United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 21-1077**
	)	**Issued: March 16, 2022**
U.S. POSTAL SERVICE, EVANSVILLE POST OFFICE, Evansville, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 6, 2021 appellant filed a timely appeal from a June 25, 2021 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 the case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 21 percent permanent impairment of her left upper extremity for which she previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the June 25, 2021 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*.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 25, 2012 appellant, then a 48-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that she felt sharp pain in her upper left arm causally related to factors of her federal employment including delivering mail and telephone books on May 22 and 23, 2013. OWCP initially accepted the claim for left rotator cuff strain. By decision dated April 20, 2015, it expanded the acceptance of appellant's claim to include other maladies of the left shoulder region not elsewhere classified and calcifying tendinitis of left shoulder. OWCP paid her wage-loss compensation on the supplemental rolls from February 18 through June 26, 2015. Appellant retired effective April 30, 2015.

On July 7 and November 17, 2015 appellant filed claims for compensation (Form CA-7) for a schedule award.

By decision dated June 13, 2016, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity based upon the findings of appellant's attending physician, Dr. Peter Szachnowski, a rheumatologist, and the district medical adviser (DMA). The period of the award was for 9.36 weeks and ran from February 24 through April 29, 2016.

On July 5, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated November 2, 2016, OWCP's hearing representative set aside the June 13, 2016 decision. The hearing representative found that OWCP's DMA failed to identify either the date of the report or the examination findings which he used to calculate appellant's permanent impairment, and date of maximum medical improvement (MMI).

By decision dated February 10, 2017, OWCP granted appellant a schedule award for an additional two percent permanent impairment for a total of five percent left upper extremity permanent impairment. The award was for 6.24 weeks and ran from April 30 to June 12, 2016.

On April 12, 2017 appellant requested reconsideration and submitted additional reports from Dr. Szachnowski dated February 17 and April 3, 2017, which related appellant's current examination findings.

By decision dated July 11, 2017, OWCP denied appellant's request for reconsideration of the merits of the claim.

On August 7, 2017 appellant filed a timely appeal to the Board. By decision dated August 3, 2018, the Board affirmed OWCP's February 10, 2017 merit decision, finding that the evidence of record was insufficient to establish that appellant had greater than five percent permanent impairment of her left upper extremity for which she previously received a schedule

[3] Docket No. 17-1732 (issued August 3, 2018).

award. The Board, however, set aside OWCP's July 11, 2017 nonmerit decision, finding that the additional reports from Dr. Szachnowski, dated February 17 and April 13, 2017, constituted pertinent new and relevant evidence warranting further merit review. The case was remanded for further proceedings to be followed by a *de novo* decision.[4]

By decision dated May 8, 2019, OWCP granted appellant a schedule award for "an additional" 16 percent left upper extremity permanent impairment for a total of 21 percent permanent impairment of the left upper extremity. The award was for 49.92 weeks and ran for the period April 15, 2019 through March 29, 2020.

On October 8, 2020 appellant filed a Form CA-7 claiming an increased schedule award.

In an October 13, 2020 development letter, OWCP acknowledged receipt of appellant's claim for an increased schedule award, noting that additional medical evidence was required to determine permanent impairment utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides)*.[5] It afforded her 30 days to provide the requested information.

In a November 6, 2020 statement, appellant indicated that she visited Dr. Szachnowski for injections in each shoulder to help alleviate the pain and to increase the mobility in her neck and shoulder region. She also noted the symptomatology in her shoulders, which caused pain in the shoulder/neck region.

OWCP received progress reports dated May 7, 2019 through December 18, 2020, wherein from Dr. Szachnowski noted that appellant underwent subacromic injections for primary localized osteoarthrosis, chronic tendinopathy, impingement phenomena and chronic rotator cuff dysfunction in both shoulders. In the May 7, 2019 report, Dr. Szachnowski opined that appellant was 30 percent "disabled."

In a November 3, 2020 letter, Dr. Szachnowski indicated that appellant reached MMI in January 2014 and was 30 percent "disabled" according to state workers' compensation guidance. He noted the rating was based on full internal and external rotation, full abduction, and 45 degrees flexion because of pain and physical inability, *i.e.*, motor abnormality.

On March 8, 2021 OWCP referred the record, including a statement of accepted facts (SOAF), to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as a DMA. In a March 19, 2021 report, Dr. Hammel indicated that the most recent clinical examination notes from Dr. Szachnowski indicated that appellant had continued left shoulder pain. He noted that the magnetic resonance imaging (MRI) scan of appellant's left shoulder was normal and that prior treatments included medication and activity modification. Dr. Hammel indicated that appellant reached MMI on November 3, 2020. He indicated that a permanent impairment based on range of motion (ROM) methodology could not be calculated as Dr. Szachnowski had not documented formal examination findings and had not provided triplicate measurements. Under the diagnosis-

[4] *Id.*

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

based impairment (DBI) methodology of the A.M.A., *Guides,* he opined that appellant had two percent permanent left upper extremity impairment. Dr. Hammel assigned a class of diagnosis (CDX) of 1, grade C with a default value of three percent for impingement syndrome, residual loss under Table 15-5.[6] He assigned grade modifier adjustments as follows: grade modifier for functional history (GMFH) of 1 for continued pain; grade modifier for clinical studies (GMCS) of 0 for normal MRI; and found that grade modifier for physical examination (GMPE) was not applicable as no formal examination was provided. Dr. Hammel explained that application of the net adjustment formula resulted in a finding of -1 or grade B**,** which was equivalent to 2 percent left upper extremity permanent impairment. He indicated that Dr. Szachnowski did not provide calculations to support his impairment, which was rated under state workers' compensation guidance, in his November 3, 2020 report.[7]

By decision dated April 21, 2021, OWCP denied appellant's claim for an increased schedule award, finding that she was not entitled to greater than the 21 percent permanent impairment of the left upper extremity previously awarded. It accorded the weight of the medical evidence to its DMA's report of March 19, 2021.

On June 15, 2021 appellant requested reconsideration.

In a letter of even date, she argued that she deserved additional compensation based on her chronic shoulder pain, which affected her everyday routine and did not allow her to work.

Dr. Szachnowski's progress notes dated December 18, 2020 and June 1, 2021 were received. In the June 1, 2021 progress note, he reported that appellant essentially had chronically torn rotator cuffs and was undergoing therapy/injections. Dr. Szachnowski indicated that both shoulders have painful impingement phenomena, which were symptomatic with decreased ROM on abduction.

In a June 1, 2021 letter, Dr. Szachnowski indicated that appellant has an incurable condition consisting of rotator cuff tendinopathy with tears in rotator cuffs and inability to abduct the shoulders above the left and right shoulder level. He indicated that she has reached MMI and had committed to periodic injection of her shoulders, which would be life-long with no expectation of change. Dr. Szachnowski indicated that appellant was previously granted a schedule award for 21 percent permanent impairment. He advised that appellant's pain was a significant impairment, which affected her activities of daily living and which permanently affected her ability to lift, carry, elevate, lie on, and use her shoulders above her head.

By decision dated June 25, 2021, OWCP denied modification.

[6] Under Table 15-5 a Class 1, grade C impingement syndrome with residual loss has a default value of three percent.

[7] OWCP received duplicative medical evidence following the DMA's report.

LEGAL PRECEDENT

The schedule award provisions of FECA,[8] and its implementing federal regulation,[9] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[12] The medical evidence must include a detailed description of the permanent impairment.[13]

Regarding the application of ROM or DBI impairment methods 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 an impairment rating for the diagnosis in question, the method producing the higher rating should be used*." (Emphasis in the original.)
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> "If the rating physician provided an assessment using the DBI method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id*. *See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

[12] *See T.W.*, Docket No. 20-1547 (issued October 4, 2021).

[13] *See K.F.*, Docket No. 18-1517 (issued October 9, 2019).

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

"If the medical evidence of record is not sufficient for the DMA to render a rating on ROM, where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[14]

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.[15]

ANALYSIS

The Board finds that appellant has not established greater than 21 percent permanent impairment of the left upper extremity for which she previously received schedule award compensation.

Preliminarily, the Board notes that findings made in its prior decision are *res judicata* absent any further review by OWCP under section 8128 of FECA.[16] The Board, therefore, will not review the evidence addressed in its prior appeal.

Following the Board's August 3, 2018 decision, by decision dated May 8, 2019, OWCP granted appellant a schedule award for an additional 16 percent left upper extremity permanent impairment for a total of 21 percent permanent impairment of the left upper extremity. Appellant subsequently filed a claim for an increased schedule award and submitted additional reports from Dr. Szachnowski.

Dr. Szachnowski opined, in his May 7, 2019 report and November 3, 2020 letter, that appellant was 30 percent "disabled." In his November 3, 2020 letter, Dr. Szachnowski indicated that appellant reached MMI in January 2014. Under state workers' compensation guidance, he opined appellant had 30 percent "disability" based on examination findings of full internal and external rotation, full abduction and 45 degrees flexion because of pain and physical inability, *i.e.*, motor abnormality. In its October 13, 2020 development letter, OWCP had advised appellant that the evidence should support an increased permanent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Szachnowski, however, failed to provide an opinion on permanent impairment based on the sixth edition A.M.A., *Guides*.[17] Thus, Dr. Szachnowski's impairment

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

[15] *Supra* note 13.

[16] *M.S.*, Docket No. 20-0276 (issued September 15, 2021); *G.W.*, Docket No. 19-1281 (issued December 4, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

[17] *M.A.*, Docket No. 19-1732 (issued September 9, 2020); *L.C.*, Docket No. 19-0564 (issued September 16, 2019).

rating lacks probative value and is insufficient to establish appellant's claim for an increased schedule award.

OWCP routed Dr. Szachnowski's reports and letter to its DMA, Dr. Hammel.[18] In a March 19, 2021 report, Dr. Hammel properly determined that appellant had two percent permanent left upper extremity permanent impairment under the DBI rating methodology for impingement syndrome, residual loss. Regarding appellant's rating under the ROM methodology, Dr. Hammel found that Dr. Szachnowski had not conducted a formal examination and had not provided triplicate ROM measurements.

As there is no evidence establishing greater than 21 percent permanent impairment of the left upper extremity, the Board finds that OWCP properly denied appellant's claim for an increased schedule award.

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.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

[18] *Supra* note 13 at Chapter 2.808.6(e) (March 2017); *see also A.K.*, Docket No. 19-1927 (issued March 31, 2021); *K.S.*, Docket No. 20-1397 issued March 19, 2021); *Tommy R. Martin*, 56 ECAB 273 (2005).