

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

M.A., Appellant	)	
	)	
and	)	Docket No. 22-1112
	)	Issued: April 24, 2023
U.S. POSTAL SERVICE, PAHRUMP POST	)	
OFFICE, Pahrump, NV, 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 July 18, 2022 appellant filed a timely appeal from a March 4, 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.<sup>2</sup>

---

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

<sup>2</sup> The Board notes that following the March 4, 2022 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

## ISSUE

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

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</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 31, 2015 appellant, then a 53-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained a left shoulder injury when carrying a package while in the performance of duty. OWCP accepted her claim for rotator cuff tear of the left shoulder and later expanded the acceptance of her claim to include adhesive capsulitis of the left shoulder. On March 3, 2016 appellant underwent OWCP-approved left shoulder arthroscopy for rotator cuff tear, impingement syndrome, and tear of the labrum. She stopped work and OWCP paid her compensation on the supplemental rolls from March 3 through 25, 2016. On December 15, 2016 appellant underwent OWCP-approved arthroscopic left shoulder surgery with subacromial decompression, arthroscopic rotator cuff repair, and debridement of labrum of left shoulder. OWCP again paid her wage-loss compensation on the supplemental rolls from December 15 through 19, 2016.

On October 17, 2017 OWCP prepared a statement of accepted facts (SOAF), in which it noted that, in addition to this present claim, appellant had sustained a June 24, 2007 traumatic right shoulder injury, accepted under OWCP File No. xxxxxx260, for right shoulder impingement and a right rotator cuff tear.

On October 25, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On February 21, 2018 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of the permanent impairment of her left upper extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup>

In his April 24, 2018 report, Dr. Swartz discussed appellant's medical history and provided findings on physical examination. He noted that she sustained a left rotator cuff tear on December 31, 2005 as a result of an employment-related injury, and that she had sustained a right rotator cuff tear on June 24, 2007 due to another employment-related injury. Dr. Swartz advised that range of motion (ROM) of appellant's shoulders were measured in three trials. He recorded

---

<sup>3</sup> Docket No. 19-1732 (issued September 9, 2020).

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

the average measurements and findings regarding ROM of the left shoulder, pursuant to Table 15-34, page 475 of the sixth edition of the A.M.A., *Guides*. Dr. Swartz combined his findings to equate to 10 percent permanent impairment. He noted that appellant's grade modifier for functional history (GMFH) was 1 and that her *QuickDASH* score of 40 confirmed the grade modifier of 1. Thus, Dr. Swartz' final rating was 10 percent permanent impairment of the left upper extremity, pursuant to the ROM methodology and Table 35, page 477 of the A.M.A., *Guides*. He reported that the diagnosis-based impairment (DBI) rating method would utilize an impairment class for rotator cuff injury full-thickness tear or impingement syndrome. Dr. Swartz explained, however, that while there was residual loss of function in the left shoulder, the DBI methodology could not be used as examination findings revealed "abnormal motion."

On September 17, 2018 Dr. Herbert White, a Board-certified occupational medicine specialist serving as an OWCP district medical adviser (DMA), reviewed Dr. Swartz' report and the medical evidence of record in order to evaluate the nature and extent of appellant's permanent partial impairment due to her complete rotator cuff tear or rupture of the left shoulder. Utilizing the DBI method for the diagnosis of full-thickness rotator cuff tear, Dr. White calculated seven percent permanent impairment of the left upper extremity. He assigned the class of diagnosis (CDX), full-thickness rotator cuff tear, a Class 1 impairment for mild objective findings, pursuant to Table 15-5, page 403 of the sixth edition of the A.M.A., *Guides*. Dr. White found that the GMFH was 1, for a *QuickDASH* score of 40 at Table 15-7, page 406; the grade modifier for physical examination (GMPE) was 2 for moderate tenderness and mild ROM decreases pursuant to Table 15-8, page 408 and Table 15-34, page 475; and the grade modifier for clinical studies (GMCS) was 2, pursuant to Table 15-9, page 410. He applied the net adjustment formula and explained that the default impairment at Class 1 grade C was five percent pursuant to Table 15-5, page 403. The net adjustment formula would move the impairment up two grades to grade E for seven percent permanent impairment. Then, utilizing the ROM methodology, he calculated six percent permanent impairment of the left upper extremity. Dr. White explained that he utilized Table 15-34, page 475 for rating loss of ROM of the left shoulder. He then noted that the DBI methodology should be used as it provided the higher rating percentage of permanent impairment. Dr. White also commented on the report from Dr. Swartz, who he noted had calculated 10 percent permanent impairment utilizing the ROM methodology. He indicated that, while he calculated only six percent permanent impairment, the values differed because Dr. Swartz had not compared the ROM findings to the unaffected right shoulder motions. Dr. White referenced page 461 of the A.M.A., *Guides* which provides: "[i]f the opposite extremity is neither involved nor previously injured, it must be used to define normal for that individual; any losses should be made in comparison to the opposite normal extremity." He concluded that the final impairment rating was seven percent based on the DBI methodology.

On December 6, 2018 OWCP requested that Dr. Swartz review Dr. White's September 17, 2018 report, which differed from his calculation of permanent impairment. It requested that he provide a supplemental report with his opinion as to the percentage of appellant's permanent impairment. Dr. Swartz did not respond.

By decision dated July 2, 2019, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. The period of the award ran for 21.84 weeks for the period from April 24 through September 23, 2018. OWCP found that Dr. White, the DMA, determined that Dr. Swartz had incorrectly applied the A.M.A., *Guides* to the

examination findings. It found, therefore, that the weight of the medical evidence regarding the percentage of permanent impairment rested with Dr. White as he had correctly applied the A.M.A., *Guides* to the examination findings.

On March 19, 2020 Dr. Randall Yee, a Board-certified orthopedic surgeon, performed OWCP-authorized left shoulder surgery, including arthroscopy with subacromial decompression and lysis of adhesions.

Appellant appealed to the Board and, by decision dated September 9, 2020,<sup>5</sup> the Board set aside OWCP's July 2, 2019 decision, finding deficiencies in the schedule award evaluations of record. The Board remanded the case for OWCP to refer appellant for another second opinion evaluation. The Board instructed that the referral physician determine whether appellant has loss of ROM of the right shoulder from her accepted employment injury and, if so, to obtain ROM findings based upon three ROM trials of the left shoulder. If appellant has no loss of ROM of the right shoulder from the accepted employment injury, the second opinion examiner should provide ROM findings comparing the ROM loss of the left shoulder to the right shoulder. The Board further instructed that the referral physician determine appellant's entitlement to a schedule award utilizing the DBI methodology. Thereafter, OWCP was to refer the record to a new DMA for review and, following any further development as deemed necessary, issue a *de novo* decision.

On February 22, 2021 OWCP referred appellant, along with the case record and an updated SOAF, for a second opinion examination with Dr. Brandon L. Snead, a Board-certified physiatrist. It requested that he evaluate the permanent impairment of appellant's left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*, as directed by the Board in its September 9, 2020 decision.

In a March 15, 2021 report, Dr. Snead discussed appellant's factual and medical history and reported the findings of his physical examination. He indicated that the diagnosis of complete rotator cuff tear/rupture of the left shoulder was related to the December 31, 2015 employment injury. Dr. Snead performed a DBI rating of the left upper extremity under Table 15-5 beginning on page 401 of the sixth edition of the A.M.A., *Guides* and concluded that appellant had seven percent permanent impairment under this method. He also performed a ROM rating of the left upper extremity under Table 15-34 on page 475 and concluded that appellant had 14 percent permanent impairment under this method. However, Dr. Snead further noted that maximum medical improvement (MMI) had not occurred based on the information available to him. He indicated that appellant was scheduled for a surgical procedure on April 12, 2021, which she presently intended to undergo.

On April 12, 2021 Dr. Yee performed OWCP-authorized surgery, including left shoulder manipulation under anesthesia. He indicated in his surgery report that he removed significant scar tissue during the procedure.

On October 21, 2021 OWCP referred the case to Dr. Theresa Curzan, a Board-certified emergency medicine specialist serving as a DMA. It requested that she review Dr. Snead's March 15, 2021 permanent impairment evaluation, particularly with regard to his comments

---

<sup>5</sup> *Supra* note 3.

regarding MMI. In an October 28, 2021 report, Dr. Curzan indicated that appellant had 14 percent permanent impairment of her left upper extremity based on the ROM rating method, noting that this method produced a higher rating for permanent impairment than the DBI rating method. She indicated that MMI “is estimated at [March 15, 2021] because this was the date for which function of the left upper extremity was measured and used to calculate this impairment rating.”

On February 9, 2023 OWCP requested that Dr. Curzan provide clarification of her October 28, 2021 report with respect to the question of MMI. In a February 16, 2022 addendum, she indicated that appellant had additional left shoulder surgery performed by Dr. Yee on April 12, 2021 to improve her underlying left upper extremity impairment, and therefore MMI and the impairment ratings were nullified. Dr. Curzan advised that a new set of goniometric measurements of active ROM would be needed in order for ROM to be objectively determined. She indicated that any notes of record reflecting ROM after April 12, 2021 would not meet the criteria for the stand-alone ROM method of rating impairment. Dr. Curzan noted that there was no report from Dr. Yee that appellant was at MMI. She indicated that Dr. Yee’s last note showed that appellant was still receiving injections to improve ROM. Dr. Curzan advised that, therefore, MMI could not be established at the present time.

By decision dated March 4, 2022, OWCP determined that appellant had not met her burden of proof to establish greater than seven percent permanent impairment of her left upper extremity, for which she previously received a schedule award. It found that, per the supplemental February 16, 2022 report of Dr. Curzan, the DMA, it was premature to calculate appellant’s left upper extremity permanent impairment because her left shoulder condition had not yet reached MMI.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>6</sup> and its implementing federal regulations,<sup>7</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 the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>8</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>9</sup>

---

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

Under FECA, MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>10</sup> The Board has held that a schedule award is not payable until MMI has been reached.<sup>11</sup>

### ANALYSIS

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

The Board finds that OWCP properly relied on the February 16, 2022 opinion of Dr. Curzan, the DMA, to determine that appellant did not meet her burden of proof to establish greater than seven percent permanent impairment of her left upper extremity, for which she previously received a schedule award. Dr. Curzan's opinion demonstrates that appellant had not reached MMI due to undergoing additional left shoulder surgery in April 2021 with associated post-surgery treatment and therefore a permanent impairment assessment could not be performed around that time.<sup>12</sup> Given these circumstances, appellant had not reached MMI because the physical condition of her injured left shoulder had not stabilized.<sup>13</sup>

In an October 28, 2021 report, Dr. Curzan reviewed a March 15, 2021 permanent impairment evaluation of Dr. Snead, an OWCP referral physician, and indicated that appellant had 14 percent permanent impairment of her left upper extremity with an MMI date of March 15, 2021.<sup>14</sup> However, in a supplemental February 16, 2022 report, she indicated that appellant had additional left shoulder surgery performed by Dr. Yee on April 12, 2021 to improve her underlying left upper extremity impairment, and therefore MMI and the impairment ratings were nullified. Dr. Curzan advised that a new set of goniometric measurements of active ROM would be needed in order for ROM to be objectively determined. She indicated that any notes of record reflecting ROM after April 12, 2021 would not meet the criteria for the stand-alone ROM method of rating impairment. Dr. Curzan noted that there was no report from Dr. Yee that appellant was at MMI. She indicated that Dr. Yee's last note showed that appellant was still receiving injections to improve ROM. Dr. Curzan advised that, therefore, MMI could not be established at the present time.

The Board finds that, in the absence of MMI having been reached, it was not possible to calculate permanent impairment.<sup>15</sup> As appellant has not established greater than seven percent

---

<sup>10</sup> See *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>11</sup> See *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

<sup>12</sup> See *id.*

<sup>13</sup> See *supra* note 10.

<sup>14</sup> The Board notes that, in his March 15, 2021 report, Dr. Snead indicated that MMI had not occurred based on the information available to him. He indicated that appellant was scheduled for a surgical procedure on April 12, 2021 which she presently intended to undergo.

<sup>15</sup> See *supra* note 11.

permanent impairment of the left upper extremity, for which she previously received a schedule award, the Board finds that she 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 permanent impairment.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 4, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2023  
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