

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

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<b>D.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0670</b>
	)	<b>Issued: November 2, 2021</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Milwaukee, WI, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 5, 2020 appellant filed a timely appeal from a January 23, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has met his burden of proof to establish greater than 13 percent permanent impairment of his right upper extremity for which he previously received schedule award compensation.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On October 29, 2009 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained an injury to his right shoulder as a result of repetitively moving heavy mail containers while in the performance of duty.<sup>3</sup> He stopped work on January 26, 2010. OWCP paid appellant wage-loss compensation on the supplemental rolls as of January 6, 2010 and on the periodic rolls as of October 24, 2010.

On February 2, 2010 appellant underwent OWCP-authorized right shoulder arthroscopic rotator cuff repair, superior labral anterior-posterior (SLAP) reconstruction repair, distal clavicle excision, and subacromial decompression. On May 17, 2012 he underwent OWCP-authorized surgery for removal of anterior cervical instrumentation at C5-6, fusion and exploration at C5-6, anterior cervical discectomy at C4-5 and C6-7, anterior cervical interbody fusion at C4-5 and C6-7, fresh frozen corticocancellous allograft with mesenchymal stem cell concentrate (Trinity), and anterior cervical instrumentation at C4-7.

On October 18, 2013 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a November 7, 2013 medical report, Dr. Thomas Perlewitz, appellant's treating physician and a Board-certified orthopedic surgeon, reported that appellant had reached maximum medical improvement (MMI) as of May 20, 2013. In accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he opined that appellant sustained 28 percent whole person permanent impairment.

OWCP referred appellant, along with a statement of accepted facts (SOAF), a series of questions and the case file to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of his right upper extremity permanent impairment.

In a December 20, 2016 report, Dr. Brecher indicated that he reviewed the medical evidence of record, including the SOAF. He referred to the sixth edition of the A.M.A., *Guides*<sup>4</sup> to calculate his impairment rating using the range of motion (ROM) methodology, noting that

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<sup>2</sup> *Order Remanding Case*, Docket No. 19-0025 (issued on September 3, 2019); Docket No. 17-1631 (issued January 3, 2018).

<sup>3</sup> The present claim was assigned OWCP File No. xxxxxx866 by OWCP. Under OWCP File No. xxxxxx171, OWCP accepted that on August 30, 2005 appellant sustained a left full thickness tear involving the anterior supraspinatus tendon, a ggravation of cervical disc C5-6, and aggravation of radiculopathy as a result of his repetitive employment duties. It authorized left shoulder arthroscopic repair. On July 22, 2010 OWCP granted appellant a schedule award for 18 percent permanent impairment of the left upper extremity. It administratively combined OWCP File Nos. xxxxxx171 and xxxxxx866, with the latter serving as the master file.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Table 15-5, Shoulder Regional Grid, was not applicable due to appellant's limited motion.<sup>5</sup> Dr. Brecher 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: three percent for 150 degrees of flexion; three percent for 105 degrees of abduction; two percent for 60 degrees of internal rotation; two percent for 50 degrees of external rotation; and zero percent for 40 degrees of abduction, and 50 degrees of extension.<sup>6</sup> He combined these values to total 10 percent permanent impairment of the right upper extremity. Dr. Brecher determined that appellant had reached MMI on December 20, 2016. He further reported that he could not provide a rating for appellant's cervicalgia and cervical disc disease as there was no clear spinal nerve involvement.

OWCP routed Dr. Brecher's December 20, 2016 report, a SOAF, and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment of the right upper extremity and date of MMI.

On January 23, 2017 Dr. Katz, serving as an OWCP DMA, concurred with Dr. Brecher's rating for 10 percent permanent impairment of the right upper extremity. He provided measurements for loss of motion to the right shoulder from Table 15-34.<sup>7</sup> This resulted in a Grade Modifier 1 due to ROM loss from Table 15-35.<sup>8</sup> Dr. Katz reported that Dr. Brecher correctly referenced Table 15-34 for a stand-alone ROM method of calculating the rating as the Shoulder Regional Grid, Table 15-5, directed the examiner to use Table 15-34 for key diagnostic factors consistent with those accepted conditions in instances where normal motion was not present. He noted that FECA does not allow a schedule award for the spine. Therefore, a diagnosed injury originating in the spine may be considered only to the extent that it results in permanent impairment of the extremities, generally manifest as spinal nerve impairment. Dr. Katz noted that Dr. Brecher could not give a rating for cervicalgia and cervical disc disease as there was no clear spinal nerve involvement. As Dr. Brecher correctly applied the procedures set forth by FECA/OWCP and the A.M.A., *Guides*, Dr. Katz opined that his evaluation should be accepted over Dr. Perlewitz' 2013 report. He concluded that appellant had 10 percent permanent impairment of the right upper extremity and that he reached MMI on December 20, 2016, the date of Dr. Brecher's examination.

By decision dated March 9, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of his right upper extremity. The award ran for 31.2 weeks from December 20, 2016 through July 26, 2017 and was based on the January 23, 2017 DMA report.

Appellant appealed to the Board on July 24, 2017. By decision dated January 3, 2018, the Board set aside OWCP's March 9, 2017 schedule award decision and remanded the case for further development.<sup>9</sup> The Board found that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. The

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<sup>5</sup> *Id.* at 405.

<sup>6</sup> *Id.* at 475.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 477.

<sup>9</sup> Docket No. 17-1631 (issued January 3, 2018).

Board noted that, following OWCP's development of a consistent method for calculating permanent impairment for upper extremities, OWCP would issue a *de novo* decision.

On remand OWCP referred appellant to Dr. Brecher for a supplemental evaluation in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06.<sup>10</sup>

In an April 24, 2018 supplemental report, Dr. Brecher provided examination findings and noted that he could not provide a spinal nerve rating until appellant underwent an electromyogram (EMG) study and perhaps had his carpal tunnel addressed. He referenced Table 15-34, Shoulder Range of Motion, noting that he previously found appellant had 13 percent permanent impairment of his right upper extremity, which was a grade modifier of 2 under Table 15-35, Range of Motion Grade Modifiers. Dr. Brecher concluded that appellant had 13 percent permanent impairment of the right upper extremity. He determined that appellant reached MMI on April 24, 2018, the date of examination. Dr. Brecher further noted that, based on the A.M.A., *Guides*, the diagnosis-based impairment (DBI) method was not applicable for a rotator cuff injury full thickness tear because appellant had abnormal motion.

Following Dr. Brecher's April 24, 2018 evaluation, OWCP authorized and scheduled appellant for an EMG and nerve conduction velocity (NCV) study on May 22, 2018.

In a May 22, 2018 report, Dr. C. Johnson, a Board-certified radiologist, indicated that appellant's bilateral EMG/NCV study revealed bilateral carpal tunnel syndrome and bilateral mid-cervical root irritation.

On June 18, 2018 Dr. Brecher resubmitted his April 24, 2018 report with an accompanying addendum. He reported that he reviewed the May 22, 2018 EMG, which was consistent with bilateral carpal tunnel syndrome and bilateral mid cervical root irritation, right greater than left. Dr. Brecher noted that his opinion was unchanged because it was not possible to provide appellant a true permanent impairment rating until his carpal tunnel syndrome was addressed and further treatment was provided.

On July 30, 2018 OWCP referred the SOAF and Dr. Brecher's April 24, 2018 report to Dr. Katz for an opinion in accordance with the Board's January 3, 2018 decision.

In an August 3, 2018 report, Dr. Katz noted review of Dr. Brecher's initial December 20, 2016 report and supplemental April 24, 2018 report. Utilizing the DBI method, under Table 15-5, page 403, the class of diagnosis (CDX) for acromioclavicular (AC) joint injury status post distal clavicle resection resulted in a class 1 impairment with a default value of 10. Dr. Katz 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 1. He utilized the net adjustment formula,  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2-1) + (2-1) + (1-1) = +2$ , which resulted in a grade E or 13 percent permanent impairment of the right upper extremity. Dr. Katz concluded that, as appellant had previously received a schedule award for 10 percent permanent impairment of the right upper extremity, he was entitled to an award for an additional three percent permanent impairment of the right upper extremity.

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<sup>10</sup> FECA Bulletin No. 17-06 (May 8, 2017).

By decision dated September 13, 2018, OWCP granted appellant a schedule award for an additional 3 percent permanent impairment of the right upper extremity, for a total 13 percent permanent impairment of the right upper extremity. The award ran for 9.36 weeks from April 24 through June 28, 2018 and was based on the reports of Dr. Brecher and the DMA.

On October 2, 2018 appellant appealed to the Board. By decision dated September 3, 2019, the Board set aside OWCP's September 13, 2018 schedule award decision and remanded the case for further development followed by a *de novo* decision.<sup>11</sup>

Following the Board's decision, OWCP forwarded the case record, an updated SOAF, and the relevant medical reports to Dr. Katz. It requested he review the October 28, 2019 SOAF, the May 22, 2018 EMG/NCV study, and the addendum provided as a supplement to Dr. Brecher's April 24, 2018 report.

In a November 5, 2019 report, Dr. Katz reviewed the requested medical evidence and concurred with Dr. Brecher's rating of 13 percent permanent impairment of the right upper extremity. He acknowledged review of the newly-submitted medical records and Dr. Brecher's addendum report as directed. Dr. Katz concurred that appellant had not yet reached MMI for his accepted cervical condition/spinal nerve impairment. He further noted that FECA does not allow a schedule award for the spine; therefore, a diagnosed injury originating in the spine may be considered only to the extent that it results in permanent impairment of the extremities, generally reflected as spinal nerve impairment. As such, Dr. Katz opined that, according to OWCP policy, spinal nerve injuries that cause spinal impairment to the extremities, *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment (The Guides Newsletter) (July/August 2009)* must be utilized. He also noted that appellant's carpal tunnel needed to be addressed before a spinal nerve impairment rating could be determined, noting that the medical records lacked sufficient detail to permit an assignment of spinal nerve impairment at that juncture. With respect to appellant's right shoulder impairment rating, Dr. Katz noted that his findings were identical to those of his prior August 3, 2018 report, utilizing the ROM method to determine that appellant sustained 13 percent permanent impairment of the right upper extremity.

By decision dated January 23, 2020, OWCP granted appellant a schedule award for an additional 3 percent permanent impairment of the right upper extremity, for a total of 13 percent permanent impairment of the right upper extremity. The award ran for 9.36 weeks from April 24 through June 28, 2018 and was based on the November 5, 2019 DMA report.

### **LEGAL PRECEDENT**

The schedule award provisions 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.<sup>12</sup> 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, OWCP has adopted the A.M.A., *Guides* as

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<sup>11</sup> *Order Remanding Case*, Docket No. 19-0025 (issued September 3, 2019).

<sup>12</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

the uniform standard applicable to all claimants.<sup>13</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>14</sup>

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>15</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>16</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.<sup>17</sup> The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>18</sup>

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).<sup>19</sup>

The A.M.A., *Guides* also provide that the ROM impairment is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.<sup>20</sup> If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and

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<sup>13</sup> 20 C.F.R. § 10.404; *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>14</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a. (March 2017).

<sup>15</sup> *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008 *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>16</sup> 5 U.S.C. § 8101(19); *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>17</sup> *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>18</sup> *M.S.*, Docket No. 20-0276 (issued September 15, 2021).

<sup>19</sup> *See* A.M.A., *Guides* (6<sup>th</sup> 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 assessment stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

<sup>20</sup> *Id.* at 461.

added.<sup>21</sup> 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.<sup>22</sup>

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 measurements should be obtained and the greatest ROM should be used for the determination of impairment, the [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.*”<sup>23</sup> (Emphasis in the original.)

The Bulletin further advises:

“If the rating physician provided an assessment using the ROM method and the [A.M.A.] *Guides* allows 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.”<sup>24</sup>

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 permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>25</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 13 percent permanent impairment of his right upper extremity for which he previously received schedule award compensation.

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<sup>21</sup> *Id.* at 473.

<sup>22</sup> *Id.* at 474.

<sup>23</sup> FECA Bulletin No. 17-06 (May 8, 2017)

<sup>24</sup> *Id.*

<sup>25</sup> *See supra* note 15. *See also D.J.*, Docket No. 19-0352 (issued July 24, 2020).

OWCP referred appellant for a second opinion evaluation with Dr. Brecher on April 24, 2018 who determined that appellant had reached MMI. Regarding permanent impairment of the right shoulder, Dr. Brecher determined that the DBI methodology could not be used due to abnormal motion findings. He referenced Table 15-34, Shoulder Range of Motion, noting that he previously found appellant had 13 percent permanent impairment of his right upper extremity, which was a grade modifier of 2 under Table 15-35, Range of Motion Grade Modifiers. Utilizing the ROM method, Dr. Brecher calculated 13 percent permanent impairment of the right upper extremity. In his June 18, 2018 addendum report, Dr. Brecher reported that while the May 22, 2018 EMG/NCV study was consistent with bilateral carpal tunnel syndrome and bilateral mid cervical root irritation, it was not possible to provide appellant a true permanent impairment rating pertaining to his cervical conditions until the carpal tunnel syndrome was addressed and further treatment was provided.

In accordance with its procedures,<sup>26</sup> OWCP properly referred the evidence of record to Dr. Katz, serving as the DMA, who reviewed the additional diagnostic study and clinical findings of Dr. Brecher. In his November 5, 2019 report, Dr. Katz concluded that appellant's right shoulder permanent impairment under the ROM rating method was greater than his right shoulder impairment using the DBI rating method. He concurred with Dr. Brecher, pursuant to the sixth edition of the A.M.A., *Guides*, finding that the ROM methodology established 13 percent permanent impairment of the right upper extremity. Dr. Katz further determined that Dr. Brecher correctly found that MMI had not been reached with respect to appellant's accepted cervical condition/spinal nerve impairment to warrant a schedule award, noting that the medical records lacked sufficient detail to permit an assignment of spinal nerve impairment at that given time.

The Board finds that Dr. Katz properly determined that appellant had 13 percent permanent impairment of the right upper extremity.<sup>27</sup> The DMA properly applied the standards of the A.M.A., *Guides* to the physical examination findings of Dr. Brecher.<sup>28</sup> He accurately summarized the relevant medical evidence and reached conclusions about appellant's conditions that comported with these findings.<sup>29</sup> The DMA properly referred to *The Guides Newsletter*, which explains that the diagnosed injury originating in the spine may be considered only to the extent that it results in permanent impairment of the extremities, generally reflected as spinal nerve impairment. He correctly noted that FECA does not allow a schedule award for the spine, though it does allow for schedule awards for spinal nerve injuries resulting in impairment of the extremities.<sup>30</sup> As the DMA report is detailed, well-rationalized, and based on a proper factual background, his opinion represents the weight of the medical evidence.<sup>31</sup>

The Board, thus, finds that OWCP properly determined that appellant was entitled to no more than 13 percent permanent impairment of the right shoulder based on the clinical findings

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<sup>26</sup> *Id.*

<sup>27</sup> *P.T.*, Docket No. 20-0040 (issued on May 17, 2021).

<sup>28</sup> *L.H.*, Docket No. 20-1550 (issued on April 13, 2021).

<sup>29</sup> *See C.W.*, Docket No. 19-1590 (issued September 24, 2020).

<sup>30</sup> *Supra* note 15.

<sup>31</sup> *Id.*



and reports of Dr. Brecher and Dr. Katz.<sup>32</sup> There is no probative medical evidence of record demonstrating greater impairment than that previously awarded.<sup>33</sup> Therefore, appellant has not met his burden of proof to establish an increased schedule award.<sup>34</sup>

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 13 percent permanent impairment of his right upper extremity for which he previously received schedule award compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 23, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2021  
Washington, DC

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

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

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

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<sup>32</sup> See *J.S.*, Docket No. 19-1567 (issued April 1, 2020); *J.M.*, Docket No. 18-1334 (issued March 7, 2019).

<sup>33</sup> See *D.F.*, Docket No. 17-1474 (issued January 26, 2018); *A.T.*, Docket No. 16-0738 (issued May 19, 2016).

<sup>34</sup> *R.C.*, Docket No. 20-0274 (issued on May 13, 2021).