United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
	)	**Docket No. 22-0670**
and	)	**Issued: November 1, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Cheyenne, WY, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 7, 2022 appellant filed a timely appeal from a February 25, 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 23 percent permanent impairment of the right upper extremity for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board.[2] 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 February 13, 2018 appellant, then a 64-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2018 he experienced sharp right shoulder pain when he lifted a tray of flat mail onto a cart while in the performance of duty. He stopped work on February 14, 2018. OWCP accepted the claim for right shoulder rotator cuff tear or rupture.[3]

On October 30, 2018 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

In a development letter dated November 9, 2018, OWCP requested that appellant's treating physician submit an impairment evaluation report in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] It afforded her 30 days to submit additional medical evidence in support of his increased schedule award claim.

In a report dated March 4, 2019, Dr. Gregory Reichhardt, a Board-certified physiatrist, noted appellant's February 12, 2018 employment injury and indicated that appellant had a history of two prior rotator cuff repairs. He reported that appellant currently complained of pain over the anterior and lateral aspect of the shoulder. On physical examination of appellant's shoulder, Dr. Reichhardt observed tenderness to palpation over the anterior and lateral aspect and mild weakness in the supraspinatus and infraspinatus. He performed three range of motion (ROM) measurements for appellant's right shoulder and noted 80 degrees flexion, 50 degrees extension, 30 degrees adduction, 90 degrees abduction, and 40 degrees internal and external rotation. Dr. Reichhardt diagnosed right shoulder pain and irreplaceable rotator cuff tear. He noted that appellant had reached maximum medical improvement (MMI). Dr. Reichhardt indicated that, based on the shoulder range of motion, appellant had 9 percent permanent impairment for flexion, 0 percent permanent impairment for extension, 3 percent permanent impairment for abduction, 1 percent permanent impairment for adduction, 4 percent permanent impairment for external rotation, and 4 percent permanent impairment for internal rotation for a total of 21 percent permanent impairment of the right upper extremity.

[2] Docket No. 20-1547 (issued October 4, 2021).

[3] OWCP assigned the present claim OWCP File No. xxxxxx127. The record indicates that appellant has two previously accepted claims. Under OWCP File No. xxxxxx252, OWCP accepted a June 14, 2004 occupational disease claim (Form CA-2) for right shoulder rotator cuff tear and right shoulder osteoarthritis. On June 7, 2005 it granted appellant a schedule award for 23 percent permanent impairment of the right upper extremity. Under OWCP File No. xxxxxx516, OWCP accepted a traumatic injury claim for a right shoulder rotator cuff tear causally related to a January 19, 2016 employment injury. It has administratively combined OWCP File Nos. xxxxxx127, xxxxxx516 and xxxxxx252, with the latter serving as the master file.

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

By decision dated March 19, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to his accepted February 12, 2018 employment injury.

OWCP subsequently referred appellant's claim, along with a statement of accepted facts (SOAF), the case file, and a series of questions, to Dr. Morley Slutsky, a Board-certified occupational and preventive medicine specialist serving as the DMA, in order to determine whether he had sustained permanent impairment of a scheduled member or function of the body due to his accepted February 12, 2018 employment injury. The SOAF indicated that, under OWCP File No. xxxxxx252, appellant was previously awarded 23 percent permanent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides*.[5]

In an October 25, 2019 report, Dr. Slutsky indicated that he had reviewed the SOAF and the case file, and noted that appellant's claim was accepted for right shoulder rotator cuff tear. He explained that he could not provide an impairment rating utilizing the diagnosis-based impairment (DBI) rating method because he was not provided with surgery or diagnostic reports. Using Dr. Reichhardt's ROM measurements, Dr. Slutsky found that, according to Table 15-34 (Shoulder Range of Motion), page 475, of the A.M.A., *Guides*, appellant had 9 percent permanent impairment for 80 degrees flexion, 0 percent permanent impairment for 50 degrees extension, 3 percent permanent impairment for 90 degrees abduction, 1 percent permanent impairment for 30 degrees adduction, 4 percent permanent impairment for 40 degrees internal rotation, and 2 percent permanent impairment for 40 degrees external rotation for a total of 19 percent permanent impairment of the right upper extremity. He assigned a grade modifier for functional history (GMFH) of 1 and indicated that appellant's right shoulder impairment remained the same. Dr. Slutsky further explained that, because appellant was previously awarded 23 percent permanent impairment for the right upper extremity, he was not entitled to an additional schedule award.

By decision dated November 14, 2019, OWCP denied appellant's schedule award claim, finding that he was not entitled to greater than the 23 percent permanent impairment of the right upper extremity previously awarded.

On December 5, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated February 14, 2020, OWCP's hearing representative set aside the November 14, 2019 decision and remanded the case for OWCP to provide the DMA with the requested surgical and diagnostic imaging reports so that he could provide a proper impairment rating based on the DBI-rating method.

In supplemental reports dated April 14 and May 10, 2020, Dr. Slutsky indicated that, based on the February 14, 2018 x-ray report, the appropriate class of diagnosis (CDX) under the DBI rating method, would be full thickness rotator cuff tear. He reported that under Table 15-5 (Shoulder Regional Grid), page 401-405, appellant was a class 1 impairment with a GMFH of 1 and a grade modifier for physical examination (GMPE) of 2. Dr. Slutsky noted that a grade modifier for clinical studies (GMCS) was not applicable. He applied the net adjustment formula

[5] A.M.A., *Guides* (5th ed. 2001).

of the A.M.A., *Guides* and determined that appellant had six percent permanent impairment of the right upper extremity. Dr. Slutsky referenced his previous finding of 19 percent permanent impairment of the right upper extremity under the ROM rating method and explained that since the ROM rating method yielded a higher rating, appellant had 19 percent permanent impairment of the right upper extremity for his right shoulder. He reiterated that, since appellant was previously granted a schedule award for 23 percent right upper extremity permanent impairment, he was not entitled to an additional award.

By decision dated May 20, 2020, OWCP denied appellant's claim for an increased schedule award. It found that the medical evidence of record was insufficient to establish greater than the 23 percent permanent impairment of the right upper extremity previously awarded.

Appellant appealed to the Board.

By decision dated October 4, 2021, the Board set aside the May 20, 2020 OWCP decision. It remanded the case for OWCP to request that the DMA explain whether his calculation of 19 percent permanent impairment of the right upper extremity duplicated the prior right upper extremity impairment rating and whether appellant had established an additional permanent impairment based on new exposure.[6]

On December 10, 2021 OWCP requested that Dr. Slutsky, the DMA, provide a supplemental report, which explained how appellant's current right upper extremity permanent impairment duplicated the prior award and comment on whether appellant was entitled to additional schedule award.

In a December 24, 2021 report, Dr. Slutsky indicated that he had reviewed the SOAF and medical records provided. He noted that appellant's claim was accepted for right shoulder rotator cuff tear. In response to OWCP's questions, Dr. Slutsky indicated that he was not provided with the October 4, 2021 Board decision. He also reported that he was not provided with a breakdown of appellant's previous 23 percent permanent impairment of the right upper extremity or the previous DMA report, which showed how the calculations were performed. Dr. Slutsky calculated that appellant had 19 percent permanent impairment of the right upper extremity for loss of range of motion of his right shoulder. He reiterated that, since appellant was previously granted a schedule award for 23 percent permanent impairment of the right upper extremity, he was not entitled to an additional award.

On January 26, 2022 OWCP forwarded the October 4, 2021 Board decision and June 3, 2005 DMA report to Dr. Slutsky and requested that he provide a supplemental report explaining how appellant's current right upper extremity permanent impairment rating duplicated the prior right upper extremity permanent impairment.

In a February 12, 2022 report, Dr. Slutsky explained that he had considered the February 14, 2018 x-ray scan in his previous impairment rating and that the most impairing diagnosis was still full thickness rotator cuff tear. He also indicated that he did not "know what is meant by duplicated." Dr. Slutsky reported that the A.M.A., *Guides* only allowed one rating for

[6] *Supra* note 2.

rotator cuff and that the most impairing rotator cuff in this case was for full thickness rotator cuff tear. He indicated that appellant had 19 percent permanent impairment of the right upper extremity under the ROM rating method and 7 percent permanent impairment of the right upper extremity under the DBI rating method. Dr. Slutsky reiterated that, since appellant had a prior schedule award for 23 percent permanent impairment of the right upper extremity for his right shoulder, he was not entitled to an additional schedule award.

By decision dated February 25, 2022, OWCP denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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. 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 and the Board has concurred in such adoption.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[10]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of the default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX).[12] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[13]

The A.M.A., *Guides* also provide that the ROM impairment is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[11] A.M.A., *Guides* 405-12; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[12] *Id*. at 411.

[13] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

based sections are applicable.[14] 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.[15] 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.[16]

Regarding the application of ROM or DBI impairment 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.,] *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).[17]

The Bulletin further advises:

> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allows 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."[18]

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.[19]

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

[15] *Id.* at 473.

[16] *Id.* at 474.

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

[18] *Id.*

[19] *See supra* note 10 at Chapter 2.808.6f (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[20]

ANALYSIS

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

In its prior decision, the Board remanded the case for OWCP to obtain a supplemental report from Dr. Slutsky explaining how appellant's current right upper extremity impairment rating of 19 percent permanent impairment of the right upper extremity duplicated the prior 23 percent permanent impairment of the right upper extremity. In a February 12, 2022 report, Dr. Slutsky explained that he did not "know what is meant by duplicated." He determined that, according to the A.M.A., *Guides*, appellant had 19 percent permanent impairment of the right upper extremity due to loss of ROM of his right shoulder. Dr. Slutsky reiterated that, since appellant had a prior schedule award for 23 percent permanent impairment of the right upper extremity for his right shoulder, he was not entitled to an additional schedule award.

The Board finds, however, that the DMA did not provide sufficient explanation in his December 24, 2021 and February 12, 2022 reports as to why appellant was not entitled to an increased schedule award for his right upper extremity. The Board has held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim.[21] The issue is not whether the current permanent impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.[22] Dr. Slutsky did not discuss the additional medical conditions contained in the prior impairment rating, nor explain how the impairment calculations contained in the previous June 3, 2005 DMA report duplicated his current impairment calculations. The case must, therefore, be remanded for further development.[23] On remand OWCP shall refer appellant to a new DMA for a proper review in order to analyze appellant's entitlement to an additional schedule award for his accepted right upper extremity conditions. The DMA should discuss the impairment rating from appellant's previous schedule award and explain how appellant's current right upper extremity impairment rating duplicated the prior right upper extremity impairment rating, particularly when the previous impairment rating included ratings that were not based on the same accepted conditions. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

[20] 20 C.F.R. § 10.404(d); *see S.M.*, Docket No. 17-1826 (issued February 26, 2018); *T.S.*, Docket No. 16-1406 (issued August 9, 2017); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

[21] *See D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

[22] *Id*.

[23] *M.F.*, Docket No. 20-1434 (issued April 26, 2021).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2022 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: November 1, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board