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<b>K.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0238</b>
	)	<b>Issued: June 7, 2022</b>
<b>DEPARTMENT OF THE TREASURY,</b>	)	
<b>INTERNAL REVENUE SERVICE, Austin, TX,</b>	)	
<b>Employer</b>	)	
	)	

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

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

## JURISDICTION

On December 9, 2020 appellant, through counsel, filed a timely appeal from an August 11, 2020 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.

## ISSUES

The issues are: (1) whether appellant has more than one percent permanent impairment of her right lower extremity for which she previously received a schedule award; and (2) whether

<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 an 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.*

appellant has met her burden of proof to establish permanent impairment of her upper extremities warranting a schedule award.

### **FACTUAL HISTORY**

On February 2, 2017 appellant, then a 38-year-old customer service representative, filed a traumatic injury claim (Form CA-1) alleging that on January 27, 2017 she twisted her right ankle fell on her right knee and left elbow, and injured her back when her right shoe became caught on a rain gutter down spout while in the performance of duty. She stopped work on the date of injury. On December 11, 2017 OWCP accepted the claim for right knee abrasion, sprain of the right ankle, and abrasion of the left elbow. It authorized wage-loss compensation from January 27 through April 3, 2017.

On January 3, 2018 Dr. John Muzak, an osteopath, found that appellant had reached maximum medical improvement (MMI) with regard to her left elbow abrasion, right knee abrasion, low back strain, and right ankle sprain. He found that she could work without restrictions and did not require further medical treatment.

On March 13, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of her claim, appellant submitted a December 18, 2018 report from Dr. Lubor Jarolimek, an orthopedic surgeon. Dr. Jarolimek noted appellant's history of injury on January 27, 2017 and related that she complained of right knee and ankle pain, and left hip pain. He diagnosed right knee abrasion and right ankle strain. Dr. Jarolimek found that appellant had reached MMI on December 18, 2018. Applying the Knee Regional Grid, Table 16-3, page 509, of the A.M.A., *Guides* for the class of diagnosis (CDX) of contusion, is a class 1 impairment due to loss of range of motion (ROM) with a default grade of 1,<sup>3</sup> Dr. Jarolimek determined that the grade modifier for function history (GMFH) was 1, that the grade modifier for physical examination (GMPE) was not applicable, and that the grade modifier for clinical studies (GMCS) was zero. Applying the net adjustment formula, page 521 of the A.M.A., *Guides*, he reached -1 and found 2 percent permanent impairment of the right lower extremity. Dr. Jarolimek noted right knee ROM findings of 90 degrees flexion, and -5 degrees extension. He found that these were indicative of a mild ROM loss of 10 percent. In utilizing Table 16-23, page 549 of the A.M.A., *Guides*, Dr. Jarolimek opined that appellant had 20 percent permanent impairment of the right lower extremity due to loss of ROM.

Dr. Jarolimek then assessed appellant's permanent impairment of the right ankle in accordance with the A.M.A., *Guides*. He found that, under Table 16-2, Foot and Ankle Regional Grid, page 501, appellant had a diagnosis of muscle and tendon strain, a class 1 impairment with a default grade of 1. Dr. Jarolimek applied the net adjustment formula to his GMFH, GMPE, and GMCS findings to reach a net adjustment of -1. He determined that appellant had one percent permanent impairment of the right ankle in accordance with the A.M.A., *Guides*. Dr. Jarolimek

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<sup>3</sup> Table 16-3 of the A.M.A., *Guides*, page 509, provides that a history of contusion is a class 1 only if there are significant consistent palpatory findings, radiographic findings, or consistent motion deficits.

also listed her right ankle ROM as 20 degrees of dorsiflexion, 25 degrees of plantarflexion, 25 degrees of inversion, and 15 degrees of eversion, none of which are ratable impairments.

On February 11, 2019 Dr. Morley Slutsky, a physician Board-certified in occupational medicine serving as the district medical adviser (DMA), reviewed Dr. Jarolimek's impairment rating and recommended a second opinion examination. He noted that Dr. Jarolimek documented only one ROM measurement per joint movement and that this was not consistent with page 517 of the A.M.A., *Guides*, which requires three measurements of the joint.

On April 12, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. James Elmer Butler, III, a Board-certified orthopedic surgeon, for a second opinion examination.

In his April 25, 2019 report, Dr. Butler reviewed the SOAF and described appellant's history of injury. He noted that she described pain in the right ankle and knee. On physical examination, Dr. Butler reported normal findings in the elbows, tenderness over the lateral ligaments in the right ankle, and normal findings in the hips, knees, and left ankle. He listed ROM in the left elbow of 150, 145, and 150 degrees of flexion, and in the right lower extremity 115, 110, and 115 degrees of flexion. Dr. Butler found that appellant had reached MMI on April 25, 2019. He based his impairment rating on the conditions of right knee abrasion, right ankle sprain, and left elbow abrasion. Applying Table 15-4, page 398 of the A.M.A., *Guides*, Dr. Butler determined that appellant had no ratable impairment of the left elbow due to her accepted employment injury.<sup>4</sup> He further found that, in accordance with Table 16-3, page 509 of the A.M.A., *Guides*, she had no ratable impairment of the right knee due to her accepted condition of abrasion. In regard to appellant's right ankle sprain, Dr. Butler applied Table 16-2, page 501 of the A.M.A., *Guides* and found that she had a class 1 impairment. He determined that GMFH was 0, GMPE was 1, and that GMCS was 1 and applied the net adjustment formula to reach one percent permanent impairment of the right lower extremity. Dr. Butler determined that the ROM method was not applicable as he found no objective evidence of restricted ROM.

On June 22, 2019 the DMA reviewed Dr. Butler's report. He indicated that appellant's lower extremity impairment was based on right ankle sprain as well as on right knee sprain. The DMA determined that appellant had one percent permanent impairment of the right lower extremity. He found that she had no other ratable impairment of a scheduled member or function of the body due to the accepted employment injury.

By decision dated July 23, 2019, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. The award ran for 2.88 weeks during the period April 25 to May 15, 2019. It also found zero percent impairment of the right upper extremity.

On July 30, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 24, 2019.

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<sup>4</sup> Table 15-4 of the A.M.A., *Guides*, page 398, provides an impairment rating for an elbow contusion as a class 1 impairment with residuals symptoms and consistent objective findings at MMI.

By decision dated December 4, 2019, OWCP's hearing representative found that the DMA's report was internally inconsistent and required clarification. She remanded for further development of the medical evidence.

In reports dated December 28, 2019 and January 21, 2020, the DMA clarified that appellant's one percent permanent impairment of the right lower extremity was due to her accepted ankle sprain. He noted that application of the ROM method resulted in a non-ratable impairment, while the DBI estimates resulted in one percent permanent impairment. The DMA concluded that appellant had no other ratable impairment of a scheduled member or function of the body causally related to her accepted employment injury.

By decision dated January 29, 2020, OWCP found that appellant had not met her burden of proof to establish greater than the one percent permanent impairment of the right lower extremity due to the accepted condition of right ankle sprain for which she had previously received a schedule award. It further found that there was zero percent impairment of the right and left upper extremities. On February 5, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

During the hearing, held on June 12, 2020, appellant testified that she continued to experience right knee pain as well as sharp pains in her ankle and her left knee. She noted that she was unable to walk for exercise, that she experienced difficulty driving, and that she felt that her schedule award did not adequately compensate her for her accepted conditions.

By decision dated August 11, 2020, OWCP's hearing representative affirmed the January 29, 2020 decision.

### **LEGAL PRECEDENT -- ISSUES 1 AND 2**

The schedule award provisions of FECA<sup>5</sup> and its implementing regulations<sup>6</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. 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 a determination is a matter which rests in the sound 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.<sup>7</sup> The Board has approved the use by OWCP of the A.M.A.,

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

*Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>8</sup>

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.<sup>9</sup> Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.<sup>10</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>11</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>12</sup>

The A.M.A., *Guides* also provide that the ROM impairment methodology is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other DBI sections are applicable.<sup>13</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>14</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>15</sup>

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.<sup>16</sup> Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

“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>8</sup> P.R., Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3.

<sup>10</sup> *Id.* at 494-531.

<sup>11</sup> *Id.* at 411.

<sup>12</sup> R.R., Docket No. 17-1947 (issued December 19, 2018); R.V., Docket No. 10-1827 (issued April 1, 2011).

<sup>13</sup> *Supra* note 9 at 461.

<sup>14</sup> *Id.* at 473.

<sup>15</sup> *Id.* at 474.

<sup>16</sup> FECA Bulletin No. 17-06 (issued May 8, 2017).

*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>17</sup> (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.”<sup>18</sup>

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>

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>20</sup>

### **ANALYSIS -- ISSUE 1**

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

In support of her claim, appellant submitted a December 18, 2018 report from Dr. Jarolimek to support her claim for a schedule award where he reviewed her history of injury and conducted an examination. Dr. Jarolimek noted diagnoses of right knee abrasion and ankle strain. He found one percent impairment of the right lower extremity due to right ankle strain. Dr. Jarolimek further found two percent impairment of the right lower extremity due to knee contusion with consistent motion deficits. However, he also provided one ROM measurement for each motion of the right knee and ankle to reach impairment ratings for loss of ROM of the right knee and ankle.

OWCP properly referred the evidence of record to the DMA, Dr. Slutsky. In his February 11, 2019 report, the DMA noted that Dr. Jarolimek had not provided three measurements of each movement of the joints as required by page 517 of the A.M.A., *Guides*. The Board has

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

<sup>18</sup> *Id.*; *see also*; V.L., Docket No. 18-0760 (issued November 13, 2018); A.G., Docket No. 18-0329 (issued July 26, 2018).

<sup>19</sup> *See supra* note 7 at Chapter 2.808.6(f) (March 2017).

<sup>20</sup> *See supra* note 7 at Chapter 2.808.6(f) (March 2017).

held that, when an attending physician's report gives an estimate of permanent impairment, but it is not based on proper application of the A.M.A., *Guides*, OWCP may follow the advice of the DMA if he or she has properly applied the A.M.A., *Guides*.<sup>21</sup> The DMA recommended a second opinion examination to properly evaluate appellant's permanent impairment in accordance with the A.M.A., *Guides*.

OWCP referred appellant to Dr. Butler for a second opinion in accordance with the recommendation of the DMA. In his April 25, 2019 report, Dr. Butler determined that appellant had no ratable loss of ROM; therefore, the DBI was the appropriate basis for evaluation of her permanent impairment for schedule award purposes. He found that she had no ratable impairment of her right knee due to the accepted contusion and agreed with Dr. Jarolimek that she had one percent permanent impairment of her right ankle due to her accepted strain.

OWCP again properly referred the evidence of record to Dr. Slutsky, the DMA who concluded in his December 28, 2019 and January 21, 2020 reports that appellant had one percent permanent impairment of the right lower extremity which was due to her accepted ankle sprain. The DMA properly applied the A.M.A., *Guides* to the physical examination findings of Dr. Butler. He noted that the physical examination of record did not establish ROM deficits. Drs. Slutsky, Butler, and Jarolimek recommended the same grade modifiers and provided a calculation of the net adjustment formula to reach one percent permanent impairment of appellant's right lower extremity due to her accepted right ankle strain. The Board finds that the DMA and Dr. Butler accurately summarized the relevant medical evidence, provided a summary of findings on examination, and reached conclusions regarding appellant's condition which comported with the findings and with the appropriate provisions of the A.M.A., *Guides*. The reports of Dr. Butler and the DMA, therefore, carry the weight of the medical evidence and establish that appellant has one percent permanent impairment of her right lower extremity.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her upper extremities warranting a schedule award.

In his December 18, 2018 report, Dr. Jarolimek, appellant's treating physician, did not provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.

In his April 25, 2019 report, Dr. Butler, the second opinion physician, reported normal findings in the elbows. He listed ROM in the left elbow of 150, 145, and 150 degrees of flexion, and in the right lower extremity 115, 110, and 115 degrees of flexion. Dr. Butler applied Table 15-4, page 398 of the A.M.A., *Guides*, and determined that appellant had no ratable impairment of the left elbow due to her accepted employment injury.<sup>23</sup>

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<sup>21</sup> *M.J.*, Docket No. 20-1264 (issued February 16, 2021); *J.D.*, Docket No. 19-0414 (issued August 19, 2019); *P.L.*, Docket No. 17-0355 (issued June 27, 2018); *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

<sup>22</sup> *M.J.*, *id.*; *F.T.*, Docket No. 16-1236 (issued March 12, 2018).

<sup>23</sup> Table 15-4 of the A.M.A., *Guides*, page 398, provides an impairment rating for an elbow contusion as a class 1 impairment with residuals symptoms and consistent objective findings at MMI.

In his June 22, 2019 report, the DMA properly applied the A.M.A., *Guides* to the physical examination findings of Dr. Butler and found that appellant had no ratable upper extremity impairment. As noted previously, the Board has held that, when an attending physician's report gives an estimate of permanent impairment, not based on proper application of the A.M.A., *Guides*, OWCP may follow the advice of the DMA if he or she has properly applied the A.M.A., *Guides*.<sup>24</sup> The Board, thus, finds that the DMA and Dr. Butler accurately summarized the relevant medical evidence, provided a summary of findings on examination, and reached conclusions regarding appellant's condition, which comported with the findings and with the appropriate provisions of the A.M.A., *Guides*. The reports of Dr. Butler and the DMA, therefore, represent the weight of the medical evidence.<sup>25</sup>

As the medical evidence of record is insufficient to establish permanent impairment of her upper extremities, the Board finds that appellant has not met her burden of proof.

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 impairment.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish greater than one percent permanent impairment of her right lower extremity for which she previously received a schedule award. The Board further finds that appellant has not met her burden of proof to establish permanent impairment of her upper extremities warranting a schedule award.

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<sup>24</sup> *Supra* note 21.

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



**ORDER**

**IT IS HEREBY ORDERED THAT** the August 11, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 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