

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

S.C., Appellant	)	
	)	
and	)	Docket No. 21-0724
	)	Issued: September 14, 2022
DEPARTMENT OF THE AIR FORCE,	)	
78 LOGISTICS READINESS SQUADRON,	)	
ROBINS AIR FORCE BASE, GA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 14, 2021 appellant filed a timely appeal from January 13 and 14, 2021 merit decisions and March 16 and 19, 2021 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than nine percent permanent impairment of his left upper extremity, for which he previously received

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the March 19, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.*

schedule award compensation; (2) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2018, as he no longer had disability or residuals causally related to his accepted March 30, 2016 employment injury; (3) whether appellant has met his burden of proof to establish continuing disability or residuals on or after September 21, 2018 causally related to the accepted employment injury; and (4) whether OWCP properly denied appellant's requests for reconsideration of the merits of its termination determination, pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On April 7, 2016 appellant, then a 50-year-old fuel distribution system worker, filed a traumatic injury claim (Form CA-1) alleging that on March 30, 2016 he sustained left knee and left shoulder injuries when he tripped over a dike containment wall and fell on his hands and left knee while in the performance of duty. OWCP accepted his claim for laceration of muscles/tendons of the left shoulder rotator cuff, and left shoulder joint sprain. Appellant stopped work and OWCP paid him wage-loss compensation for disability from work on the supplemental rolls commencing May 15, 2016 and on the periodic rolls commencing August 21, 2016.

On October 18, 2016 and September 26, 2017 Dr. Jeffrey C. Easom, an osteopath and Board-certified orthopedic surgeon, performed OWCP-authorized left rotator cuff repair surgeries. In a January 29, 2018 report, he noted that appellant's left shoulder examination showed no deformity, swelling, ecchymosis, or atrophy. There was mild crepitus with direct palpation of the left shoulder and strength testing was 5/5 in all muscle groups tested.

OWCP then referred appellant, along with a statement of accepted facts and a series of questions, for a second opinion examination with Dr. Jeffrey A. Fried, a Board-certified orthopedic surgeon. It requested that he provide an opinion regarding whether appellant had disability or residuals related to his accepted March 30, 2016 employment injury.

In an April 4, 2018 report, Dr. Fried discussed appellant's factual and medical history and reported his physical examination findings. He cited range of motion (ROM) figures for the left shoulder and noted that there was no instability or deformity of the left shoulder. Dr. Fried indicated that both the strength of appellant's shoulders and his cervical spine motion were good. He concluded that the objective findings on examination corresponded with the subjective findings and opined that appellant's left rotator cuff tear was now resolved, following surgical repair with resulting full ROM and good strength. Based on the examination and review of the medical evidence, Dr. Fried concluded that appellant was capable of returning to his date-of-injury job as a fuel distribution system worker without medical restrictions.

In a May 9, 2018 report, Dr. K. Scott Malone, a Board-certified orthopedic surgeon, determined that appellant had nine percent permanent impairment of his left upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup> For the left shoulder, he recorded one ROM measurement for each type of shoulder motion and utilized Table 15-34 (Shoulder Range of

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

Motion) on page 475 of the sixth edition of the A.M.A., *Guides* to find that appellant had nine percent permanent impairment under the ROM impairment rating method.

On May 7, 2018 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits because he ceased to have disability or residuals causally related to his accepted March 30, 2016 employment injury. It indicated that the weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Fried, the second opinion examiner. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed termination action.

On May 21, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award due to his accepted March 30, 2016 employment injury.

In a June 5, 2018 report, Dr. Nelson S. Haas, a Board-certified occupational medicine physician serving as an OWCP district medical adviser (DMA), determined that appellant had four percent permanent impairment of his left upper extremity under the sixth edition of the A.M.A., *Guides*. He opined that the ROM impairment rating method could not be utilized because Dr. Malone recorded only one ROM measurement, rather than three, for each type of shoulder motion. Dr. Haas obtained his impairment rating by utilizing the diagnosis-based impairment (DBI) rating method under Table 15-5 (Shoulder Regional Grid) on page 402 of the sixth edition of the of the A.M.A., *Guides*.

With respect to the termination matter, appellant submitted a copy of a letter to his union representative in which he described Dr. Fried's examination. He also submitted copies of medical records, which had previously been submitted to OWCP.

By decision dated September 21, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective the same date, because he ceased to have disability or residuals causally related to his accepted March 30, 2016 employment injury. It found that Dr. Fried's opinion constituted the weight of the medical opinion evidence.

By decision dated November 6, 2018, OWCP granted appellant a schedule award for four percent permanent impairment of his left upper extremity (left arm). The award ran for 12.48 weeks from September 21 through December 7, 2018.

OWCP requested that Dr. Malone provide a supplemental report that clarified the ROM findings. In a supplemental February 12, 2019 report, Dr. Malone advised that OWCP was missing the second page of his May 9, 2018 report. He utilized Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides* to find that appellant had nine percent permanent impairment under the ROM rating method. Dr. Malone also utilized Table 15-5 (Shoulder Regional Grid) on page 402 of the sixth edition of the A.M.A., *Guides* to determine that appellant had five percent permanent impairment utilizing the DBI rating method. He concluded that, given the higher rating under the ROM rating method, appellant had nine percent permanent impairment of the left upper extremity.

On July 5, 2019 appellant requested reconsideration of OWCP's September 21, 2018 termination decision and submitted several reports of attending physicians. By decision dated October 2, 2019, OWCP denied modification of the September 2, 2018 decision.

In an October 28, 2019 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as DMA, agreed with Dr. Malone's February 12, 2019 determination that, under the ROM rating method, appellant had nine percent permanent impairment of the left upper extremity. He found that appellant reached maximum medical improvement (MMI) on May 9, 2018, the date of Dr. Malone's last examination.

By decision dated November 13, 2019, OWCP granted appellant increased schedule award compensation for five percent permanent impairment of the left upper extremity (left arm) for a total award of nine percent permanent impairment of the left upper extremity (left arm).<sup>4</sup>

On November 25, 2019 appellant requested reconsideration of the November 13, 2019 schedule award decisions. He submitted several letters in which he argued that he was entitled to increased schedule award compensation. By decision dated January 24, 2020, OWCP denied appellant's request for reconsideration of the merits of OWCP's schedule award decision, pursuant to 5 U.S.C. § 8128(a).

On June 26, 2020 appellant again requested reconsideration of OWCP's schedule award decision, arguing that he was entitled to increased schedule award compensation. By decision dated January 13, 2021, OWCP denied modification of its November 13, 2019 schedule award decision.

On June 26, 2020 appellant also requested reconsideration of OWCP's termination decision. He submitted several letters in which he argued that his wage-loss compensation should not have been terminated. By decision dated January 14, 2021, OWCP denied modification of its September 21, 2018 termination determination.

On March 9, 2021 appellant requested reconsideration of OWCP's January 14, 2021 termination decision and submitted several statements in support of his request. By decision dated March 16, 2021, OWCP denied his March 9, 2021 request for reconsideration of the merits of its termination determination, pursuant to 5 U.S.C. § 8128(a).

On March 17, 2021 appellant again requested reconsideration of OWCP's January 14, 2021 termination decision and submitted several statements in support of his request. By decision dated March 19, 2021, OWCP denied his March 17, 2021 request for reconsideration of the merits of its termination decision, pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA,<sup>5</sup> and its implementing federal 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For

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<sup>4</sup> Under a separate decision dated November 13, 2019, OWCP vacated its November 6, 2018 decision.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

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.<sup>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

With respect to calculating impairment under the DBI method for the right shoulder, reference is made to Table 15-5 (Shoulder Regional Grid).<sup>9</sup> Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating.<sup>10</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>11</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:

“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.)<sup>12</sup>

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 [claims examiner].<sup>13</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

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<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> See A.M.A., *Guides* 401-05, Table 15-5.

<sup>10</sup> *Id.* at 401-05, 475-78.

<sup>11</sup> FECA Bulletin No. 17-06 (issued May 8, 2017).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also *H.H.*, Docket No. 19-1530 (issued June 26, 2020); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

percentage of impairment in accordance with the A.M.A., [*Guides*], with the DMA providing rationale for the percentage of impairment specified.”<sup>14</sup>

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 class of diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>15</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than nine percent permanent impairment of his left upper extremity for which he previously received schedules award compensation.

In a February 12, 2019 report, Dr. Malone determined that appellant had nine percent permanent impairment of his left upper extremity. He utilized Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides* to find that appellant had nine percent permanent impairment under the ROM rating method. Dr. Malone also utilized Table 15-5 on page 402 of the sixth edition of the of the A.M.A., *Guides* to determine that appellant had five percent permanent impairment of the DBI rating method. He concluded that, given the higher rating under the ROM rating method, appellant had nine percent permanent impairment of the left upper extremity.<sup>16</sup> In an October 28, 2019 report, Dr. Harris, OWCP’s DMA, agreed with Dr. Malone’s February 12, 2019 determination that, under the ROM rating method, appellant had nine percent permanent impairment of the left upper extremity. He found that appellant reached MMI on May 9, 2018 the date of Dr. Malone’s last examination. Appellant has not submitted probative medical evidence demonstrating that he has greater than nine percent permanent impairment of the left upper extremity. Therefore, OWCP properly denied his claim for increased schedule award compensation.

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.

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<sup>14</sup> *Supra* note 9 at Chapter 2.808.6(f); *P.W.*, Docket No. 19-1493 (issued August 12, 2020).

<sup>15</sup> See A.M.A., *Guides* (6<sup>th</sup> ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using Section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

<sup>16</sup> See *supra* note 14.

## LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>17</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>18</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>19</sup>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2018.

In an April 4, 2018 report, Dr. Fried discussed appellant's factual and medical history and reported the findings of his physical examination. He cited ROM figures for the left shoulder and noted that there was no instability or deformity of the left shoulder. Dr. Fried indicated that both the strength of appellant's shoulders and his cervical spine motion were good. He concluded that the objective findings on examination corresponded with the subjective findings and opined that appellant's left rotator cuff tear was now resolved, following surgical repair with resulting full ROM and good strength. Based on the examination and review of the medical evidence, Dr. Fried concluded that appellant was capable of returning to his date-of-injury job as a fuel distribution system worker without medical restrictions.

The Board finds that Dr. Fried did not provide adequate medical rationale in support of his opinion that appellant ceased to have disability or residuals due to his March 30, 2016 employment injury. Dr. Fried opined that appellant's left rotator cuff tear had resolved, but he did not sufficiently discuss the medical findings of record to explain when and/or how the condition had resolved and no longer caused disability. In addition, he did not provide any discussion regarding whether appellant's accepted left shoulder joint sprain had resolved or otherwise ceased to cause disability from work. For these reasons, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 21, 2018.<sup>20</sup>

## CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than nine percent permanent impairment of his left upper extremity for which he previously received schedule award compensation. The Board further finds that OWCP failed to meet its burden of

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<sup>17</sup> *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>18</sup> *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>19</sup> *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>20</sup> In light of the Board's disposition of Issue 2, Issues 3 and 4 are rendered moot.

proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2018.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 13, 2021 decision of Office of Workers' Compensation Programs is affirmed. The January 14, 2021 decision of Office of Workers' Compensation Programs is reversed. The March 16 and 19, 2021 decisions of the Office of Workers' Compensation Programs are set aside as moot.

Issued: September 14, 2022  
Washington, DC

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

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

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