United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 20-1547**
	)	**Issued: October 4, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Cheyenne, WY, Employer	)	

Appearances:
Appellant, *pro se*
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 21, 2020 appellant filed a timely appeal from a May 20, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 23 percent permanent impairment of the right upper extremity for which he previously received a schedule award.

FACTUAL HISTORY

On February 13, 2018 appellant, then a 64-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2018 he experienced right shoulder pain when

[1] 5 U.S.C. § 8101 *et seq.*

he lifted a tray of flat mail onto a cart while in the performance of duty. He stopped work on February 14, 2018. OWCP accepted his claim for right shoulder rotator cuff tear or rupture.[2]

The record reveals that appellant has a previously accepted the June 14, 2004 occupational disease claim (Form CA-2) for right shoulder rotator cuff tear and right shoulder osteoarthritis, which OWCP assigned OWCP File No. xxxxxx252. On January 12, 2005 appellant underwent authorized right shoulder surgery for repair of tendons and partial removal of the collar bone. On June 7, 2005 OWCP granted appellant a schedule award for 23 percent right upper extremity permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Appellant also has a previously accepted traumatic injury claim for a right shoulder rotator cuff tear causally related to a January 19, 2016 employment injury, which OWCP assigned OWCP File No. xxxxxx516. On August 16, 2018 OWCP administratively combined the present claim, under OWCP File No. xxxxxx127, with OWCP File Nos. xxxxxx252 and xxxxxx516, designating OWCP File No. xxxxxx252 as the master file.

Appellant retired from federal service, effective June 30, 2018.

On October 30, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

Appellant submitted an August 27, 2018 examination report by Dr. Bruce D. Smith, a Board-certified orthopedic surgeon, who recounted that appellant was seen for follow up of right shoulder pain. Upon examination of appellant's right shoulder, Dr. Smith observed tenderness in the deltoid, greater tubercle and supraspinatus area and positive cross arm and Hawkins tests. He assessed complete right shoulder rotator cuff tear and chronic right shoulder pain.

In a November 9, 2018 development letter, OWCP requested that appellant's treating physician submit an impairment evaluation report in accordance with the sixth edition of the A.M.A., *Guides*.[4] It afforded him 30 days to submit additional medical evidence in support of his schedule award claim.

In a March 4, 2019 report, Dr. Gregory Reichhardt, a Board-certified physiatrist, discussed that appellant had a history of two prior rotator cuff repairs and was doing well until the February 12, 2018 work injury. He recounted appellant's complaints of pain over the anterior and lateral aspect of the shoulder. Upon examination of appellant's shoulder, Dr. Reichhardt observed tenderness to palpation over the anterior and lateral aspect and mild weakness in the supraspinatus

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[2] A February 14, 2018 right shoulder x-ray scan showed two suture anchors in the humeral head from the two rotator cuff repairs and demonstrated that the overlying rotator cuff was re-torn.

[3] A.M.A., *Guides* (5th ed. 2001). The award was based on a June 3, 2005 report of an OWCP district medical adviser (DMA) who indicated that appellant had 12 percent right upper extremity permanent impairment due to loss of range of motion (ROM) of the right shoulder, 10 percent right upper extremity permanent impairment due to a diagnosis of status post distal clavicle-resection, and 2 percent right upper extremity permanent impairment due to loss of strength on abduction for a combined rating of 23 percent right upper extremity permanent impairment.

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

and infraspinatus. ROM testing, performed three times, was 80 degrees flexion, 50 degrees extension, 30 degrees adduction, 90 degrees abduction, and 40 degrees internal and external rotation. Dr. Reichhardt diagnosed right shoulder pain and irreplaceable rotator cuff tear. He noted that appellant had reached maximum medical improvement (MMI). Based on appellant's limitations in ROM, Dr. Reichhardt determined that appellant had 9 percent permanent impairment for limited flexion, 0 percent permanent impairment for extension, 3 percent permanent impairment for limited abduction, 1 percent permanent impairment for limited adduction, 4 percent permanent impairment for limited external rotation, and 4 percent permanent impairment for limited internal rotation for a total of 21 percent right upper extremity permanent impairment.

By decision dated March 19, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish that he sustained a permanent impairment due to his accepted employment-related right shoulder condition.

On October 25, 2019 Dr. Morley Slutsky, a Board-certified occupational and preventive medicine specialist serving as DMA, reviewed a statement of accepted facts, and the case file, and noted that appellant's claim was accepted for right shoulder rotator cuff tear. He indicated that, since he was not provided with any surgery or diagnostic reports, he could not provide an impairment rating utilizing the diagnosis-based impairment (DBI) rating method. Dr. Slutsky referred to Table 15-34, (Shoulder Range of Motion), page 475, of the A.M.A., *Guides* and applied the right shoulder ROM measurements provided by Dr. Reichhardt. He determined that appellant had 9 percent permanent impairment for 80 degrees flexion, 0 percent permanent impairment for 50 degrees extension, 3 percent permanent impairment for 90 degrees abduction, 1 percent permanent impairment for 30 degrees adduction, 4 percent permanent impairment for 40 degrees internal rotation, and 2 percent permanent impairment for 40 degrees external rotation for a total of 19 percent right upper extremity permanent impairment. Dr. Slutsky noted that he disagreed with Dr. Reichhardt's impairment of four percent permanent impairment for 40 degrees external rotation based on Table 15-34. He assigned a grade modifier for functional history (GMFH) of 1 because appellant's shoulder was still symptomatic. Applying the net adjustment formula, Dr. Slutsky determined that there was no net adjustment, which resulted in a total of 19 percent right upper extremity permanent impairment. He reported that appellant had reached MMI on March 4, 2019. Dr. Slutsky further indicated that, because appellant had a prior award for 23 percent right upper extremity permanent impairment, appellant was not entitled to an additional schedule award.

In a November 14, 2019 decision, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish that he sustained a permanent impairment due to his accepted employment-related right shoulder condition. It noted that, because he was previously awarded a schedule award for 23 percent right upper extremity permanent impairment, he was not entitled to an increased schedule award based on the October 25, 2019 DMA report of Dr. Slutsky.

On December 5, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated February 14, 2020, a hearing representative set aside the November 14, 2019 decision and remanded the case for further medical development. On remand OWCP was instructed to provide the DMA with the requested reports

of surgery and diagnostic studies so that he could provide an opinion on whether an impairment rating based on the DBI method was appropriate.

In an April 14, 2020 supplemental report, Dr. Slutsky, the DMA, indicated that he was provided with appellant's right shoulder surgery note, but not his right shoulder magnetic resonance imaging (MRI) scan. He utilized that the DBI rating method to find that, under Table 15-5, (Shoulder Regional Grid), page 403, the class of diagnosis (CDX) for appellant's right rotator cuff tear resulted in a class 1 impairment with a default value of five percent. Dr. Slutsky assigned a GMFH of 1 because appellant was still symptomatic and grade modifier for physical examination (GMPE) of 2 based on ROM measurements. He explained that a grade modifier for clinical studies (GMCS) was not applicable because diagnostic studies were used for class assignment. Applying the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (1 – 1) + (2 – 1), Dr. Slutsky calculated a net adjustment of +1 for grade D or six percent permanent impairment of the right upper extremity. He also reported that, under the ROM method, appellant had 19 percent right upper extremity permanent impairment and provided the calculations for the ROM method as noted in his previous October 25, 2019 report. Dr. Slutsky reiterated that, since appellant was previously granted a schedule award for 23 percent right upper extremity permanent impairment, appellant was not entitled to additional impairment.

On April 23, 2020 OWCP requested that Dr. Slutsky clarify his impairment rating and noted that it was providing the February 23, 2016 operative report and January 21 and March 28, 2016 MRI scan reports.

In a May 10, 2020 supplemental report, Dr. Slutsky discussed the additional diagnostic reports provided to him, reviewed the history of injury, and noted that appellant's claim was accepted for right shoulder rotator cuff tear. He referred to the A.M.A., *Guides* and determined that, under the ROM method for rating appellant's right shoulder, appellant had 19 percent right upper extremity permanent impairment. Dr. Slutsky provided the same calculations as his previous reports. Using the DBI method, he referred to Table 15-5, page 403, and determined that, for a CDX of right rotator cuff tear, appellant had a class 1 impairment for residual dysfunction with a default value of five percent. Dr. Slutsky assigned a GMFH of 1 and a GMPE of 2. He assigned a GMCS of 2 based on x-ray and MRI scan diagnostic testing. After applying the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (1 – 1) + (2 – 1) + (2 – 1), Dr. Slutsky calculated a net adjustment of +2 for grade E or seven percent permanent impairment of the right upper extremity. He noted that the ROM impairment rating of 19 percent exceeded the DBI impairment rating of 7 percent right upper extremity permanent impairment. Dr. Slutsky reiterated that, since appellant was previously granted a schedule award for 23 percent right upper extremity permanent impairment, he was not entitled to an additional impairment rating.

By decision dated May 20, 2020, OWCP denied appellant's claim for an increased schedule award. It found that the medical evidence of record was insufficient to establish greater permanent impairment than the 23 percent right upper extremity permanent impairment previously awarded.

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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[8]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish that 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 the default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS.[9] The net adjustment formula is (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX).[10] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

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 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.,]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[9] A.M.A., *Guides* 405-12; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[10] *Id.* at 411.

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

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.)[12]

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."[13]

It is well established that benefits payable under 5 U.S.C. §8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[14]

ANALYSIS

The Board finds that this case is not in posture for decision.

On June 7, 2005 OWCP previously granted appellant a schedule award for 23 percent right upper extremity permanent impairment under the fifth edition of the A.M.A., *Guides.* On October 30, 2018 appellant filed a claim for a schedule award under this present claim. OWCP initially received a March 4, 2019 report from Dr. Reichhardt, who provided ROM testing, performed three times, of 80 degrees flexion, 50 degrees extension, 30 degrees adduction, 90 degrees abduction, and 40 degrees internal and external rotation. Dr. Reichhardt applied his ROM measurements to the applicable table of the A.M.A., *Guides* and determined that, under the ROM method, appellant had a total of 21 percent right upper extremity permanent impairment.

In accordance with its procedures, OWCP properly routed Dr. Reichhardt's March 4, 2019 report to its DMA who provided permanent impairment ratings using both the DBI and ROM methodologies. Dr. Reichhardt determined that appellant had 7 percent right upper extremity permanent impairment under the DBI method for the CDX of rotator cuff tear and 19 percent right upper extremity permanent impairment under the ROM method. The DMA concluded that the ROM method yielded the greater impairment.

The Board has reviewed the DMA's ROM impairment rating under Table 15-34, page 475, of the A.M.A., *Guides,* based on the findings of Dr. Reichhardt and finds that appellant has 19 percent right upper extremity permanent impairment based upon the ROM method. Pursuant to Table 15-34, 80 degrees flexion equals 9 percent permanent impairment, 50 degrees extension

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

[13] *Id.*

[14] 20 C.F.R. § 10.404(d); *see S.M.*, Docket No. 17-1826 (issued February 26, 2018); *T.S.*, Docket No. 16-1406 (issued August 9, 2017); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

equals 0 percent permanent impairment, 90 degrees abduction equals 3 percent permanent impairment, 30 degrees adduction equals 1 percent permanent impairment, 40 degrees internal rotation equals 4 percent permanent impairment, and 40 degrees external rotation equals 2 percent permanent impairment for a total of 19 percent right upper extremity permanent impairment. The DMA properly found a GMFH of 1, which resulted in no adjustment. He concluded that appellant's current permanent impairment of the right upper extremity was based on the ROM method as it yielded a higher permanent impairment rating than the DBI method. Accordingly, the Board finds that the DMA properly calculated that appellant has 19 percent right upper extremity permanent impairment.[15] The DMA further explained that, since appellant was previously granted a schedule award for 23 percent right upper extremity permanent impairment, he was not entitled to an additional impairment rating. Accordingly, OWCP determined that appellant was not entitled to a schedule award greater than the 23 percent permanent impairment previously awarded based on the opinion of its DMA.

Although the DMA sought to apportion appellant's impairment between the current accepted condition and the previously accepted condition, the Board notes that a claimant is not precluded from an additional schedule award solely because he or she received a greater award to the same scheduled member from another claim.[16] The Board has previously held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim.[17] The issue is not whether the current permanent impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.[18]

The Board notes that, under OWCP File No. xxxxxx252, OWCP granted appellant a schedule award for a total of 23 percent right upper extremity permanent impairment, with 12 percent due to loss of ROM of the right shoulder, 10 percent for a diagnosis of status post distal clavicle resection, and 2 percent due to loss of abduction strength. In the present case, the DMA calculated 19 percent right upper extremity permanent impairment due to loss of ROM of the right shoulder; however, because appellant had previously received schedule award compensation for 23 right upper extremity percent permanent impairment, OWCP found that he was not entitled to an increased schedule award. The Board finds, however, that OWCP failed to take into account that the previous right upper extremity rating included ratings that were not based on the same accepted conditions.[19] Therefore, the Board finds that OWCP has not properly analyzed appellant's entitlement to schedule award benefits in the present claim for his accepted right shoulder rotator cuff tear condition.

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[15] *See I.L.*, Docket No. 20-0048 (issued July 7, 2020).

[16] *See S.M.*, *supra* note 14.

[17] *R.K.*, Docket No. 19-0247 (issued August 1, 2019); *M.K.*, Docket No. 18-1614 (issued March 25, 2019).

[18] *Id.; see also Richard Saldibar,* 51 ECAB 585 (2000).

[19] *See D.P.*, Docket No. 19-1514 (issued October 21, 2020); *see also P.M.*, Docket No. 18-1215 (issued June 18, 2020).

Furthermore, OWCP's procedures provide that claims for increased schedule awards may be based upon additional exposure.[20] An increased schedule award may be awarded if it is determined that, after payment of a schedule award, the claimant is entitled to a greater percentage of loss or if the claimant sustains increased impairment at a later date.[21] In this case, appellant submitted a February 14, 2018 right shoulder x-ray scan report, which showed that his rotator cuff was retorn. Accordingly, the Board will remand the case to OWCP to analyze appellant's entitlement to an additional schedule award for his accepted right upper extremity conditions. On remand, OWCP should request that the DMA explain how appellant's current right upper extremity impairment rating duplicated the prior right upper extremity impairment rating. Following this and other such further development, as deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2020 merit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 4, 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

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[20] *Supra* note 8, Chapter 2.808.9 (February 2013).

[21] *Id.*