United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 22-0584**
	)	**Issued: August 15, 2022**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, U.S. BORDER PATROL, Yuma, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 1, 2022 appellant filed a timely appeal from a February 2, 2022 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.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the February 2, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 13 percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On September 9, 2020 appellant, then a 46-year-old mission support specialist, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her left shoulder when she slipped and fell and caught herself with her left arm while in the performance of duty. She did not stop work. On November 30, 2020 OWCP accepted the claim for sprain, impingement syndrome, and adhesive capsulitis of the left shoulder.

In a January 25, 2021 medical report, Dr. Tal David, a Board-certified orthopedic surgeon, evaluated appellant's impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Utilizing Table 15-5 (Shoulder Regional Grid), page 404, he determined that she had 11 percent permanent impairment of her left upper extremity due to shoulder instability.

On January 29, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On February 3, 2021 OWCP routed the medical record, a statement of accepted facts (SOAF), and a list of questions to Dr. Herbert White, Jr., a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), for review and evaluation of appellant's permanent impairment pursuant to the A.M.A., *Guides*.[4]

In a February 14, 2021 report, Dr. White indicated that he had reviewed the SOAF and the medical record, but was unable to provide an impairment rating because the medical record contained inconsistent physical examination findings pertaining to instability in appellant's left shoulder. He further noted that the medical record did not contain measurements of adduction or external rotation in the right and left shoulders. Dr. White recommended referring appellant for a second opinion examination to determine the reproducibility of instability on examination and for evaluation of all motions of the right and left shoulders in accordance with the A.M.A., *Guides.*

On April 13, 2021 OWCP referred appellant for a second opinion evaluation with Dr. William P. Curran, a Board-certified orthopedic surgeon. In a June 28, 2021 report, Dr. Curran determined that she had 14 percent permanent impairment of her left upper extremity based on the range of motion (ROM) method found on Table 15-34, page 475, of the sixth edition of the A.M.A., *Guides*. He advised that he utilized the ROM method to assess appellant's permanent impairment because it resulted in a higher rating for the left upper extremity than the two percent rating obtained under the diagnosis-based impairment (DBI) rating method. For the left shoulder,

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

[4] *Id*.

Dr. Curran found that she had three percent permanent impairment due to 110 degrees of flexion, one percent permanent impairment due to 20 degrees of extension, three percent permanent impairment due to 100 degrees of abduction, one percent permanent impairment due to 30 degrees of adduction, four percent permanent impairment due to 30 degrees of internal rotation, and two percent permanent impairment due to 40 degrees of external rotation.[5] He concluded that these separate ratings totaled 14 percent permanent impairment of the left upper extremity.

On July 13, 2021 OWCP again referred the SOAF and medical evidence, including Dr. Curran's June 28, 2021 report, to Dr. White, serving as DMA, to provide a permanent impairment rating. In a report of even date, Dr. White determined that appellant had 13 percent permanent impairment of her left upper extremity under the ROM rating method. He noted that he utilized the findings of the ROM rating method for her permanent impairment because it resulted in a higher rating for the left upper extremity than the two percent rating obtained under the DBI rating method. Dr. White asserted that Dr. Curran improperly rated left shoulder extension of 20 degrees as a one percent impairment. He noted that appellant's extension on the right side (*i.e.*, the unaffected side) was 40 degrees, which also was a one percent impairment. Dr. White opined that, given the same degree of impairment on both sides, the A.M.A., *Guides* provided on page 461 that there was no impairment of the left shoulder due to extension of 20 degrees. Therefore, he concluded that Dr. Curran's assessment of left upper extremity impairment should be reduced from 14 percent to 13 percent permanent impairment. Dr. White also concluded that appellant's left shoulder injury had reached maximum medical improvement (MMI) as of June 21, 2021.

On July 15, 2021 OWCP requested clarification from Dr. White regarding the date appellant reached MMI.

In an amendment to the July 15, 2021 report, Dr. White opined that appellant reached MMI on June 28, 2021 the date of Dr. Curran's physical examination.

By decision dated July 19, 2021, OWCP granted appellant a schedule award for 13 percent permanent impairment of the left upper extremity (left arm). The date of MMI was found to be June 28, 2021. The award covered a period of 40.56 weeks and ran from June 28, 2021 to April 7, 2022. OWCP noted that the weight of the medical evidence rested with Dr. White as the DMA, who applied the A.M.A., *Guides* to Dr. Curran's findings.

On July 20, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 18, 2021.

[5] In his June 28, 2021 impairment rating report, Dr. Curran utilized the examination findings that he obtained on that date. The sixth edition of the A.M.A., *Guides* provides that the maximum measurement (out of the required three) is chosen for assessing impairment and that rounding procedures are applied to each measurement. *See* A.M.A., *Guides* 464. The maximum measurement obtained by Dr. Curran for each type of left shoulder motion was as follows: 110 degrees of flexion; 20 degrees of extension; 100 degrees of abduction; 30 degrees of adduction; 30 degrees of internal rotation; and 40 degrees of external rotation. The maximum measurement obtained for each type of shoulder motion for the unaffected right side was as follows: 180 degrees of flexion; 40 degrees of extension; 180 degrees of abduction; 40 degrees of adduction; 80 degrees of internal rotation; and 80 degrees of external rotation.

OWCP thereafter received an August 31, 2021 report by Dr. David, who noted that he reviewed Dr. Curran's June 28, 2021 report. Dr. David indicated that he concurred with Dr. Curran's permanent impairment rating of 14 percent of the left upper extremity based upon the ROM method.

By decision dated February 2, 2022, the hearing representative affirmed OWCP's July 19, 2021 decision.

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 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. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.[10] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[11]

With respect to calculating impairment under the DBI method for the right shoulder, reference is made to Table 15-5 (Shoulder Regional Grid).[12] Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

[8] *Id.*; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[10] *E.D.*, Docket No. 19-1562 (issued March 3, 2020); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[11] *Supra* note 9 at Chapter 2.808.5 (February 2022).

[12] *See* A.M.A., *Guides* 401-05, Table 15-5.

may alternatively be assessed using section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating.[13]

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology *versus* the ROM methodology for rating of upper extremity impairments.[14] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No 17-06 provides:

> "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*."[15] (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*] 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 [claims examiner]."[16]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's 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.[17]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 13 percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

In his June 28, 2021 report, Dr. Curran determined that appellant had 14 percent permanent impairment of her left upper extremity based on the ROM rating method found on Table 15-34 of the sixth edition of the A.M.A., *Guides*.[18] For the left shoulder, he found that she had three percent

[13] *Id*. at 401-05, 475-78.

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

[15] *Id*.

[16] *Id*.; *see also H.H.*, Docket No. 19-1530 (issued June 26, 2020); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[17] *See supra* note 9 at Chapter 2.808.6f (March 2017); *P.W.*, Docket No. 19-1493 (issued August 12, 2020).

[18] *See* A.M.A., *Guides* 475, Table 15-34.

permanent impairment due to 110 degrees of flexion, one percent permanent impairment due to 20 degrees of extension, three percent permanent impairment due to 100 degrees of abduction, one percent permanent impairment due to 30 degrees of adduction, four percent permanent impairment due to 30 degrees of internal rotation, and two percent permanent impairment due to 40 degrees of external rotation.

The Board finds, however, that in his July 13, 2021 report, Dr. White, the DMA, properly determined that appellant had 13 percent permanent impairment of her left upper extremity.[19] He found that Dr. Curran incorrectly rated left shoulder extension of 20 degrees as a one percent impairment. Appellant's shoulder extension on the unaffected right side was 40 degrees, which also was a one percent impairment. Given the same degree of impairment on both sides, the A.M.A., *Guides* provided on page 461 that there was no impairment due to left shoulder extension of 20 degrees. The Board notes that Dr. White concurred with the other individual ROM ratings calculated by Dr. Curran and that these ratings totaled 13 percent. Therefore, the Board finds that Dr. White properly concluded that appellant had 13 percent permanent impairment of her left upper extremity.[20]

Appellant also submitted a January 25, 2021 report by Dr. David in support of her claim for schedule award compensation, who found 11 percent permanent impairment of the left upper extremity under the A.M.A., *Guides* Table 15-5 (Shoulder Reginal Grid), page 404. As noted above, it is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.[21] Dr. David's January 25, 2021 report does not support greater than 13 percent impairment of the left upper extremity based upon the A.M.A., *Guides* and, therefore, is insufficient to establish appellant's burden of proof.

Appellant also submitted an August 31, 2021 report by Dr. David, who indicated that he had reviewed Dr. Curran's June 28, 2021 report and concurred with an impairment rating of 14 percent permanent impairment of the left upper extremity based upon the ROM method. However, he did not provide medical rationale in support of this opinion. The Board has held that a medical report is of limited probative value on a given medical matter if it contains a conclusion regarding that matter which is unsupported by medical rationale.[22] Therefore, Dr. David's August 31, 2021 report is also insufficient to meet appellant's burden of proof.

As the record contains no other probative, rationalized medical opinion that, supports greater impairment of the left upper extremity based upon the A.M.A., *Guides*, the Board finds that appellant has not met her burden of proof.

[19] The Board notes that Dr. White properly used the findings of the ROM rating method for appellant's permanent impairment because it resulted in a higher rating for left upper extremity than the two percent rating obtained under the DBI rating method. *See supra* note 5. Table 15-5 provides for use of the ROM rating method in appellant's case given her left shoulder impingement diagnosis. *See* A.M.A., *Guides* 402, Table 15-5.

[20] *See B.J.*, Docket No. 20-0930 (issued July 2, 2021).

[21] *See supra* note 11.

[22] *D.H.*, Docket No. 17-0530 (issued July 2, 2018).

Accordingly, the Board finds that the evidence of record is insufficient to establish greater than the 13 percent permanent impairment of her left upper extremity previously awarded.

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than 13 percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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