United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 19-1067**
	)	**Issued: June 24, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Butler, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On April 15, 2019 appellant, through counsel, filed a timely appeal from a March 22, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[1] 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.

[2] The Board notes that, following the March 22, 2019 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*.

Federal Employees' Compensation Act[3] (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 greater than 19 percent permanent impairment of her right upper extremity and 1 percent permanent impairment of her left upper extremity for which she previously received schedule award compensation.

FACTUAL HISTORY

On April 14, 2009 appellant filed an occupational disease claim (Form CA-2) alleging that she had developed basal joint arthritis due to factors of her federal employment, including casing and delivering mail, and opening mailbox lids. She noted that she first became aware of her condition and realized its relationship to her federal employment on February 16, 2007. OWCP, on July 10, 2009, accepted the claim for aggravation of localized primary osteoarthritis of the hands, bilaterally.[4]

On April 12, 2010 appellant filed a schedule award claim (Form CA-7).

On August 16, 2011 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, to Dr. Theodore Toan Le, a Board-certified orthopedic surgeon.

In a report dated September 13, 2011, Dr. Le noted his evaluation of appellant regarding disability due to aggravation of localized primary osteoarthritis of the hand bilaterally. He noted that examination of both hands revealed well-healed carpal tunnel incisions, no atrophy, and good grip bilaterally. Dr. Le, however, found that both the metacarpophalangeal (MCP) and interphalangeal (IP) joints on the right were slightly larger than on the left. There was also slightly-decreased sensation to pinprick along the median nerve distribution of her right hand. Dr. Le opined that osteoarthritis of appellant's hands bilaterally was a preexisting condition, most likely before the carpal tunnel syndrome. He noted that a recent x-ray showed evidence of joint narrowing at both the MCP and IP joints, as well as increased sclerosis at the thumb MCP joints. Dr. Le found that appellant was capable of returning to medium-duty work with restrictions of occasional lifting up to 20 to 50 pounds and frequent lifting of 10 to 20 pounds. Applying the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent*

[3] 5 U.S.C. § 8101 *et seq*.

[4] OWCP assigned the present claim OWCP File No. xxxxxx609. Appellant has several other claims before OWCP involving her upper extremities. Under OWCP File No. xxxxxx734, OWCP accepted her occupational disease claim for lateral epicondylitis of the left elbow. Under File No. xxxxxx382, it accepted appellant's August 20, 2010 occupational disease claim for right shoulder bicipital tenosynovitis, impingement syndrome, partial rotator cuff tear, and rotator cuff syndrome. Under OWCP File No. xxxxxxx017, OWCP accepted her December 29, 2012 occupational disease claim for right hand and wrist extensor tenosynovitis. Under OWCP File No. xxxxxx759, it accepted appellant's June 24, 2014 occupational disease claim for symptomatic left wrist dorsal tenosynovitis. Under OWCP File No. xxxxxx842, OWCP accepted her October 29, 2014 occupational disease claim for tear of the right rotator cuff. Appellant's claims have been administratively combined, with OWCP File No. xxxxxx734 serving as the master file.

Impairment, (A.M.A., *Guides*)[5] Table 15-1, he determined that appellant had mild impairment of 1-13 percent of the upper extremity. Dr. Le explained that, using the adjustment grid, her functional history and physical examination were mild. He, therefore, determined that she had 5 percent whole person permanent impairment.[6]

OWCP subsequently requested clarification from the second opinion physician, Dr. Le, noting that FECA does provide for whole person impairment. It further requested that he determine appellant's date of maximum medical improvement (MMI), and state the range of motion (ROM) of the fingers and thumbs of each hand, explaining how he arrived at the percentage of impairment rated. Dr. Le was also to provide reports of any x-rays or tests used in his impairment evaluation.

In a November 16, 2011 addendum report, Dr. Le noted his September 9, 2011 examination and chart review. He explained that there was a report of an x-ray from a prior treating physician's office which showed that in 2009 appellant had joint narrowing of both MCP and IP joints and that there was also increased sclerosis at the thumb MCP joint. Dr. Le noted that, objectively, on examination, there was "no restricted range of motion at the thumb MCP joint or the digit MCP joint." He explained that, "based on the x-ray findings and her subjective complaints of pain with repetitive motion, this is considered mild. There is no objective finding overall in terms of range of motion. However, there [are] enlarged MCP and IP joints on gross physical exam." Dr. Le applied Table 15-1, page 385, of the sixth edition of the A.M.A., *Guides* and determined that appellant had mild permanent impairment of the upper extremity at three percent, which is the lowest mild rating. He again noted there were radiographic findings of arthritis, as well as enlarged MCP and IP joints on physical examination, consistent with osteoarthritis of the hand. Dr. Le clarified that appellant had reached MMI as of September 9, 2011, the date of his last examination.

On November 18, 2011 OWCP referred the case to a district medical adviser (DMA) for review. No response was received.

OWCP subsequently received a November 11, 2017 statement from appellant in support of his schedule award claim.

By decision dated January 9, 2012, OWCP denied appellant's schedule award claim.[7]

On June 27, 2017 appellant filed another Form CA-7 schedule award claim under OWCP File No. xxxxxx609.

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

[6] By decision dated October 13, 2011, under File No. xxxxxx382, OWCP granted appellant a schedule award for three percent permanent impairment of the right arm due to ROM deficits in the right shoulder.

[7] By decision dated March 11, 2016, under OWCP File No. xxxxxx842, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the right upper extremity based on the DBI of the full-thickness rotator cuff tear with residual dysfunction in accordance the A.M.A., *Guides* noting that she had previously received a schedule award for three percent permanent impairment in OWCP File No. xxxxxx382.

OWCP denied the latest schedule award claim by decision dated August 22, 2017.

On August 31, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received an October 25, 2017 report, wherein Dr. Martin Fritzhand, a Board-certified urologist, provided results on physical examination including left elbow and left wrist tenderness to palpation. He listed appellant's wrist and elbow ROM as normal on the left, with findings after three measurements on the right of 0 degrees of flexion, 20, 10, and 10 degrees of "inversion," and 5 degrees of "eversion" consistently over three measurements. Dr. Fritzhand then evaluated appellant's conditions in accordance with the sixth edition of the A.M.A., *Guides*. He applied Table 15-12, (Impairment Values Calculated From Digit Impairment) page 421, A.M.A., *Guides* to convert digit impairments to the respective upper extremity impairment ratings of one percent permanent impairment for each finger and three percent for each thumb or an additional seven percent permanent impairment of each of the upper extremities. Dr. Fritzhand then utilized the Combined Values Chart, page 604, A.M.A., *Guides* to reach 31 percent permanent impairment of the right upper extremity and 9 percent impairment of the left upper extremity.[8]

On January 1, 2018 Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a DMA, reviewed Dr. Fritzhand's report and found that appellant had an additional 13 percent right upper extremity impairment due to right hand and wrist extensor tenosynovitis in accordance with the A.M.A., *Guides*. He found that she had reached MMI on October 25, 2017.

By decision dated January 5, 2018, OWCP's hearing representative set aside the August 22, 2017 decision and remanded the case for OWCP to administratively combine all of appellant's claims concerning her upper extremities. On remand OWCP was instructed to update the SOAF to include all of appellant's upper extremity claims and her accepted conditions and refer Dr. Fritzhand's October 25, 2017 report for another review by a DMA, followed by a *de novo* decision regarding appellant's schedule award claim.

On January 11, 2018 OWCP requested that Dr. Fritzhand review the January 1, 2018 report from Dr. Slutsky. It afforded him 30 days to respond.

In a January 17, 2018 report, Dr. Fritzhand explained his previous assessments under the A.M.A., *Guides*. He concluded that, under Table 15-32, appellant had 26 percent permanent impairment of the right upper extremity due to extensor tenosynovitis.

On January 18, 2018 OWCP administratively combined File Nos. xxxxxx609, xxxxxx382, xxxxxx017, xxxxxx759, xxxxxx842 and xxxxxx734, with the latter serving as the master file. On January 23, 2018 it updated the SOAF to incorporate all of appellant's bilateral upper extremity claims.

[8] By decision dated December 20, 2017, under OWCP File No. xxxxxx759, OWCP granted appellant a schedule award for one percent permanent impairment of her left upper extremity based on the A.M.A., *Guides* DBI estimates of sprain/strain, tenosynovitis.

In a February 12, 2018 report,[9] Dr. Le, again serving as an OWCP second opinion physician, reviewed appellant's claim for left elbow lateral epicondylitis. He found that she had full ROM of the left elbow and normal muscle strength. Dr. Le determined that appellant had reached MMI and based his calculation of her left upper extremity impairment on the A.M.A., *Guides*' DBI estimates of lateral epicondylitis with one percent permanent impairment of the left upper extremity in accordance with Table 15.4 page 399 of the A.M.A., *Guides*.

On February 23, 2018 OWCP referred a list of accepted conditions, an updated SOAF, and medical evidence to the DMA for review.

In a July 12, 2018 report, Dr. Slutsky, again serving as DMA, reviewed the SOAF, Dr. Fritzhand's October 25, 2017 report and Dr. Le's February 12, 2018 report and listed appellant's accepted upper extremity impairments as left elbow epicondylitis, aggravation of localized primary osteoarthritis of both hands, right hand and wrist extensor tenosynovitis, left wrist dorsal tenosynovitis and right shoulder conditions including bicipital tenosynovitis, impingement syndrome, partial rotator cuff tear, and rotator cuff syndrome, as well as rotator cuff tear. He found that appellant reached MMI on October 25, 2017. The DMA applied the A.M.A., *Guides* and found that appellant had nonspecific tenosynovitis in the right upper extremity, in accordance with Table 15-3, page 395. He applied a Class 1 diagnosis, with a grade modifier for functional history (GMFH) of 2 and a grade modifier for physical examination (GMPE) of 2. He noted that a grade modifier for clinical studies (GMCS) was not applicable. The DMA applied the net adjustment formula of the A.M.A., *Guides* and determined that she had a net adjustment of 2 resulting in grade E impairment or two percent impairment of the upper extremity. He then applied the ROM impairment rating under the A.M.A., *Guides* for appellant's right wrist and reached nine percent permanent impairment due to wrist flexion of 0 degrees in accordance with Figure 15-24, page 472, and Table 15-32, page 473. The DMA found wrist ulnar deviation, named by Dr. Fritzhand as "eversion," of 5 degrees was 4 percent permanent impairment of the right upper extremity in accordance with Figure 15-25, and Table 15-32, page 473 of the A.M.A., *Guides* and that 20 degrees of wrist radial deviation, listed by Dr. Fritzhand as inversion, was 0 percent permanent impairment. The DMA added these impairments to reach 13 percent permanent impairment of the right upper extremity due to loss of ROM of the right wrist. With regard to appellant's left upper extremity impairment due to lateral epicondylitis of the elbow, the DMA applied Table 15-4, page 399 of the A.M.A., *Guides* DBI estimate, and found left lateral epicondylitis was a class 1 impairment, with GMFH of 1, GMPE 1, and that GMCS was not applicable. The DMA reached a net adjustment of zero with a resulting finding of one percent permanent impairment of the left upper extremity in accordance with the A.M.A., *Guides*. Dr. Slutsky noted that ROM impairment was not appropriate as appellant had normal elbow motion. He did not address her permanent impairment due to the accepted condition of left wrist dorsal tenosynovitis.

By decision dated August 1, 2018, OWCP granted appellant a schedule award for an additional 13 percent permanent impairment of her right upper extremity, for a total of 19 percent,

[9] In a letter dated December 28, 2017, OWCP referred appellant for a second opinion evaluation with Dr. Le to determine her permanent impairment due to her left lateral epicondylitis of the elbow in accordance with the A.M.A., *Guides*.

noting that she had previously received schedule award compensation for 3 percent permanent impairment of the right upper extremity under OWCP File No. xxxxxx382, and 3 percent permanent impairment of the right upper extremity under OWCP File No. xxxxxx842.

On November 13, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated November 28, 2018, OWCP denied appellant's request for an oral hearing as untimely filed. It noted that the request was dated November 13, 2018, more than 30 days after the August 1, 2018 decision. OWCP exercised its discretion, but determined that the issue in this case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered, which established that she was entitled to a greater schedule award than that previously awarded.

On December 27, 2018 appellant, through counsel, requested reconsideration of the August 1, 2018 decision and contended that OWCP failed to consider appellant's left upper extremity when establishing her impairment ratings. In support of this request, he provided medical reports addressing appellant's bilateral hand osteoarthritis.

By decision dated March 22, 2019, OWCP denied modification of the August 1, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[10] and its implementing federal regulations,[11] 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 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.[12] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[13]

In addressing impairment of the upper extremities, the sixth edition of the A.M.A., *Guides* request identify the impairment for the class of diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[14] The net adjustment formula is (GMFH - CDX)

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Id*. at § 10.404(a).

[13] 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).

[14] A.M.A., *Guides* (6th ed. 2009) at 3, section 1.3, The World Health Organization's *International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement*.

+ (GMPE - CDX) + (GMCS - CDX).[15] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[16]

The A.M.A., *Guides* also provides 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.[17] 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.[18] 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.[19]

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).
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> "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 impairment rating for the diagnosis in question, the method producing the higher rating should be used*." (Emphasis in the original).[20]
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> The Bulletin further advises:
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> "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

[15] *Id*. at 411.

[16] *R.A.*, Docket No. 19-1798 (issued November 4, 2020); *S.J.*, Docket No. 18-0966 (issued September 20, 2019); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[17] A.M.A., *Guides* 461.

[18] *Id*. at 473.

[19] *Id*. at 474.

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

should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE."[21]

Before the A.M.A., *Guides* can be utilized, a description of the impairment must be obtained from the attending physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decrease in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[22]

A claimant may seek increased schedule award compensation if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[23]

ANALYSIS

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

On August 16, 2011 OWCP referred appellant, along with a SOAF and a series of questions, to Dr. Le, a Board-certified orthopedic surgeon. In a report dated September 13, 2011, Dr. Le applied the sixth edition of the A.M.A., *Guides*, Table 15-1, and determined that she had five percent whole person permanent impairment. OWCP subsequently requested clarification from Dr. Le. In a November 16, 2011 addendum report, Dr. Le applied Table 15-1, of the sixth edition of the A.M.A., *Guides* and determined that appellant had three percent permanent impairment of the upper extremity. In January 2018, OWCP administratively combined appellant's claims pertaining to her upper extremities and updated the SOAF to incorporate all of appellant's accepted bilateral upper extremity conditions and prior schedule awards. OWCP again referred appellant to Dr. Le for an impairment rating. In a February 12, 2018 report,[24] Dr. Le, again serving as an OWCP second opinion physician, reviewed appellant's schedule claim, but only addressed appellant's left elbow lateral epicondylitis. He found that she had full ROM of the left elbow and normal muscle strength. Dr. Le determined that appellant had reached MMI and based his calculation of her left upper extremity impairment on the A.M.A., *Guides*' DBI estimates of lateral epicondylitis with one percent permanent impairment of the left upper extremity in accordance with Table 15-4 of the A.M.A., *Guides*.

[21] *Id*.

[22] *A.T.*, Docket No. 18-0864 (issued October 9, 2018).

[23] *R.A., supra* note 16; *Rose V. Ford*, 55 ECAB 449 (2004).

[24] In a letter dated December 28, 2017, OWCP referred appellant for a second opinion evaluation with Dr. Le to determine her permanent impairment due to her left lateral epicondylitis of the elbow in accordance with the A.M.A., *Guides*.

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.[25]

Dr. Le did not provide detailed findings with regard to all of appellant's accepted upper extremity conditions, nor did he explain his findings in accordance with the A.M.A., *Guides*. Once OWCP undertook development of the evidence by referring appellant to Dr. Le, it had an obligation to obtain a proper evaluation that sufficiently addresses the issues in this case.[26] OWCP's procedures provide that when OWCP refers the schedule award claim for a second opinion examination, and this report does not contain a discussion of how the impairment rating was calculated, clarification should be sought.[27] The case must therefore be remanded for further development. On remand, OWCP shall refer appellant, along with an updated SOAF and a series of questions to a new second opinion physician for an opinion on the nature and extent of appellant's bilateral upper extremity impairment. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[25] *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

[26] *Id.*; *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[27] *Supra* note 20 at Chapter 2.808.6.a and d.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 24, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board