United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 22-0961**
	)	**Issued: January 20, 2023**
DEPARTMENT OF VETERANS AFFAIRS, MALCOLM RANDALL VA MEDICAL CENTER, Gainesville, FL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 7, 2022 appellant filed a timely appeal from a March 21, 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.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the March 21, 2022 decision, appellant submitted additional evidence to OWCP. 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 met her burden of proof to establish greater than 14 percent permanent impairment of her left upper extremity impairment, for which she previously received a schedule award.

FACTUAL HISTORY

On July 2, 2020 appellant, then a 58-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on July 1, 2020 she sustained an injury to her left arm, neck, left side of chest, and back when she slipped and fell to the floor while in the performance of duty. She stopped work on July 2, 2020 and returned to work on August 31, 2020. OWCP accepted appellant's claim for unspecified closed fracture of the upper end of the left humerus.[3] It paid her wage-loss compensation on the supplemental rolls effective October 13, 2020.

In a January 27, 2021 report, Clifford Nunery, a physician assistant, indicated that appellant complained of intermittent pain in her left shoulder which became worse with overuse. He noted that, upon range of motion (ROM) testing of the left shoulder, appellant exhibited flexion of 100 degrees, as well as good strength with abduction, internal rotation, and external rotation. Appellant participated in physical therapy sessions and Angela Brannon, a physical therapist, recorded appellant's left shoulder ROM during a February 24, 2021 therapy session, including flexion of 110 degrees, abduction of 60 degrees, and external rotation of 44 degrees. On February 24, 2021 Dr. Mark A. Petty, a Board-certified orthopedic surgeon, indicated that appellant had left shoulder flexion of 70 degrees and abduction of 40 degrees. In an April 21, 2021 report, Dr. Petty noted that appellant reported decreased left shoulder pain with physical therapy, and he recorded left shoulder elevation of 140 degrees and 85 degrees of abduction.

In a July 7, 2021 report, Dr. Petty reported ROM findings for appellant's left shoulder, including flexion of 90 degrees, extension of 20 degrees, abduction of 80 degrees, internal rotation to the hip, and external rotation of 45 degrees. He opined that, due to her left shoulder condition, appellant had 17 percent impairment of the whole person under the standards of *The 1996 Florida Uniform Permanent Impairment Rating Schedule*.

On July 15, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated October 29, 2021, OWCP requested that appellant obtain an impairment rating from an attending physician, which evaluated the permanent impairment of her 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*).[4] It afforded her 30 days to obtain such evidence.

[3] On July 14, 2020 appellant underwent OWCP-authorized open reduction and internal fixation of her left proximal humerus fracture.

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

On January 7, 2022 appellant submitted an October 11, 2021 note from Dr. Petty who indicated that appellant had 11 percent permanent impairment of the whole person and 19 percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*.

On February 9, 2022 OWCP referred the record, including a statement of accepted facts (SOAF), to Dr. Todd A. Fellars, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to review the medical evidence of record, including Dr. Petty's reports, and provide an opinion on the permanent impairment of appellant's left upper extremity under the sixth edition of the A.M.A., *Guides*.

In a February 17, 2022 report, Dr. Fellars indicated that, according to Table 15-5 (Shoulder Regional Grid) of the sixth edition of the A.M.A., *Guides*, appellant was status post open reduction and internal fixation of a proximal humerus fracture, and the highest level of impairment associated with this condition using the diagnosis-based impairment (DBI) rating method would be five percent permanent impairment of the left upper extremity. He noted, however, that loss of ROM of the left shoulder was documented and indicated that, utilizing Table 15-34 on page 475, appellant had three percent impairment for loss of flexion; one percent for loss of extension; six percent for loss of abduction; zero percent for adduction; two percent for loss of internal rotation; and two percent for loss of external rotation. Dr. Fellars indicated, "[t]his equals 14 [percent] upper extremity impairment." He concluded that appellant had 14 percent permanent impairment of the left upper extremity because she had a greater impairment under the ROM rating method than the DBI rating method (5 percent) and the A.M.A., *Guides* provides that "the impairment method that provides the greatest level of impairment is chosen."

By decision dated March 21, 2022, OWCP granted appellant a schedule award for 14 percent permanent impairment of her left upper extremity impairment. The award ran for 43.68 weeks from July 8, 2021 through May 9, 2022. OWCP indicated that the award was based on Dr. Fellars' February 17, 2022 assessment of the findings in Dr. Petty's reports.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing regulations,[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] Under the DBI rating method, the sixth edition requires identifying the class for the class of diagnosis (CDX), which is then adjusted by

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*.

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

the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

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).
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> "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.)
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> "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.
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> "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."[11]

The Board has previously found that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[12] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal

[9] A.M.A., *Guides* 494-531.

[10] *Id.* at 521.

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

[12] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

justice under the law to all claimants.[13] In *T.H.*, the Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and DMAs use both DBI and ROM methodologies interchangeably without a consistent basis. Furthermore, the Board observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. The Board, therefore, found that OWCP should develop a consistent method for calculating permanent impairment for upper extremities, which could be applied uniformly.

ANALYSIS

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

As noted above, FECA Bulletin No. 17-06 provides that, if the rating physician provided an assessment using the DBI rating method, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.[14]

The Board finds that this case requires further development of the medical evidence. On February 17, 2022 Dr. Fellars, the DMA, indicated that he had reviewed the medical evidence of record, including the reports of Dr. Petty, and determined that appellant had 14 percent permanent impairment of her left upper extremity as calculated under the ROM rating method of the sixth edition of the A.M.A., *Guides*. Since Dr. Fellars provided a rating using the DBI rating method, and appellant's left upper extremity condition (humerus fracture) provided for application of the ROM rating method, Dr. Fellars was required to independently calculate appellant's impairment using both the DBI and ROM methods and identify the higher rating for the claims examiner.[15]

First, although Dr. Fellars referenced Table 15-5 of the sixth edition of the A.M.A., *Guides*, he did not adequately explain how application of this table warranted a finding of no more than five percent permanent impairment of the left upper extremity under the DBI rating method. Second, the Board notes that, although Dr. Fellars referenced Table 15-34 on page 475 and attempted to conduct a rating calculation under the ROM method based on Dr. Petty's July 7, 2021 report, the case record does not contain complete ROM findings for properly conducting a left upper extremity permanent impairment rating under the ROM method. In his July 7, 2021 report, Dr. Petty failed to provide specific measurements for ROM upon adduction and internal rotation of the left hip, and it is unclear whether he took three measurements for the instances when he did provide specific measurements, *i.e.*, for the motions of flexion, extension, abduction, and external

[13] *K.J.*, Docket No. 19-0901 (issued December 6, 2019); *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[14] *See supra* note 11.

[15] *Id*.

rotation.[16] As noted above, FECA Bulletin No. 17-06 provides detailed instructions for obtaining sufficient evidence to conduct a complete permanent impairment evaluation. However, such instructions were not fully carried out in this case and therefore it requires further development of the medical evidence in accordance with FECA Bulletin No. 17-06.[17]

Section 15.7 of the sixth edition of the A.M.A., *Guides* provides that ROM should be measured after a "warm up," in which the individual moves the joint through its maximum ROM at least three times. The ROM examination is then performed by recording the active measurements from three separate ROM efforts and all measurements should fall within 10 degrees of the mean of these three measurements. The maximum observed measurement is used to determine the ROM impairment.[18] There currently is no evidence in the case record that these requirements for evaluating permanent impairment due to ROM deficits have been met.

In order to conduct a full evaluation of appellant's left upper extremity permanent impairment, the Board finds that the case shall be remanded to OWCP in order for it to make an attempt to obtain the raw data from Dr. Petty's ROM testing for the left upper extremity. If the data is obtained, it should be evaluated and considered under the relevant standards of the A.M.A., *Guides*, including referral to a DMA, as a possible basis for an impairment rating. If no such data is obtained, OWCP should take appropriate action for further examination by a second opinion physician to obtain the necessary ROM measurements.

The Board, therefore, will remand this case to OWCP for full application of its procedures found in FECA Bulletin No. 17-06 and the standards of the sixth edition of the A.M.A., *Guides*. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's permanent impairment.

CONCLUSION

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

[16] Dr. Fellars provided ROM impairment ratings for adduction and internal rotation of the left shoulder, but the bases for these impairment ratings are unclear. In multiple reports, Dr. Petty provided whole person impairment ratings. However, neither FECA nor its implementing regulations provides for a schedule award for impairment to the body as a whole. *See James E. Mills*, 43 ECAB 215, 219 (1991). In his October 11, 2021 note, Dr. Petty indicated that appellant had 19 percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. However, this rating is of limited probative value because Dr. Petty did not explain how it was calculated in accordance with the relevant standards. *See N.A.*, Docket No. 19-0248 (issued May 17, 2019).

[17] *See supra* note 11.

[18] A.M.A., *Guides* 464.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 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: January 20, 2023
Washington, DC

Alec J. Koromilas, 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