

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

T.W., Appellant)

and)

U.S. POSTAL SERVICE, CHEYENNE POST)
OFFICE, Cheyenne, WV, Employer)
-----)

**Docket No. 23-0357
Issued: September 7, 2023**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 9, 2023 appellant filed a timely appeal from a December 27, 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

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 23 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 27, 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.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 13, 2018 appellant, then a 64-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2018 he experienced sharp right shoulder pain when he lifted a tray of flat mail onto a cart while in the performance of duty. He stopped work on February 14, 2018 and returned to full-time, limited-duty on March 2, 2018. OWCP accepted the claim for right shoulder rotator cuff tear or rupture.⁴

On October 30, 2018 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

In a development letter dated November 9, 2018, OWCP requested that appellant's treating physician submit an impairment evaluation report in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It afforded appellant 30 days to submit additional medical evidence in support of his increased schedule award claim.

In a report dated March 4, 2019, Dr. Gregory Reichhardt, a Board-certified physiatrist, performed three range of motion (ROM) measurements for appellant's right shoulder and noted 80 degrees flexion, 50 degrees extension, 30 degrees adduction, 90 degrees abduction, and 40 degrees internal and external rotation. He indicated that appellant had reached maximum medical improvement (MMI). Dr. Reichhardt applied the ROM rating method and determined that appellant had 21 percent right upper extremity permanent impairment.

By decision dated March 19, 2019, OWCP denied appellant's additional schedule award claim, finding that he was not entitled to greater than the 23 percent permanent impairment of the right upper extremity previously awarded.

OWCP subsequently referred appellant's claim, along with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Morley Slutsky, a Board-certified occupational and preventive medicine specialist serving as the district medical adviser (DMA), in order to determine whether appellant has permanent impairment of a scheduled member or function of the body due to his accepted February 12, 2018 employment injury.

³ Docket No. 22-0670 (issued November 1, 2022); Docket No. 20-1547 (issued October 4, 2021).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx127. Appellant has two previously-accepted claims. Under OWCP File No. xxxxxx252, OWCP accepted a June 14, 2004 occupational disease claim (Form CA-2) for right shoulder rotator cuff tear and right shoulder osteoarthritis. On June 7, 2005 it granted appellant a schedule award for 23 percent permanent impairment of the right upper extremity. Under OWCP File No. xxxxxx516, OWCP accepted a traumatic injury claim for a right shoulder rotator cuff tear causally related to a January 19, 2016 employment injury. It has administratively combined OWCP File Nos. xxxxxx127, xxxxxx516, and xxxxxx252, with the latter serving as the master file.

⁵ A.M.A., *Guides* (6th ed. 2009).

In reports dated October 25, 2019 and April 14 and May 10, 2020, Dr. Slutsky utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 15-5, (Shoulder Regional Grid -- Upper Extremity Impairments), page 403, appellant had a class of diagnosis (CDX) for full thickness rotator cuff tear which resulted in a Class 1 impairment with a default value of five percent. He assigned a grade modifier for functional history (GMFH) of 1 and a grade modifier for physical examination (GMPE) of 2. Dr. Slutsky noted that a grade modifier for clinical studies (GMCS) was not applicable. He applied the net adjustment formula and determined that appellant had six percent right upper extremity permanent impairment. Dr. Slutsky referenced Dr. Reichhardt's ROM measurements and determined that, according to Table 15-34 (Shoulder Range of Motion), page 475, of the A.M.A., *Guides*, appellant had 19 percent permanent impairment of the right upper extremity. He explained that, since the ROM rating method yielded a higher rating, appellant had 19 percent permanent impairment of the right upper extremity (shoulder). Dr. Slutsky further indicated that, because appellant was previously awarded 23 percent permanent impairment for his right upper extremity, appellant was not entitled to an additional schedule award.

By decision dated May 20, 2020, OWCP denied appellant's claim for an additional schedule award. It found that the medical evidence of record was insufficient to establish greater than the 23 percent permanent impairment of the right upper extremity previously awarded.

Appellant appealed to the Board.

By decision dated October 4, 2021, the Board set aside the May 20, 2020 OWCP decision. The Board remanded, the case for OWCP to request that the DMA explain whether his calculation of 19 percent permanent impairment of the right upper extremity duplicated the prior right upper extremity impairment rating and whether appellant had established additional permanent impairment based on new exposure.⁶

In a February 12, 2022 supplemental report, Dr. Slutsky indicated that the most impairing diagnosis was still full thickness rotator cuff tear. He also noted that he did not "know what [the Board] meant by duplicated." Dr. Slutsky reported that appellant had 19 percent permanent impairment of the right upper extremity under the ROM rating method and 7 percent permanent impairment of the right upper extremity under the DBI rating method.

By decision dated February 25, 2022, OWCP denied appellant's claim for an additional schedule award.

Appellant appealed to the Board.

By decision dated November 1, 2022, the Board set aside the February 25, 2022 OWCP decision. It remanded the case for OWCP to refer appellant to a new DMA to review his previous schedule award to determine his entitlement to an additional schedule award for his

⁶ Docket No. 20-1547 (issued October 4, 2021).

right upper extremity and explain whether his current right upper extremity permanent impairment duplicated the prior right upper extremity permanent impairment.⁷

On December 16, 2022 OWCP referred appellant's schedule award claim, along with a SOAF, to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, for review and opinion on the extent of any employment-related permanent impairment of his right upper extremity under the A.M.A., *Guides*.

In a December 19, 2022 report, Dr. Katz indicated that he had reviewed the SOAF and the case file, and noted that appellant's current claim was accepted for right shoulder rotator cuff tear. He noted that appellant had undergone right shoulder arthroscopy surgery and had received a prior award of 23 percent permanent impairment of the right upper extremity for appellant's right shoulder under OWCP File No. xxxxxx252. Dr. Katz referenced the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 15-5, (Shoulder Regional Grid -- Upper Extremity Impairments), page 403, appellant had a CDX for acromioclavicular joint injury, status post distal clavicle resection which resulted in a Class 1 impairment with a default value of 10 percent. He assigned a GMFH of 2, GMPE of 2, and GMCS of 2. Dr. Katz applied the net adjustment formula $(2-1) + (2-1) + (2-1) = +3$, which resulted in a final impairment of 12 percent permanent impairment of the right upper extremity. Using Dr. Reichhardt's ROM measurements, Dr. Katz found that, according to Table 15-34 (Shoulder ROM), page 475, of the A.M.A., *Guides*, appellant had 9 percent permanent impairment for 80 degrees flexion, 0 percent permanent impairment for 50 degrees extension, 3 percent permanent impairment for 90 degrees abduction, 1 percent permanent impairment for 30 degrees adduction, 4 percent permanent impairment for 40 degrees internal rotation, and 2 percent permanent impairment for 40 degrees external rotation for a total of 19 percent permanent impairment of the right upper extremity. He explained that he disagreed with Dr. Reichhardt's permanent impairment because Dr. Reichhardt incorrectly assigned four percent permanent impairment for 40 degrees of external rotation. Dr. Katz reported that the date of MMI was March 4, 2019, which was the date of Dr. Reichhardt's examination. He explained that, because appellant was previously awarded 23 percent permanent impairment for the right upper extremity, appellant was not entitled to an additional schedule award. Dr. Katz further explained that the present determination was duplicative of the prior award because the ROM impairment was for the same right shoulder joint and related to the same pathology.

By decision dated December 27, 2022, OWCP denied appellant's claim for an additional schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁸ and its implementing regulations⁹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

⁷ Docket No. 22-0670 (issued November 1, 2022).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.¹⁰ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹¹

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish that the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of the default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS.¹² The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.¹³ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁴

The A.M.A., *Guides* also provide that the ROM impairment 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.¹⁵ 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 added.¹⁶ 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.¹⁷

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

¹⁰ *Id.* at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹² A.M.A., *Guides* 405-12; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

¹³ *Id.* at 411.

¹⁴ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹⁵ A.M.A., *Guides* 461.

¹⁶ *Id.* at 473.

¹⁷ *Id.* at 474.

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.*” (Emphasis in the original.)¹⁸

The Bulletin further advises:

“If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allows 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.”¹⁹

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP’s 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.²⁰

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.²¹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 23 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

In its prior decision, the Board remanded the case for OWCP to obtain a report from a new DMA that addressed appellant’s entitlement to an additional schedule award for his right

¹⁸ FECA Bulletin No. 17-06 (issued May 8, 2017).

¹⁹ *Id.*

²⁰ *See supra* note 11 at Chapter 2.808.6f (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

²¹ 20 C.F.R. § 10.404(d); *see S.M.*, Docket No. 17-1826 (issued February 26, 2018); *T.S.*, Docket No. 16-1406 (issued August 9, 2017); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

upper extremity and explain whether appellant's current right upper extremity permanent impairment duplicated the prior right upper extremity permanent impairment.

In a December 19, 2022 report, Dr. Katz, serving as the DMA, provided an accurate history of injury and noted the accepted condition of right shoulder rotator cuff tear. He indicated that appellant had received a prior award of 23 percent permanent impairment of the right upper extremity for his right shoulder under OWCP File No. xxxxxx252. Utilizing the A.M.A., *Guides* and the DBI rating method, Dr. Katz determined that, under Table 15-5, (Shoulder Regional Grid), appellant had a CDX for acromioclavicular joint injury, status-post distal clavicle resection which resulted in a Class 1 impairment with a default value of 10 percent. He assigned grade modifiers and applied the net adjustment formula in order to determine that appellant had a final impairment of 12 percent permanent impairment of the right upper extremity. Using Dr. Reichhardt's ROM measurements, Dr. Katz found that, according to Table 15-34 (Shoulder ROM), appellant had 9 percent permanent impairment for 80 degrees flexion, 0 percent permanent impairment for 50 degrees extension, 3 percent permanent impairment for 90 degrees abduction, 1 percent permanent impairment for 30 degrees adduction, 4 percent permanent impairment for 40 degrees internal rotation, and 2 percent permanent impairment for 40 degrees external rotation for a total of 19 percent permanent impairment of the right upper extremity.

The Board has reviewed the DMA, Dr. Katz', rating and finds that he properly applied the appropriate tables and grading schedules to the findings from Dr. Reichhardt's report, pursuant to the A.M.A., *Guides*.²² The DMA properly utilized the DBI-rating method to find that appellant had a final impairment of 12 percent permanent impairment of the right upper extremity. He also properly determined that, applying the ROM-rating method, appellant had 19 percent permanent impairment of the right upper extremity. As the ROM rating method yielded a higher rating, the DMA properly accorded appellant 19 percent permanent impairment of the right upper extremity. The DMA explained that the 19 percent permanent impairment duplicated the prior award for 23 percent permanent impairment. When the prior impairment is due to a previous employment injury and a schedule award had been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.²³ Thus, the DMA properly found that appellant was not entitled to an additional schedule award for the right upper extremity.

As appellant has not submitted medical evidence establishing greater than the 23 percent permanent impairment of the right upper extremity previously awarded, the Board finds that he has not met his 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.

²² See A.S., Docket No. 22-0930 (issued January 19, 2023); see also R.S., Docket No. 21-0833 (issued January 25, 2022).

²³ *Supra* note 21.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 23 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2023
Washington, DC

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

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

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