

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

D.O., Appellant	)	
	)	
and	)	Docket No. 21-0525
	)	Issued: July 8, 2022
U.S. POSTAL SERVICE, POST OFFICE,	)	
Stillwater, NY, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 19, 2021 appellant, through counsel, filed a timely appeal from a January 22, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

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

## FACTUAL HISTORY

On February 21, 2018 appellant, then a 63-year-old rural mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 20, 2018 he injured his right hand and wrist when he was bitten by a dog during a parcel delivery while in the performance of duty. He stopped work on the filing date of his claim and returned to full-time, modified-duty work on August 16, 2018. OWCP assigned that claim OWCP File No. xxxxxx007 and accepted it for puncture wound without foreign body of the right wrist and right hand, initial encounter, and cellulitis of the right and left upper limbs. It subsequently expanded the acceptance of appellant's claim to include post-traumatic stress disorder (PTSD).<sup>3</sup> OWCP paid him compensation on the supplemental rolls beginning April 14, 2018.

In a September 4, 2018 letter, Dr. Elizabeth Sandel, a family practitioner, noted that appellant had reached maximum medical improvement (MMI) as of May 19, 2017 in his claim under OWCP File No. xxxxxx391.

On September 12, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award under OWCP File No. xxxxxx391.

In a development letter dated September 21, 2018, OWCP requested that appellant submit an impairment evaluation from appellant's attending physician that addressed whether he had obtained MMI and to provide a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup>

In response, appellant submitted a January 28, 2019 medical report from Dr. Stewart A. Kaufman, a Board-certified orthopedic surgeon. Dr. Kaufman described appellant's history of injury on March 2, 2014 and February 20, 2018 in OWCP File Nos. xxxxxx391 and xxxxxx007 and noted the accepted conditions in these case files. He also reviewed medical records. Dr. Kaufman reported findings on physical examination and reviewed diagnostic test results. He diagnosed status post dog bites with multiple surgeries on the right forearm and wrist, and Type 1 right arm complex regional pain syndrome (CRPS). Dr. Kaufman advised that appellant had reached MMI. Using Table 15-25, page 453 of the sixth edition of the A.M.A., *Guides*, he

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<sup>3</sup> Appellant has a prior claim for a March 2, 2014 traumatic injury for a dog bite, which OWCP accepted for open wound of the right forearm without complications and injury to the right median nerve, under OWCP File No. xxxxxx391. He underwent authorized neurolysis of major peripheral nerves in the right wrist and forearm on August 17, 2015 and right carpal tunnel release, release of the right ulnar nerve of the wrist (Guyon's canal), neuroplasty of the median and ulnar nerves at the wrist, and application of a short arm splint on June 28, 2016. OWCP administratively combined the present claim, with OWCP File No. xxxxxx391 serving as the master file.

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

identified a class of diagnosis (CDX) of CRPS. Dr. Kaufman found that, under Table 15-26, page 454, appellant had a Class 2 impairment, thereby warranting a default value of 20 percent permanent impairment. He assigned a grade modifier for functional history (GMFH) of 2 under Table 15-7, page 406; a grade modifier for physical examination (GMPE) of 2 under Table 15-26, page 454; and a grade modifier for clinical studies (GMCS) of 0. Dr. Kaufman applied the net adjustment formula and concluded that appellant had 21 percent permanent impairment of the right upper extremity.

On March 22, 2019 OWCP routed Dr. Kaufman's January 28, 2019 report, a statement of accepted facts (SOAF),<sup>5</sup> 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 a determination of permanent impairment of appellant's right upper extremity under the sixth edition of the A.M.A., *Guides*, and his date of MMI.

On March 26, 2019 Dr. Katz reviewed the findings in Dr. Kaufman's January 28, 2019 report. He noted that appellant's claim had not been accepted for CRPS by OWCP and that he was unable to locate any other physician evaluation in the record that documented CRPS as a medical condition. As such, the DMA recommended that OWCP obtain a second opinion impairment evaluation for the determination of impairment due to CRPS.

By letter dated April 4, 2019, OWCP requested that appellant submit a supplemental report from Dr. Kaufman which addressed the concerns expressed by the DMA, Dr. Katz, in his March 26, 2019 report.

In an April 24, 2019 addendum report, Dr. Kaufman noted that he stood by his diagnosis of CRPS. He indicated, however, that, since one of the criteria for diagnosing CRPS required corroboration by at least two physicians, there was a need for another physician, apart from himself, to make the diagnosis for that condition. Dr. Kaufman advised that a three-phase bone scan would also be helpful for corroboration of the diagnosis.

On December 5, 2019 the DMA, Dr. Katz, reviewed the findings in Dr. Kaufman's April 24, 2019 addendum report. He again recommended a second opinion examination to determine the extent of appellant's permanent impairment.

On January 3, 2020 OWCP referred appellant, together with a SOAF and the case file to, Dr. Kevin Scott, a Board-certified orthopedic surgeon, for a second opinion evaluation of his permanent impairment for schedule award purposes.

In a February 10, 2020 report, Dr. Scott noted appellant's history of injury on March 2, 2014 and February 20, 2018 and medical treatment. He reviewed the SOAF and medical record in OWCP File No. xxxxxx391. On physical examination of the right wrist, Dr. Scott reported full range of motion (ROM), noting 40 degrees of dorsiflexion and palmar flexion, 25 degrees of radial deviation, and 20 degrees of ulnar deviation. He also found well-healed scars in the palm of the right hand, some hypothenar and thenar muscle wasting compared to the left side, and a positive

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<sup>5</sup> The Board notes that the March 22, 2019 SOAF described appellant's March 2, 2014 and February 20, 2018 employment injuries under both claim files.

compression test at less than five seconds. Full ROM of the right elbow was found to be normal, as there was 140 degrees of flexion, 0 degrees of extension, 80 degrees of pronation, and 70 degrees of supination. Dr. Scott diagnosed status post right-hand carpal tunnel release secondary to a dog bite. He related that he did not appreciate any signs of CRPS. Dr. Scott advised that appellant reached MMI on January 28, 2019 the date of Dr. Kaufman's impairment evaluation. He used the ROM rating method on page 473 of the sixth edition of the A.M.A., *Guides* to rate impairment to the right wrist. Dr. Scott determined that 40 degrees of dorsiflexion and palmar flexion represented three percent impairment, 25 degrees of radial deviation represented zero percent impairment, and 20 degrees of ulnar deviation represented two percent impairment, totaling eight percent permanent impairment of the right upper extremity. He also used the diagnosis-based impairment (DBI) rating method found at Table 15-23, page 449 and assigned a grade modifier of 1 for GMCS based on an electromyogram (EMG) that showed a conduction delay, a grade modifier of 3 for GMFH due to constant symptoms, and a grade modifier of 3 for GMPE due to atrophy of the hypothenar and thenar muscles and weakness with a dynamometer. Dr. Scott added these grade modifiers which totaled 7 and then divided this figure by 3 which resulted in 2.3 or a grade modifier of 2. He noted that appellant had a *QuickDASH* score of 72.7 or 72, which was severe and yielded six percent permanent impairment of the right upper extremity. Dr. Scott concluded that appellant had eight percent permanent impairment of the right upper extremity as the ROM permanent impairment rating was greater than the DBI permanent impairment rating.

On March 10, 2020 OWCP requested that the DMA, Dr. Katz, review Dr. Scott's February 10, 2020 report and provide whether he agreed with his findings.

In an April 25, 2020 report, the DMA, Dr. Katz, utilized the findings in Dr. Scott's February 10, 2020 report. Using the DBI rating method found at Table 15-23, page 449, Entrapment/Compression Neuropathy Impairment, of the sixth edition of the A.M.A., *Guides*, the DMA found that appellant's condition fell under a grade modifier of 2 for GMCS due to an electromyogram with motor delay. He applied a grade modifier of 2 for GMPE due to decreased sensation, a grade modifier of 2 for GMFH due to significant intermittent symptoms, and a grade modifier of 3 based on a *QuickDASH* score of 72.3. The DMA reached six percent permanent impairment of appellant's right upper extremity. He also used the ROM method to rate impairment to the right upper extremity. The DMA determined that under Table 15-32, page 473, 40 degrees of flexion and extension represented three percent impairment, respectively, 30 degrees of radial deviation represented zero percent impairment, and 20 degrees of ulnar deviation represented two percent impairment, for a total right wrist permanent impairment of eight percent.<sup>6</sup> He assigned a GMFH of 1 under Table 15-7, page 406, and a grade modifier of 3 for a *QuickDASH* score of 72 under Table 15-7, page 406, resulting from ROM. The DMA determined that the total difference was +2, which represented a grade adjustment of 10 percent impairment under Table 15-36, page 477. He multiplied the 10 percent impairment rating by the 8 percent impairment rating to calculate 8 percent or 9 percent permanent impairment of the right upper extremity. The DMA concluded that appellant had nine percent permanent impairment of the right upper extremity as the ROM permanent impairment rating was greater than the DBI permanent impairment rating.

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<sup>6</sup> The Board notes that Dr. Scott recorded 20 degrees of radial deviation. The DMA's notation of 30 degrees of radial deviation is harmless error as radial deviation greater than 20 degrees equals zero percent impairment under Table 15-32.

He determined that appellant reached MMI on February 10, 2020, the date of Dr. Scott's impairment evaluation.

On July 10, 2020 OWCP requested that the DMA, Dr. Katz, clarify his report as he did not address permanent impairment due to the accepted right and left upper extremity conditions in OWCP File No. xxxxxx007.

On July 22, 2020 the DMA responded that there was no change in his nine percent right upper extremity ROM impairment rating. He explained that he had only reviewed the medical record in OWCP File No. xxxxxx391, including the findings of Dr. Scott and Dr. Kaufman, and that, based on his review, the accepted conditions of puncture wounds of the right wrist and hand, and cellulitis of the right and left upper limbs in OWCP File No. xxxxxx007 had resolved as there was no documented physical findings of these conditions. The DMA also noted that while Dr. Kaufman noted both case files in OWCP File Nos. xxxxxx391 and xxxxxx007, he only rated impairment of the right upper extremity. Additionally, he indicated that Dr. Scott only addressed the case file in OWCP File No. xxxxxx391.

On July 27, 2020, in OWCP File No. xxxxxx007, appellant filed a copy of the September 12, 2018 Form CA-7 schedule award claim he filed under OWCP File No. xxxxxx391. In support of his claim, he submitted the January 28 and April 24, 2019 reports of Dr. Kaufman, February 10, 2020 report of Dr. Scott, and March 26 and December 5, 2019 and April 25 and July 22, 2020 reports of the DMA, Dr. Katz.

OWCP, by decision dated July 29, 2020, under the combined files, granted appellant a schedule award for nine percent permanent impairment of the right upper extremity. The award ran for 28.08 weeks from February 10 through August 24, 2020 and was based on the impairment ratings of Dr. Kaufman, the DMA, Dr. Katz, and Dr. Scott.

On August 4, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 6, 2020.

In a January 22, 2021 decision, an OWCP hearing representative affirmed the July 29, 2020 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>7</sup> and its implementing regulations<sup>8</sup> 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

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

standard for evaluating schedule losses.<sup>9</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>10</sup> 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.<sup>11</sup>

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by grade modifiers or GMFH, GMPE, and GMCS.<sup>12</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>13</sup> Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>14</sup>

The A.M.A., *Guides* also provide that the ROM impairment method 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>15</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 added.<sup>16</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>17</sup>

Regarding the application of ROM or DBI 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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<sup>9</sup> *Id.* See also Ronald R. Kraynak, 53 ECAB 130 (2001).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Chapter 2.808.5a (March 2017).

<sup>11</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> A.M.A., *Guides* 383-492.

<sup>13</sup> *Id.* at 411.

<sup>14</sup> *Id.* at 23-28.

<sup>15</sup> *Id.* at 461.

<sup>16</sup> *Id.* at 473.

<sup>17</sup> *Id.* at 474.

*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>18</sup> (Emphasis in the original.)

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 impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>19</sup>

### ANALYSIS

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

In accordance with its procedures, OWCP properly referred the medical record to Dr. Katz, a DMA,<sup>20</sup> for review and a determination on whether appellant sustained permanent impairment of his right upper extremity and the date of MMI. In a March 26, 2019 report, the DMA disagreed with Dr. Kaufman's 21 percent right upper extremity impairment rating, explaining that OWCP had not accepted appellant's claim for CRPS and this condition was not documented by any physician in the medical record. He recommended a second opinion impairment evaluation to determine appellant's permanent impairment.

Following review by the DMA, Dr. Katz, OWCP, in an April 4, 2019 letter, requested that appellant submit a supplemental report from Dr. Kaufman which addressed the concerns raised by its DMA. In an April 24, 2019 addendum report, Dr. Kaufman indicated that his diagnosis of CRPS remained unchanged. He noted, however, that another physician was needed to make the diagnosis of CRPS as corroboration of the diagnosis was required by at least two physicians. Dr. Kaufman noted that a three-phase bone scan would be helpful for corroboration of the diagnosis.

On December 5, 2019 the DMA, Dr. Katz, reviewed the findings in Dr. Kaufman's April 24, 2019 addendum report and restated his recommendation for a second opinion examination to determine the extent of appellant's permanent impairment.

OWCP properly referred appellant to Dr. Scott for a second opinion evaluation to determine the nature and extent of his employment-related permanent impairment. In his February 10, 2020 report, Dr. Scott determined that appellant had eight percent permanent impairment of the right upper extremity under the ROM rating method and six percent permanent impairment of the right upper extremity under the DBI rating method. He concluded that appellant

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<sup>18</sup> FECA Bulletin No. 17-06 (issued May 8, 2017); *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

<sup>19</sup> See *supra* note 10 at Chapter 2.808.6(f) (March 2017). See also *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>20</sup> *Supra* note 18.

had eight percent permanent impairment of the right upper extremity as the ROM permanent impairment rating was greater than the DBI permanent impairment rating.

In accordance with its procedures, following the second opinion evaluation, OWCP properly referred the evidence of record to the DMA, Dr. Katz, for review.<sup>21</sup> On April 25, 2020 the DMA reviewed the February 10, 2020 report of Dr. Scott, and determined that appellant had six percent permanent impairment of the right upper extremity under the DBI rating method and nine percent permanent impairment of the right upper extremity under the ROM rating method. He concluded that appellant had nine percent permanent impairment of the right upper extremity as the ROM permanent impairment rating was greater than the DBI permanent impairment rating. The DMA also concluded that he had reached MMI on February 10, 2020.

OWCP subsequently requested that the DMA clarify his report because he did not address permanent impairment due to the right and left upper extremity conditions accepted under OWCP File No. xxxxxx007. On July 22, 2020 the DMA responded that his nine percent right upper extremity ROM impairment rating remained unchanged. He noted that he had only reviewed the medical record in OWCP File No. xxxxxx391 and based on his review, the accepted conditions of puncture wounds of the right wrist and hand, and cellulitis of the right and left upper limbs in OWCP File No. xxxxxx007 had resolved as there was no documented physical findings of these conditions. The DMA also noted that Dr. Kaufman referred to OWCP File Nos. xxxxxx391 and xxxxxx007, but only rated impairment of the right upper extremity. He further noted that Dr. Scott only addressed the case file in OWCP File No. xxxxxx391.

By decision dated July 29, 2020, OWCP granted appellant a schedule award for nine percent permanent impairment of the right upper extremity. It found that the weight of the medical evidence rested with Dr. Katz serving as OWCP's DMA and the date of MMI was February 10, 2020.

The Board finds that OWCP failed to properly develop the evidence following the DMA's July 22, 2020 report. It should have routed the DMA's July 22, 2020 report to Dr. Scott for comment and review pertaining to the extent of appellant's right and left upper extremity permanent impairment, particularly since Dr. Scott only reviewed the case file in File No. xxxxxx391 in rating appellant's right upper extremity permanent impairment.<sup>22</sup>

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.<sup>23</sup> Once it undertakes development of the record, it must do a complete job in

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

<sup>22</sup> *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *D.S.*, Docket No. 19-0025 (issued September 3, 2019).

<sup>23</sup> *See L.F.*, Docket No. 20-0549 (issued January 27, 2021).



procuring medical evidence that will resolve the relevant issues in the case.<sup>24</sup> Accordingly, the Board finds that the case must be remanded to OWCP.<sup>25</sup>

On remand OWCP shall refer the July 22, 2020 report of the DMA, Dr. Katz, and the records contained in File Nos. xxxxxx391 and xxxxxx007 to Dr. Scott for review and a reasoned opinion regarding the extent of appellant's permanent impairment of his upper extremities in accordance with the sixth edition of the A.M.A., *Guides*. Following this and any such further development as deemed necessary, OWCP shall issue a *de novo* decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 22, 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: July 8, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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

<sup>25</sup> *Id.*