent permanent impairment, totaling zero percent permanent impairment of the left upper extremity.

In his April 12 2019 report, the DMA concurred with Dr. O'Brien's finding that appellant had 18 percent permanent impairment of his right upper extremity and 0 percent permanent impairment of his left upper extremity pursuant to the sixth edition of the A.M.A., *Guides*.

The Board finds that OWCP properly determined that the clinical findings and reports of Dr. O'Brien and the DMA constitute the weight of the medical evidence.[14] There is no probative medical evidence of record demonstrating greater impairment than that previously awarded.[15] Therefore, appellant has not met his burden of proof to establish an increased schedule award.

[13] *Id.*

[14] *J.S.*, Docket No. 19-1567 (issued April 1, 2020); *J.H.*, Docket No. 18-1207 (issued June 20, 2019); *M.C.*, Docket No. 15-1757 (issued March 17, 2016).

[15] *See J.S., id.*; *J.M.*, Docket No. 18-1334 (issued March 7, 2019).

On appeal counsel contends that OWCP has the duty to develop the evidence. The Board notes that appellant has the burden of proof to establish his entitlement to a greater schedule award and the medical evidence submitted is insufficient to meet his burden of proof.[16]

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 more than 18 percent permanent impairment of his right upper extremity and two percent permanent impairment of his left upper extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 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

[16] *See D.F.*, Docket No. 17-1474 (issued January 26, 2018); *A.T.*, Docket No. 16-0738 (issued May 19, 2016).