United States Department of Labor
Employees' Compensation Appeals Board

F.H., Appellant	)	
	)	**Docket No. 23-0765**
and	)	**Issued: October 5, 2023**
	)	
SOCIAL SECURITY ADMINISTRATION, Toledo, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On May 3, 2023 appellant, through counsel, filed a timely appeal from an April 17, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award.

FACTUAL HISTORY

On October 7, 2014 appellant, then a 45-year-old generalist claims representative, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 2014 she injured her head, right side, left big toe, and low back when she slipped and fell on a wet floor while in the performance of duty. She stopped work on October 1, 2014. OWCP initially accepted the claim for concussion with loss of consciousness of unspecified duration; contusion of shoulder, right; contusion of wrist, right; and head contusion. It subsequently expanded the acceptance of the claim to include headache; other synovitis and tenosynovitis, right hand; and contusion of face, scalp, and neck except eye(s). OWCP paid appellant wage-loss compensation on the supplemental rolls effective November 17, 2014. Appellant returned to full-duty work on September 11, 2017.

OWCP received an August 28, 2017 note by Dr. Arshad Husain, an internist, who advised that appellant had reached maximum medical improvement (MMI).

On December 6, 2017 appellant, through counsel, requested a schedule award. Counsel submitted a November 28, 2017 medical report from Dr. Peter E. Metropoulos, an osteopath Board-certified in occupational medicine. Dr. Metropoulos noted appellant's accepted conditions and he utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairm*ent (A.M.A., *Guides*),[3] to the diagnosis-based impairment (DBI) method of evaluating permanent impairment to determine that appellant had two percent permanent impairment of the right upper extremity due to right wrist intersection syndrome or synovitis and tenosynovitis. Dr. Metropoulos also utilized the range of motion (ROM) rating method to find eight percent permanent impairment of the right upper extremity due to right wrist loss of ROM. Additionally, he determined that appellant had five percent whole person permanent impairment for migraine headaches. Dr. Metropoulos advised that she reached MMI on the date of his impairment evaluation.

On September 27, 2017 appellant again filed a claim for compensation (Form CA-7) for a schedule award.

On August 16, 2018 OWCP referred Dr. Metropoulos' November 28, 2017 report, a statement of accepted facts (SOAF), and the case record, to Dr. David I. Krohn, a Board-certified internist serving as an OWCP district medical adviser (DMA), for review and determination of appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

In an August 19, 2018 report, Dr. Krohn indicated that he had reviewed Dr. Metropoulos' report and concurred with his finding of two percent permanent impairment of the right upper extremity due to appellant's right wrist sprain/strain (including diagnoses of intersection syndrome, nonspecific tendinitis). However, he noted that Dr. Metropoulos' finding of five

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

percent whole person impairment for headaches was not preferred and, thus, he converted the whole percent impairment rating to 100 percent permanent impairment. Further, the DMA advised that the ROM rating method could not be used to determine impairment of appellant's right wrist in the absence of a comparison of ROM of the uninjured left wrist. He recommended that Dr. Metropoulos provide ROM measurements for the left wrist. The DMA concluded that appellant reached MMI on November 28, 2017, the date of Dr. Metropoulos' impairment evaluation.

Dr. Metropoulos, in an October 23, 2018 report, noted his review of Dr. Krohn's August 19, 2018 report. He related that the left wrist had normal ROM and that ROM measurements for the right wrist could be appropriately used for calculating appellant's right upper extremity ROM impairment. Dr. Metropoulos found eight percent permanent impairment of appellant's right upper extremity. He deferred to the DMA's finding that appellant had 100 percent permanent impairment for headaches.

In a January 8, 2019 report, Dr. Krohn indicated that he had reviewed Dr. Metropoulos' October 23, 2018 report. He utilized the ROM rating method and determined that appellant had six percent permanent impairment of the right upper extremity due to loss of ROM of the right wrist. The DMA explained the discrepancies between his six percent right upper extremity permanent impairment rating and Dr. Metropoulos' eight percent permanent impairment rating. He reiterated his prior finding that appellant had 100 percent impairment for headaches.

On September 30, 2019 OWCP declared a conflict in medical opinion between appellant's physician, Dr. Metropoulos, and the DMA, Dr. Krohn, regarding the extent of appellant's permanent impairment due to the October 1, 2014 employment injury. On October 16, 2019 it referred appellant, a SOAF, the case record, and a list of questions, to Dr. Robert Kalb, a Board-certified orthopedic surgeon, selected as the impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence.

In a November 22, 2019 report, Dr. Kalb reviewed the history of appellant's October 1, 2014 employment injury and medical record. He provided findings on physical, neurological, and sensory examination. Dr. Kalb determined that appellant had reached MMI in 2015. He applied the DBI rating method of the sixth edition of the A.M.A., *Guides* and determined that she had two percent permanent impairment of the right upper extremity due to right wrist sprain/strain. Dr. Kalb also applied the ROM rating method and found that appellant had eight percent permanent impairment, but that appellant's *Quick*DASH score resulted in a calculation of six percent permanent impairment of the right upper extremity due to loss of ROM. He concluded that she had six percent permanent impairment of the right upper extremity because the ROM rating method yielded greater impairment than the DBI rating method.

OWCP, by decision dated March 12, 2020, granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The award ran for 18.72 weeks for the period November 28, 2017 through April 8, 2018 based on the findings of Dr. Kalb, the IME.

On March 19, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 16, 2020.

By decision dated October 1, 2020, an OWCP hearing representative vacated the March 12, 2020 decision and remanded the case to OWCP to obtain a supplemental report from Dr. Kalb clarifying whether appellant had six percent permanent impairment or eight percent permanent impairment of the right upper extremity due to right wrist loss of ROM.

In letters dated October 8, 2020 and March 16, May 12, and July 29, 2021, OWCP requested that Dr. Kalb provide a supplemental report addressing and clarifying his right upper extremity permanent impairment. No response was received.

On May 19, 2022 OWCP referred appellant, a SOAF, the case record, and a series of questions, to Dr. Douglas C. Gula, a Board-certified orthopedic surgeon, selected as the IME, to resolve the conflict in the medical opinion evidence.

In a July 26, 2022 report, Dr. Gula reviewed appellant's history of injury on October 1, 2014 and medical treatment. On examination of appellant's right wrist and forearm, Dr. Gula observed no evidence of tenderness to palpation, swelling, discoloration, or ecchymoses. He related that three sets of ROM measurements for the right wrist, provided measurements of dorsiflexion of 60 degrees, palmer flexion of 60 degrees, ulnar deviation of 30 degrees, and radial deviation of 20 degrees. Dr. Gula reported that there was satisfactory strength as related to the dorsiflexors, palmer flexors, ulnar deviators, and radial deviators at 5/5. There was also negative Tinel's, Phalen's, reverse Phalen's, and Finkelstein's testing. Digital motion was intact. There was satisfactory strength as related to the abductors and adductors of the digits of the right hand. There was no evidence of any atrophy as related to the thenar and/or hypothenar eminence. Grip and pinch strength were intact. On examination of appellant's right shoulder, Dr. Gula observed tenderness to palpation about the subdeltoid region. He provided ROM measurements, which included flexion of 180 degrees with pain, extension of 50 degrees, abduction of 180 degrees, adduction of 50 degrees, and internal and external rotation of 90 degrees each. Hawkins', Neer's, two-finger drop arm test, Yergason's, Speed's, empty can, and lift-off testing were negative. There was satisfactory strength as related to the flexors, abductors, adductors, and internal and external rotators at +5/ 5. On examination of the upper extremities, Dr. Gula reported +2/+4 deep tendon reflexes, bilaterally symmetrical, regarding the biceps, triceps, and brachioradialis. Sensory examination revealed intact sensation. Major motor groups of the upper extremities were satisfactory at +5/ 5.

Dr. Gula determined that appellant reached MMI on November 28, 2017, the date of Dr. Metropoulos' impairment evaluation. He noted the accepted condition of right shoulder contusion. Dr. Gula referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 15-5 (Shoulder Regional Grid) on page 401, appellant did not fit the criteria for shoulder contusion or crush injury with healed minor soft tissue of skin injury. He noted that the diagnosis of shoulder contusion resulted in a class of diagnosis (CDX) of 1 with a default value of grade C or two percent impairment. Dr. Gula found, however, that appellant fit the criteria for shoulder pain, nonspecific shoulder pain following injury of occupational exposure, which represented a CDX of 0 with a default value of grade 0. He noted that clinical studies demonstrated no evidence of abnormality. Dr. Gula further noted that the physical examination of the right shoulder was normal with full ROM and negative orthopedic test results. He indicated that the only abnormality from a functional standpoint was right shoulder pain rated as 6 on a scale of 1 to 10 based on subjective complaints of discomfort. Thus, Dr. Gula concluded that appellant

had Class 0 with no ratable impairment of the right shoulder. He maintained that his finding was consistent with the findings of Dr. Metropoulos, appellant's physician, and Dr. Krohn, the DMA. Regarding permanent impairment to the right wrist, Dr. Gula again utilized the DBI rating method to find that, under Table 15-3 (Wrist Regional Grid) on page 395, the diagnosis of appellant's accepted right wrist contusion, and other synovitis and tenosynovitis resulted in a CDX of 0 with no significant objective abnormal findings of muscle or tendon injury at MMI. He noted that clinical studies demonstrated no evidence of abnormality. The physical examination was normal with full ROM of the right wrist with negative test results. Dr. Gula reported that the only abnormality from a functional standpoint was right wrist pain rated as 4 to 5 on a scale of 1 to 10 based on subjective complaints of discomfort. Thus, he concluded that appellant had CDX of 0 with no ratable impairment of the right wrist.

On September 13, 2022 OWCP routed the medical record and a SOAF, to Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as a DMA, for review and comment.

In an October 5, 2022 report, Dr. Hammel concurred with Dr. Gula's July 26, 2022 impairment rating of zero percent permanent impairment of the right upper extremity. He advised that appellant reached MMI on July 26, 2022.

OWCP, by decision dated October 6, 2022, denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award due to her accepted October 1, 2014 employment injury. It accorded the weight of the medical evidence to the opinions of Dr. Gula, the IME, and Dr. Hammel, the DMA.

On October 12, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 13, 2023.

By decision dated April 17, 2023, a second OWCP hearing representative affirmed the October 6, 2022 decision.[4]

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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.

[4] Additionally, in the April 17, 2023 decision, the hearing representative returned the case record to OWCP, noting that appellant had received an $18,262.68 overpayment of compensation for the period November 28, 2017 through April 8, 2018 because she had previously received a schedule award for six percent permanent impairment, but the current evidence of record established that she had zero percent permanent impairment of the right upper extremity.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[8] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[9]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF)*.[10] 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.[11] With respect to the wrist and shoulder, reference is made to Table 15-3 (Wrist Regional Grid) beginning on page 395[12] and Table 15-5 (Shoulder Regional Grid) beginning on page 401,[13] respectively. After the CDX is determined from the Wrist or Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[16]

The A.M.A., *Guides* also provide that the ROM impairment methodology is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other DBI sections are applicable.[17] 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

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[7] *Id. See also Ronald R. Kraynak,* 53 ECAB 130 (2001).

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

[9] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

[10] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

[11] *K.R.*, Docket No. 20-1675 (issued August 19, 2022); *M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[12] A.M.A., *Guides* 395-97.

[13] *Id.* at 401-5.

[14] *Id.* at 494-531.

[15] *Id.* at 411.

[16] *Id.* at 23-28.

[17] *Id.* at 461.

added.[18] 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.[19]

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.[20] 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:

> "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."[21] (Emphasis in the original.)
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> The Bulletin further advises:
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> "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."[22]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[23] When there are opposing reports

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[18] *Id*. at 473.

[19] *Id*. at 474.

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

[21] *Id.*

[22] *Id.*; *see also V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[23] 5 U.S.C. § 8123(a). *See D.C.,* Docket Nos. 22-0020 and 22-0297 (issued April 24, 2023); *M.C.,* Docket No. 20-1234 (issued January 27, 2022).

of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[24] Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[25]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award.

In a July 26, 2022 report, Dr. Gula, selected as the IME, opined that appellant had zero percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. He discussed her history of injury and reviewed her medical records. Dr. Gula provided essentially normal findings on physical examination with the exception that appellant complained of right shoulder and right wrist pain and discomfort. With regard to permanent impairment of the right shoulder, he maintained that, under the DBI method for rating impairment, she did not fit the criteria for the diagnosis of shoulder contusion or crush injury with healed minor soft tissue of skin injury under Table 15-5 (Shoulder Regional Grid) on page 401, which represented a CDX of 1 with a default value of grade C or two percent impairment. Instead, Dr. Gula found that appellant fit the criteria for shoulder pain, nonspecific shoulder pain following injury of occupational exposure, which represented a CDX of 0 with a default value of grade 0 under Table 15-5. He indicated that clinical studies demonstrated no evidence of abnormality. Dr. Gula further indicated that his physical examination of the right shoulder was normal with full ROM and negative orthopedic test results. He therefore determined that appellant had CDX of 0 with no ratable impairment of the right shoulder. With respect to impairment of the right wrist, Dr. Gula also utilized the DBI rating method and referenced Table 15-3 (Wrist Regional Grid) on page 395, to find that the diagnosis of right wrist contusion, and other synovitis and tenosynovitis resulted in a CDX of 0 with no significant objective abnormal findings of muscle or tendon injury at MMI. He found that clinical studies demonstrated no evidence of abnormality. Dr. Gula noted that his physical examination was normal with full ROM of the right wrist with negative test results. He therefore determined that appellant had CDX of 0 with no ratable impairment of the right wrist. Dr. Gula concluded that she had zero percent permanent impairment of the right upper extremity.

The Board finds that Dr. Gula's July 26, 2022 report is entitled to the special weight of the medical evidence and establishes that appellant had no permanent impairment of the right upper extremity.[26] Dr. Gula's opinion was based on a proper factual and medical history, which he reviewed, and his essentially normal examination findings. Moreover, he provided medical rationale for his impairment rating.

[24] *See M.C.,* Docket No. 20-1234 (issued January 27, 2022); *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[25] *R.R.,* Docket No. 21-0212 (issued November 3, 2021); *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

[26] *M.C.,* Docket No. 20-1234 (issued January 27, 2022); *V.H.*, *id.*; *L.G.,* Docket No. 18-0065 (issued June 11, 2018).

The record contains no other probative, rationalized medical opinion which establishes that appellant had right upper extremity permanent impairment based upon the A.M.A., *Guides*. As such, 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 permanent impairment of the right upper extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2023 decision of the Office of Workers' Compensation Program is affirmed.

Issued: October 5, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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