

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

S.F., widow of J.F., Appellant	)	
	)	
and	)	Docket No. 22-0982
	)	Issued: April 3, 2023
U.S. POSTAL SERVICE, POST OFFICE,	)	
Houma, LA, 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  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 14, 2022 appellant filed a timely appeal from a January 6, 2022 merit decision 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.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 1, 2001 the employee, then a 54-year-old full-time letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained neck and right shoulder injuries on that date when a string attached along a property line caused him to fall on his right shoulder while in the performance of duty. OWCP accepted the claim for neck sprain and right shoulder tendinitis. Subsequently, it accepted that he sustained a recurrence of disability on December 31, 2001 causally related to his accepted December 1, 2001 employment injury.

On March 16, 2017 the employee filed a claim for compensation (Form CA-7) for a schedule award.

OWCP, by development letter dated March 21, 2017, informed the employee of the deficiencies of his schedule award claim. It advised him of the type of medical evidence necessary to establish his claim and provided 30 days for him to submit the requested evidence.

In response, OWCP received an April 7, 2017 medical report from Dr. Rima El-Abassi, an attending Board-certified clinical neurophysiologist, who noted that in 2005 the employee underwent C5-6, C6-7 anterior cervical discectomy and fusion due to central canal stenosis. Dr. El-Abassi examined the employee, and diagnosed cervical stenosis with myelopathy. She rated the employee's upper extremities under the diagnosis-based impairment (DBI) rating method in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> and opined that he had 24 percent combined permanent impairment of the upper extremities which represented 14 percent whole person permanent impairment due to a diagnosis of cervical stenosis with upper extremity peripheral nerve impairment impacting strength and range of motion (ROM) (brachial plexus impairment C5 through C8, and T1). Additionally, Dr. El-Abassi rated permanent impairment of the employee's upper extremities under the ROM rating method, and opined that he had 20 percent combined permanent impairment of the upper extremities which represented 12 percent whole person permanent impairment. She concluded, that because the DBI method impairment rating was higher, the employee had 24 percent combined permanent impairment of the upper extremities. Further, Dr. El-Abassi noted that he had hereditary spastic paraplegia (HSP), and was chronically disabled by his condition. The employee also had a cervical strain with irreversible weakness in the upper extremities.

On May 18, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the medical record, including Dr. El-Abassi's April 17, 2017 report. He disagreed with her permanent impairment ratings. Dr. Katz noted that the DBI impairment rating was not supported by the

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<sup>2</sup> Docket No. 19-0922 (issued October 4, 2019).

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

accepted condition in the claim. He also noted that Dr. El-Abassi did not utilize *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), Proposed Tables One and Two<sup>4</sup> to determine bilateral upper extremity impairment. The DMA further noted that as the sole cervical spine accepted diagnosis of neck sprain, was a self-limited diagnosis, it was unclear if, in fact, the 2005 cervical fusion was authorized under the employee's claim. He recommended a second opinion evaluation.

On July 11, 2017 Dr. Christopher E. Cenac, Sr., a Board-certified orthopedic surgeon serving as a second opinion physician, opined that the employee had no permanent impairment causally related to his accepted December 1, 2001 employment injury.

On September 14, 2017 the DMA, Dr. Katz, reviewed Dr. Cenac's July 11, 2017 report and agreed with his finding of no employment-related permanent impairment. He determined that the employee had zero percent permanent impairment of the right and left upper extremities under the DBI rating method. Further, utilizing *The Guides Newsletter*, the DMA determined that he had zero percent permanent impairment of the cervical spine. He advised that the medical evidence of record was insufficient to render an impairment rating under the ROM rating method because the medical record did not contain three independent ROM measurements of each arc with the greatest ROM used for the determination of impairment. The DMA explained that a complete arc of motion was not supplied in all planes for which impairment may be rated per the ROM impairment table. He concluded that maximum medical improvement (MMI) was reached on July 10, 2017, the date of Dr. Cenac's impairment evaluation.

In an undated letter, Dr. El-Abassi advised that the employee was disabled due to his preexisting genetic disorder, HSP, superimposed by the consequences of the "MVC" and his cervical strain that required surgery. She reiterated her earlier evaluation findings regarding his disability status.

By decision dated December 13, 2017, OWCP denied the employee's schedule award claim. It found that the medical evidence of record was insufficient to establish that he had sustained permanent impairment of a scheduled member or function of the body.

On October 15, 2018 the employee requested reconsideration. He asserted that the opinions of Dr. Katz and Dr. Cenac could not represent the weight of the medical evidence as the physicians were given insufficient and inaccurate information. The employee further asserted that the SOAF failed to provide information regarding his recurrence of disability.

By decision dated December 19, 2018, OWCP denied modification of its December 13, 2017 decision. It found that the employee did not submit any additional medical evidence providing a permanent impairment rating under the A.M.A., *Guides*. OWCP further found that the weight of the medical evidence remained with the opinions of Dr. Katz and Dr. Cenac based on the correct evidence of record.

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<sup>4</sup> Table 1 and Table 2, *The Guides Newsletter*.

The employee, through counsel, appealed to the Board on March 26, 2019. By decision dated October 4, 2019, the Board set aside the December 19, 2018 decision.<sup>5</sup> The Board determined that Dr. El-Abassi had not obtained three independent ROM measurements prior to determining the extent of impairment in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06.<sup>6</sup> The Board remanded the case for OWCP to obtain three independent ROM measurements for each shoulder pursuant to FECA Bulletin No. 17-06, to be followed by a *de novo* decision regarding the employee's schedule award claim.

On March 11, 2020 OWCP requested that Dr. El-Abassi provide a new impairment rating in accordance with the sixth edition of the A.M.A., *Guides*, including three measurements for each type of ROM based on the standards of FECA Bulletin No. 17-06, due to the age of the prior impairment rating. It afforded her 30 days to respond.

On May 29, 2020 OWCP sent a second request regarding the employee's permanent impairment rating to Dr. El-Abassi. No response was received.

By letter dated August 25, 2020, OWCP referred the employee, along with a SOAF, the medical record, and a series of questions, to Dr. Simon Finger, a Board-certified orthopedic surgeon, for a second opinion.

In an October 22, 2020 report, Dr. Finger noted his review of the SOAF and medical record. On examination, he found that active and passive ROM of the bilateral shoulders was symmetric. Dr. Finger specifically reported flexion of 160 degrees bilaterally; extension of 40 degrees bilaterally; abduction of 160 degrees bilaterally; adduction of 30 degrees bilaterally; internal rotation of 45 degrees bilaterally; and external rotation of 50 degrees bilaterally. He noted that these ROM measurements were taken while the employee was on a stretcher, because he was unable to stand or be seated due to his other conditions. Dr. Finger further noted that the ROM measurements may have been affected by the stretcher. He advised that his documented ROM measurements were normal under the sixth edition of the A.M.A., *Guides*, as they were symmetric and equal on both the injured and uninjured side. Therefore, Dr. Finger concluded that the employee had no bilateral upper extremity ROM permanent impairment.

On December 16, 2020 OWCP again referred the record to Dr. Katz. It requested that he review Dr Finger's October 22, 2020 report, and provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*. On December 17, 2020 Dr. Katz determined that the employee had a two percent DBI permanent impairment rating for the right upper extremity based upon his accepted condition of right shoulder tendinitis. He also concurred that the employee had

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> FECA Bulletin No. 17-06 (issued May 8, 2017).

a zero percent permanent impairment rating based upon his ROM findings. Dr. Katz concluded that MMI was reached on October 22, 2020, the date of Dr. Finger's impairment evaluation.<sup>7</sup>

On November 30, 2021 OWCP requested that Dr. Morley Slutsky, a physician Board-certified in occupational medicine serving as a DMA, review the medical record, including the October 22, 2020 report of Dr. Finger, and provide an opinion regarding the employee's permanent impairment based on the sixth edition of the A.M.A., *Guides*.<sup>8</sup> In a December 10, 2021 report, Dr. Slutsky reviewed the SOAF and medical record, including Dr. Finger's October 22, 2020 findings. He indicated that Dr. Finger provided invalid upper extremity ROM measurements. The DMA advised that Dr. Finger documented only one motion per joint movement, which was not consistent with the validity criteria in section 15.7, page 464 of the A.M.A., *Guides* for measuring ROM. He related that Dr. Finger needed to provide 18 shoulder measurements (three measurements for each of the six shoulder motions), and show that these measurements met the A.M.A., *Guides* criteria. As such, the DMA concluded that Dr. Finger's ROM measurements were not valid for impairment calculations. Additionally, he noted that a DBI impairment rating could not be calculated because Dr. Finger did not provide any other clinical findings related to the right shoulder. The DMA concluded that the employee had reached MMI on July 10, 2017, the date of Dr. Cenac's impairment evaluation.

By decision dated January 6, 2022, OWCP denied appellant's claim for a schedule award, finding that the medical evidence of record was insufficient to establish that the employee had sustained permanent impairment of a scheduled member or function of the body.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>9</sup> and its implementing federal regulations,<sup>10</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 consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted

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<sup>7</sup> On June 14, 2021 the employee's wife informed OWCP that the employee died on May 11, 2021. On November 5, 2021 she submitted a death certificate confirming his death.

<sup>8</sup> On May 4, 2021 OWCP determined that the case should be referred to the DMA, Dr. Slutsky, because it had used an improper referral memorandum, an old referral memorandum, when it previously referred the case to the DMA, Dr. Katz.

<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>11</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>12</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.<sup>13</sup> In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity, even though the cause of the impairment originated in the spine.<sup>14</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.<sup>15</sup> The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.<sup>16</sup> In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>17</sup>

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX) condition, which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).<sup>18</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>19</sup>

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<sup>11</sup> *Id.* at § 10.404(a).

<sup>12</sup> 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 3.700.2 and Exhibit 1 (January 2010).

<sup>13</sup> *See B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>14</sup> *J.M., id.*; *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>15</sup> *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *see also supra* note 12 at Chapter 3.700, Exhibit 1, n.5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>16</sup> *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

<sup>17</sup> *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>18</sup> A.M.A., *Guides* 383-492.

<sup>19</sup> *Id.* at 411.

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. 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 combined.<sup>20</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>21</sup>

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).

“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.*”<sup>22</sup> (Emphasis in the original.)

A claimant has the burden of proof under FECA to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury entitling him or her to a schedule award.<sup>23</sup> Before the A.M.A., *Guides* can be utilized, a description of impairment must be obtained from his or her 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.<sup>24</sup>

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<sup>20</sup> *Id.* at 473.

<sup>21</sup> *Id.* at 473-74.

<sup>22</sup> FECA Bulletin No. 17-06 (issued May 8, 2017); A.G., Docket No. 18-0329 (issued July 26, 2018).

<sup>23</sup> See M.G., Docket No. 19-0823 (issued September 17, 2019); D.F., Docket No. 18-1337 (issued February 11, 2019); Tammy L. Meehan, 53 ECAB 229 (2001).

<sup>24</sup> K.F., Docket No. 18-1517 (issued October 9, 2019); A.T., Docket No. 18-0864 (issued October 9, 2018).

Section 8109(a) of FECA provides that if an individual has sustained disability compensable under section 8107(a), has filed a valid claim in his lifetime, and dies from a cause other than the injury before the end of the period specified by the schedule, the compensation specified by the schedule that is unpaid at his death, whether or not accrued or due at his death, shall be paid, under an award made before or after the death and for the period specified by the schedule, to designated surviving beneficiaries.<sup>25</sup>

OWCP's procedures further provide that, if at the time of the claimant's death a schedule award claim is being developed, but has not yet been paid, the claimant's dependent(s) would be entitled to the entire payment of the award.<sup>26</sup>

### ANALYSIS

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

On August 25, 2020, OWCP referred the employee to Dr. Finger for a second opinion examination for the purpose of ascertaining the extent of permanent impairment due to his accepted neck sprain and right shoulder tendinitis. In a report dated October 22, 2020, Dr. Finger provided a set of normal active and passive ROM measurements for the bilateral shoulders. He opined that the employee had no bilateral shoulder ROM permanent impairment according to the sixth edition of the A.M.A., *Guides*.

OWCP properly routed Dr. Finger's report to the DMA, Dr. Slutsky.<sup>27</sup> In a December 10, 2021 report, Dr. Slutsky noted that Dr. Finger's report only contained one set of ROM measurements of the employee's bilateral shoulders rather than three measurements for the bilateral shoulder ROM and, as such, the ROM measurements were invalid for impairment calculations.<sup>28</sup> He also noted that an impairment rating under the DBI rating method could not be calculated because Dr. Finger did not provide any other clinical findings related to the right shoulder.

Pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, after review of the DBI rating, and the ROM findings are incomplete, the DMA should

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<sup>25</sup> 5 U.S.C. § 8109(a).

<sup>26</sup> *Supra* note 12 at Chapter 2.808.7(a)(7) (February 2013); *see also* C.B., Docket No. 20-0994 (issued August 9, 2021).

<sup>27</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. *See* Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.808.6(f) (March 2017). *See* K.W., Docket No. 22-0320 (issued July 28, 2022); K.R., Docket No. 21-0247 (issued February 25, 2022); J.J., Docket 18-1615 (issued March 5, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>28</sup> A.M.A., *Guides* 464.



advise regarding the medical evidence necessary to complete the ROM method of rating if the medical evidence of record is insufficient to rate the employee's impairment using ROM.<sup>29</sup>

In this case, OWCP failed to follow the Board's instructions on remand, including the directive to follow the procedures outlined in FECA Bulletin No. 17-06, after the DMA advised that the ROM measurements for the bilateral shoulders provided by Dr. Finger were incomplete and, thus, there was insufficient documentation to rate the employee's permanent impairment utilizing the ROM methodology.<sup>30</sup> OWCP also did not seek to obtain further clinical findings to clarify a DBI permanent impairment rating for the employee's accepted right shoulder tendinitis, while he was still alive.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>31</sup> Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. While it undertook development of the evidence, it failed to refer the employee for supplemental opinion clarifying the deficiencies noted by the Board and Dr. Slutsky.

The case must, therefore, be remanded for further development.<sup>32</sup> On remand, OWCP shall refer the case record to a physician in the appropriate field of medicine for an opinion on permanent impairment, applying the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* to all existing medical findings.<sup>33</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding the employee's schedule award claim.

### CONCLUSION

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

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<sup>29</sup> See *C.R.*, Docket No. 21-1265 (issued March 23, 2022); *J.L.*, Docket No. 19-1684 (issued November 20, 2020); *R.L.*, Docket No. 19-1793 (issued August 7, 2020); *E.P.*, Docket No. 19-1708 (issued April 15, 2020).

<sup>30</sup> See *C.R.*, *id.*; *C.H.*, Docket No. 20-0529 (issued June 16, 2021); *J.L.*, *R.L.*, *id.*; *C.T.*, Docket No. 18-1716 (issued May 16, 2019).

<sup>31</sup> See *T.C.*, Docket No. 19-0771 (issued March 17, 2021); *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

<sup>32</sup> *T.C.*, *id.*; *X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

<sup>33</sup> As a physical examination cannot be conducted now that the employee is deceased, OWCP shall forward all available medical records regarding the employee's permanent impairment to the referral physician and request an impairment rating based upon information contained in the medical records. See *C.B.*, *supra* note 26; *P.R.*, (*N.R.*), Docket No. 19-1313 (issued August 11, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 6, 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: April 3, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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