United States Department of Labor
Employees' Compensation Appeals Board

G.L., Appellant	)	
and	)	**Docket No. 22-0166**
	)	**Issued: August 24, 2022**
U.S. POSTAL SERVICE, WEST SACRAMENTO PROCESSING & DISTRIBUTION CENTER, West Sacramento, CA, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 5, 2021 appellant filed a timely appeal from a May 19, 2021 merit decision and July 2, 2021 nonmerit 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.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the July 2, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.

ISSUES

The issues are: (1) whether appellant has established greater than 11 percent permanent impairment of the left upper extremity and 16 percent permanent impairment of the right upper extremity for which he previously received schedule award compensation; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 21, 2003 appellant, then a 44-year-old mailhandler, filed an occupational disease claim (Form CA-2) alleging that he developed numbness and pain in both hands and arms due to factors of his federal employment including squeezing a handle in order to operate a machine. He noted that he first became aware of his condition and realized its relation to his federal employment on December 3, 2003. Appellant did not immediately stop work. OWCP accepted appellant's claim for repetitive strain injury of both upper extremities.

On May 29, 2003 appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated November 17, 2003, OWCP granted him a schedule award for nine percent permanent impairment of the right upper extremity and nine percent permanent impairment of the left upper extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] The period of the award ran for 56.16 weeks from August 26, 2003 through September 22, 2004.

On February 28, 2008 appellant filed a traumatic injury claim (Form CA-1) alleging that on that date he severed his right finger while adjusting an oscillating fan while in the performance of duty. OWCP assigned OWCP File No. xxxxxx749. It accepted the claim for open wound of right hand without complications, open wound of the right finger without complications, and closed fracture of the right phalanx or phalanges. On February 28, 2008 appellant underwent a reapplication of the tip of his right finger with a full-thickness graft. On April 25, 2008 he underwent a revision amputation of the right index finger. On January 12, 2010 OWCP granted appellant a schedule award for 13 percent permanent impairment of the right upper extremity, which included the 9 percent permanent impairment award previously paid under OWCP File No. xxxxxx819 for bilateral repetitive strain injury and an additional 4 percent permanent impairment for open wound of the right finger. The period of the award ran for 12.48 weeks from August 21 through November 16, 2009.[4]

On July 5, 2013 appellant filed a Form CA-7 for a schedule award under OWCP File No. xxxxxx819. By decision dated September 23, 2013, OWCP denied appellant's claim for an additional schedule award.

[3] A.M.A., *Guides* (5th ed. 2001).

[4] OWCP administratively combined OWCP File Nos. xxxxxx819 and xxxxxx749 with OWCP File No. xxxxxx819 designated as the master file.

On September 13, 2019 appellant filed a Form CA-7 for a schedule award.

In an October 4, 2019 development letter, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing whether he had reached maximum medical improvement (MMI) and, if so, the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] It afforded him 30 days to submit the necessary evidence.

OWCP received additional evidence. On August 13, 2019 Dr. Ralph D'Auria, an orthopedic specialist, evaluated appellant for bilateral upper extremity pain. Appellant reported random sharp and stabbing pain in both shoulders with movement and pain in both elbows and hands when gripping or using a computer. Shoulder range of motion was normal except for right flexion, which was limited to 170 degrees and left flexion, which was limited to 170 degrees. Dr. D'Auria noted positive Tinel's sign over the ulnar nerve at the wrist and elbow and positive Phalen's sign bilaterally. Dr. D'Auria noted that the date of MMI was August 26, 2003. He referred to the sixth edition of the A.M.A, *Guides* and *calculated* impairment on the right pursuant to Table 15-34 (Shoulder Range of Motion), page 475, for 170 degrees of flexion for three percent permanent impairment and on the left for 170 degrees flexion for three percent permanent impairment. Dr. D'Auria determined the final upper extremity impairment of "3.45" percent permanent impairment for each shoulder or 7 percent permanent impairment for both combined.

On May 28, 2020 OWCP expanded acceptance of appellant's claim to include carpal tunnel syndrome of the left and right upper limb and lesion of the ulnar nerve of the right and left upper limb.

By decision dated July 10, 2020, OWCP denied appellant's claim for an additional schedule award.

OWCP received additional evidence. In a report dated November 17, 2020, Dr. D'Auria utilized the A.M.A., *Guides*, examined appellant on November 17, 2020, and provided an impairment rating. Regarding impairment to the upper limbs, he referred to Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449. Dr. D'Auria noted a diagnosis of right and left ulnar neuropathy at the elbow with motor conduction block and determined that each elbow had a grade modifier for functional history (GMFH) of 3 due to constant symptoms, a grade modifier for physical examination (GMPE) of 0 for a normal examination, and a grade modifier for clinical studies (GMCS) of 2 for motor conduction block. He indicated that appellant's *Quick*DASH score was 68 based on the functional scale. Averaging the three grade modifiers meant that appellant fell under grade modifier 2 on Table 15-23 with a default impairment value of five percent permanent impairment. Dr. D'Auria applied the findings of the *Quick*DASH score of 68 (severe) and opined that the final impairment would be six percent permanent impairment for right and left ulnar neuropathy at the elbows.

Regarding impairment to both wrists, Dr. D'Auria noted a diagnosis of right and left median neuropathy and determined that each wrist had a GMFH of 3 due to constant symptoms, a GMPE of 0 for a normal physical examination, and a GMCS of 1 for motor conduction delay. He

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

also again indicated that appellant's *Quick*DASH score was 68 based on the functional scale. Dr. D'Auria concluded that, according to page 449 of the A.M.A., *Guides*, appellant had three percent permanent impairment of the right wrist and three percent impairment the left wrist for bilateral carpal tunnel syndrome. He advised that, since there were two nerve entrapments, the larger impairment of 6 percent for the elbow was given the full impairment and the second impairment of 3 percent for the wrist was given 50 percent of that rating, or 1.5 percent. Dr. D'Auria calculated the total upper extremity impairment for nerve entrapments was 7.5 percent, which he rounded down to 7 percent permanent impairment for the right upper extremity and 7 percent permanent impairment for the left upper extremity.

On January 28, 2021 appellant filed a Form CA-7 for a schedule award. In a letter dated February 11, 2021, OWCP indicated that no additional action would be taken on his claim and instructed him to exercise his appeal rights associated with OWCP's July 10, 2020 decision.

OWCP received an electromyogram (EMG) and nerve conduction velocity (NCV) study dated November 17, 2020, which revealed bilateral ulnar neuropathy at the elbow (cubital tunnel syndrome) with complete conduction block at three centimeters below the medial epicondyle bilaterally.

Appellant submitted a February 17, 2021 report from Dr. D'Auria who treated him for bilateral shoulder pain related to the December 3, 2002 employment injury. Dr. D'Auria noted range of motion findings for both shoulders and provided three successive trials for each measurement. He noted limited range of motion for right and left abduction, right and left flexion, right and left internal rotation, and right and left external rotation. Dr. D'Auria related that he examined appellant for the purposes of determining impairment rating for the bilateral shoulder conditions and recommended additional diagnostic studies prior to determining impairment.

A magnetic resonance imaging (MRI) scan of the right shoulder dated February 26, 2021 demonstrated degenerative changes in the acromioclavicular (AC) joint, short segment articular surface partial tear at the insertion, non-specific tendinopathy, and subtle longitudinal interstitial tear of the supraspinatus tendon. An MRI scan of the left shoulder demonstrated nonspecific tendinopathy of the lateral aspect of the infraspinatus and supraspinatus tendons, shallow articular surface partial tear at the anterior aspect of the infraspinatus and posterior aspect of the supraspinatus insertion, and degenerative changes in the AC joint.

In a March 4, 2021 report, Dr. D'Auria reviewed the MRI scans of both shoulders performed on February 26, 2021 and reported their findings. He calculated impairment of the bilateral shoulders by using the range of motion method and diagnosis-based impairment (DBI) method and noted the range of motion method provided a greater impairment. Dr. D'Auria noted 8 percent permanent impairment of the right upper extremity and 11 percent permanent impairment of the left upper extremity.

On April 6, 2021 appellant requested reconsideration of the decision dated July 10, 2020 and resubmitted a November 17, 2020 report and submitted a March 18, 2021 report from Dr. D'Auria.

On April 19, 2021 OWCP referred appellant's medical record, including Dr. D'Auria's November 17, 2020 impairment rating, a series of questions, and a statement of accepted facts (SOAF) to the district medical adviser (DMA) for a schedule award determination. It also asked him to assess appellant's impairment and review and address any areas of disagreement with Dr. D'Auria.

On April 21, 2021 Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as a DMA, reviewed the SOAF and the medical record. Utilizing the sixth edition of the A.M.A., *Guides*, Table 15-23 (Entrapment/ Compression Neuropathy Impairment), page 449, he noted a diagnosis of ulnar nerve entrapment and determined that each elbow had a GMFH of 3 due to constant symptoms, a GMPE of 0 for a normal physical examination, and a GMCS of 2 for electrodiagnostic evidence of motor conduction block. The DMA noted a *Quick*DASH score of 68. Averaging the three grade modifiers appellant fell under grade modifier 2 on Table 15-23. The DMA applied the findings of the *Quick*DASH score of 68 and opined that the final impairment would be six percent permanent impairment for both right and left ulnar nerve entrapment. With regard to the median nerve entrapment for both wrists, he noted a GMFH of 3 due to constant symptoms, a GMPE of 0 for a normal physical examination, and a GMCS of 1 for electrodiagnostic evidence of delay. The DMA noted a *Quick*DASH score of 68. Averaging the three grade modifiers and applying the findings of the *Quick*DASH score of 68 he opined that the final impairment would be three percent permanent impairment for both right and left median nerve entrapment. He noted that as the second entrapped nerve in the extremity, per the A.M.A., *Guides*, the impairment was reduced by 50 percent to 2 percent impairment (rounded up). The DMA noted total combined impairment was eight percent permanent impairment of the right and left upper extremities. He advised that his impairment determination was higher than Dr. D'Auria's rating because Dr. D'Auria incorrectly rounded 7.5 percent down to 7 percent permanent impairment, which was inconsistent with the A.M.A., *Guides*.

By decision dated April 26, 2021, OWCP vacated the decision dated July 10, 2020. It found that the medical evidence of record supported an increase in permanent impairment of the bilateral upper extremities. OWCP advised that an increased schedule award would be issued under a separate decision.

By decision dated May 19, 2021, OWCP granted appellant a schedule award for 11 percent permanent impairment of the left upper extremity and 16 percent permanent impairment of the right upper extremity. It noted that appellant was previously granted a schedule award for 9 percent permanent impairment of the left upper extremity and was entitled to an additional award of two percent permanent impairment of the left upper extremity. OWCP further noted that appellant was previously granted a schedule award for 13 percent permanent impairment of the right upper extremity and was entitled to an additional award of three percent permanent impairment of the right upper extremity. The period of the award ran for 15.6 weeks from November 17, 2020 through March 6, 2021.

On June 1, 2021 appellant requested reconsideration. He asserted that the May 19, 2021 schedule award decision did not consider the most recent medical documentation from his treating physician Dr. D'Auria dated March 18, 2021, which provided medical findings supporting an increased schedule award. He requested that OWCP consider all the medical documentation prior to issuing an impairment rating.

By decision dated July 2, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 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.[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] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.[10]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[11] In Table 15-23, grade modifier levels (ranging from 0 to 4) are described for the categories Test Findings, History, and Physical Findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[13]

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[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

[8] 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 id*. at Chapter 3.700, Exhibit 1 (January 2010).

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

[10] *P.R.*, *id*.; *Carol A. Smart*, 57 ECAB 340 (2006).

[11] A.M.A., *Guides* 449, Table 15-23; 449. *See also L.G.*, Docket No. 18-0065 (issued June 11, 2018).

[12] *Id*. at 448-49.

[13] *See supra* note 8 at Chapter 2.808.6(d) (March 2017).

ANALYSIS

The Board finds this case not in posture for decision.

OWCP accepted appellant's claim for repetitive strain injury of both upper extremities, open wound of right hand without complications, open wound of the right finger without complications, closed fracture of the right phalanx or phalanges, carpal tunnel syndrome left and right upper limb, and lesion of the ulnar nerve of the right and left upper limb. In support of his schedule award claim, he initially submitted a November 17, 2020 report from Dr. D'Auria finding that appellant's total upper extremity impairment for nerve entrapments was 7 percent permanent impairment for the right upper extremity and 7 percent permanent impairment for the left upper extremity.

Appellant submitted a February 17, 2021 report from Dr. D'Auria who examined appellant for the purposes of determining an impairment rating and recommended additional diagnostic studies. In a March 4, 2021 report, Dr. D'Auria reviewed the MRI scans of both shoulders performed on February 26, 2021. He provided an additional impairment rating based on these new diagnostic studies and an application of the sixth edition of the A.M.A., *Guides*, finding that appellant had 8 percent permanent impairment of the right upper extremity and 11 percent permanent impairment of the left upper extremity.

As Dr. D'Auria provided an impairment rating based on his February 17 and March 4, 2021 examination using the sixth edition of the A.M.A., *Guides*, pursuant to its procedures, OWCP should have routed the case record, including the additional electrodiagnostic studies and the additional reports of Dr. D'Auria, 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, if any.[14] As this was not done, the case must be remanded for referral to a DMA.[15]

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[16] Once OWCP undertook development of the evidence by referring appellant's case file to an OWCP medical adviser, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[17] The Board will therefore set aside OWCP's May 19, 2021 decision and remand the case to its DMA to conduct a proper analysis under the A.M.A., *Guides* in order to determine permanent impairment of the bilateral upper extremities. After this and other such further development as

[14] *L.S.*, Docket No. 19-0092 (issued June 12, 2019); *N.I.*, Docket No. 16-1027 (issued January 11, 2017); *Tommy R. Martin*, 56 ECAB 273 (2005); *supra* note 6 at Chapter 2.808.6(f) (March 2017). (If the claimant's physician provides an impairment report the case should be referred to the DMA for review).

[15] *L.S., id.*; *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

[16] *See W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[17] *See W.W., id.*; *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an increased schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision.[18]

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2021 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: August 24, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[18] The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.