

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

_____)	
B.B., Appellant)	
)	
and)	Docket No. 22-1230
)	Issued: April 7, 2023
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Rochester, NY, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 28, 2022 appellant filed a timely appeal from an April 19, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 19, 2022 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 12 percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On March 3, 2018 appellant, then a 60-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2018 he injured his right shoulder while in the performance of duty. He indicated that the injury occurred when he slipped and fell on an icy walkway. Appellant stopped work the day of injury and has not returned. OWCP accepted the claim for contusion of right hip, contusion of thorax, and complete rotator cuff tear or rupture of the right shoulder. It paid appellant wage-loss compensation on its supplemental rolls from April 17 through September 14, 2018. Appellant resigned from his position on July 1, 2019 and relocated to Florida.

On January 10, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated April 29, 2020, OWCP denied his claim for a schedule award as the evidence of file failed to demonstrate a measurable permanent impairment of a scheduled member or function of the body.

On November 1, 2021 appellant again filed a Form CA-7 for a schedule award.

In a development letter dated November 8, 2021, OWCP outlined the requirements for a medical report rating a permanent impairment of a scheduled member under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It requested that appellant present the letter to his treating physician.

On October 19, 2021 Dr. Cristina Demian, an occupational medicine specialist, co-signed an August 26, 2021 report from a nurse practitioner. She indicated that appellant reached maximum medical improvement (MMI) for his chronic right shoulder rotator cuff tear and that he had permanent work restrictions. Using the range of motion (ROM) methodology of the A.M.A., *Guides*, Dr. Demian opined that appellant had 12 percent permanent impairment and set forth her impairment calculation. The report contained only one set of right shoulder ROM findings.

On February 16, 2022 OWCP sent a statement of accepted facts (SOAF), a copy of the medical record, including Dr. Demain's October 19, 2021 report, to Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as OWCP's district medical adviser (DMA).

In a February 21, 2022 report, Dr. Hammel, the DMA, indicated that he reviewed the SOAF and appellant's medical records. He reported the accepted conditions as contusion of right hip, contusion of thorax, and complete rotator cuff tear or rupture of right shoulder, not specified as traumatic. Dr. Hammel opined that appellant attained MMI on August 26, 2021, the date of the impairment examination. Using the diagnosis-based impairment (DBI) methodology of the A.M.A., *Guides*, he indicated that the maximum rating for a full-thickness rotator cuff tear was

³ A.M.A., *Guides* (6th ed. 2009).

seven percent permanent impairment. Dr. Hammel concurred with Dr. Demian that appellant had 12 percent impairment under the ROM method of the A.M.A., *Guides*, noting that he came to the same calculation. He selected the ROM methodology as it yielded a greater result than the maximum value under the DBI methodology.

By decision dated April 19, 2022, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right upper extremity. The award ran for 37.44 weeks for the period August 26, 2021 to May 15, 2022.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁴ and its implementing federal regulation,⁵ 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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

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.⁸ The medical evidence must include a detailed description of the permanent impairment.⁹

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).

“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*

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁷ 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).

⁸ See *T.W.*, Docket No. 20-1547 (issued October 4, 2021).

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

impairment rating for the diagnosis in question, the method producing the higher rating should be used.” (Emphasis in the original.)

FECA Bulletin No. 17-06 further provides:

“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 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.”¹⁰

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.¹¹

ANALYSIS

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

On October 19, 2021 Dr. Demian co-signed an August 26, 2021 report evaluating appellant’s permanent impairment of the right upper extremity. As noted, FECA Bulletin No. 17-06 requires three independent measurements when evaluating a loss of ROM. However, there is no indication that Dr. Demian obtained triplicate ROM measurements on August 26, 2021.¹² As such, Dr. Demian’s October 19, 2021 report does not comply with the A.M.A., *Guides* and is of limited probative value.¹³

Furthermore, Dr. Hammel, upon reviewing Dr. Demian’s impairment report, indicated that he agreed with the August 26, 2021 permanent impairment evaluation that appellant had 12 percent permanent impairment to the right upper extremity based on the ROM method of the A.M.A., *Guides*. Without providing any calculations, he noted that he had come to the same calculated impairment under the ROM method during an independent analysis, and that it yielded a greater impairment than the DBI method of seven percent permanent impairment. As noted above, Dr. Demian’s impairment report does not comply with the A.M.A., *Guides* as there is no indication that he obtained triplicate ROM measurements on August 26, 2021. Pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, and the ROM findings

¹⁰ FECA Bulletin No. 17-06 (issued May 8, 2017).

¹¹ *B.T.*, Docket No. 22-0615 (issued September 16, 2022).

¹² *Supra* note 10; *B.T., id.*; *S.R.*, Docket No. 18-1307 (issued March 27, 2019).

¹³ *See S.R., id.*

are incomplete, the DMA should advise as to the medical evidence necessary to complete the ROM method of rating and, OWCP shall obtain the necessary evidence.¹⁴ Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 as the DMA failed to advise that the ROM measurements for the right shoulder were incomplete.¹⁵

On remand OWCP shall obtain the necessary evidence as required under FECA Bulletin No. 17-06 from Dr. Demian.¹⁶ After it obtains the evidence necessary to complete the rating as described above, the case along with an updated SOAF shall be referred to a DMA to independently calculate impairment to the right shoulder using both ROM and DBI methods and identify the higher rating.¹⁷ If Dr. Demian does not fully comply with the A.M.A., *Guides*, OWCP shall refer appellant to a specialist in the appropriate field of medicine for a second opinion evaluation. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁴ *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).

¹⁵ *C.R.*, Docket No. 21-1265 (issued March 23, 2022); *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).

¹⁶ *C.R.*, *id.*; *J.L.*, *supra* note 14; *J.S.*, Docket No. 19-0483 (issued October 10, 2019).

¹⁷ *See J.L.*, *supra* note 14; *J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 7, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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