

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

D.R., Appellant)	
)	
and)	Docket No. 23-0561
)	Issued: September 7, 2023
U.S. POSTAL SERVICE, PEYTON POST)	
OFFICE, Peyton, CO, 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 March 13, 2023 appellant filed a timely appeal from a February 22, 2023 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference.² The relevant facts are set forth below.

On October 17, 2019 appellant, then a 42-year-old delivery/sales services and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2019 she sustained a left shoulder strain when lifting a heavy parcel while in the performance of duty. OWCP accepted the claim for a left shoulder and upper arm strain.

On January 20, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award. In a January 15, 2021 report, Dr. Jack L. Rook, a Board-certified physiatrist, opined that appellant had reached maximum medical improvement (MMI). He noted that while she continued with compelling left shoulder pain around her anterior shoulder and pectoral muscle, the diagnostic testing, including an electrodiagnostic study and a brachial plexus magnetic resonance imaging (MRI) scan, were unrevealing. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Dr. Rook opined that appellant had a final upper extremity permanent impairment rating of one percent for a left shoulder strain under the diagnosis-based impairment (DBI) methodology. He provided grade modifiers and his calculations under the net adjustment formula. Dr. Rook also provided range of motion (ROM) measurements in triplicate for the left shoulder, which he indicated resulted in a final rating of 13 percent permanent impairment of the left shoulder. As the ROM methodology yielded the highest permanent impairment, he opined that appellant had 13 percent permanent impairment of the left upper extremity. Dr. Rook also completed a January 16, 2021 upper extremity permanent impairment evaluation form, made notations on copies of Table 15-5 and Table 15-34 from the A.M.A., *Guides* and provided a *QuickDASH* worksheet.

On March 18, 2021 OWCP prepared a statement of accepted facts (SOAF) and referred the case file to its district medical adviser (DMA) for a permanent impairment determination. In a March 23, 2021 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's DMA, reviewed the SOAF and the medical record. In applying the A.M.A., *Guides* to Dr. Rook's evaluation findings, Dr. Katz determined that appellant had 2 percent permanent impairment of the left shoulder under the DBI methodology and 10 percent permanent impairment under the ROM methodology. He provided his impairment calculations. Under the ROM methodology, Dr. Katz found 10 percent permanent left upper extremity impairment as Dr. Rook did not take into account the baseline impairment of the contralateral shoulder. As the ROM methodology yielded the highest impairment, he found that appellant had 10 percent permanent impairment of the left upper extremity. Dr. Katz further opined that MMI was reached on January 15, 2021, the date of Dr. Rook's permanent impairment evaluation.

² Docket No. 22-0620 (issued September 26, 2022).

³ A.M.A., *Guides* (6th ed. 2009).

On March 26, 2021 OWCP forwarded Dr. Katz' impairment report to Dr. Rook for review and requested clarification of his permanent impairment calculations. Dr. Rook was afforded 30 days to reply. No response was received.

On August 3, 2021 OWCP referred appellant, along with the medical record and July 28, 2021 addendum to the SOAF, and series of questions to Dr. Arnold G. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation of her accepted condition(s), and a permanent impairment rating of her left upper extremity.

In a September 18, 2021 report, Dr. Smith noted appellant's history of the injury and her medical course. He provided an impression of left shoulder strain and possible cervical spine injury. Dr. Smith noted that, while Dr. Rook had opined that appellant had reached MMI on January 15, 2021, her loss of range of motion of the shoulder and pain complaints could not be objectively explained by imaging or other tests. He requested that appellant undergo an MRI scan of her cervical spine before he offered a permanent impairment rating.

Appellant underwent a cervical spine MRI scan on November 5, 2021, which demonstrated findings of mild degenerative disc disease and osteophyte formation at C5-6.

In a December 16, 2021 addendum report, Dr. Smith indicated that the current cervical spine MRI scan showed an abnormality at C5-6 with disc space narrowing and osteophyte formation. He opined that this may suggest that appellant had not reached MMI because her cervical condition had never been investigated as it was assumed that her shoulder region was responsible for her pain. For this reason, Dr. Smith concluded that it was not appropriate to render a permanent impairment rating.

By decision dated March 7, 2022, OWCP 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.

On March 20, 2022 appellant appealed to the Board. By decision dated September 26, 2022, the Board set aside OWCP's March 7, 2022 decision.⁴ In light of Dr. Smith's opinion that it was premature to render a permanent impairment rating, the Board remanded the case for a supplemental opinion by Dr. Smith to determine whether there are any additional conditions causally related to the October 14, 2019 employment injury, and then whether a permanent impairment evaluation could be conducted incorporating all of appellant's accepted conditions.

On October 31, 2022 OWCP prepared an addendum to the SOAF dated October 31, 2022 and requested that Dr. Smith provide a supplemental opinion as to whether there were any additional conditions causally related to the October 14, 2019 employment injury. It also asked Dr. Smith to conduct a permanent impairment evaluation of appellant's employment-related conditions.

⁴ *Supra* note 2.

On November 16, 2022 appellant notified OWCP that she had recently moved from Florida to Colorado; however, her change in address was never reflected in OWCP's records.

On December 6, 2022 OWCP referred appellant along with an addendum to SOAF dated November 30, 2022 and a list of questions to Dr. Matthew Simonich, a Board-certified orthopedic surgeon, for a second opinion evaluation of appellant's accepted conditions, and to address whether she had any additional conditions causally related to her October 14, 2019 employment injury. It also asked Dr. Simonich to perform a permanent impairment rating of appellant's conditions which were causally related to the accepted injury.

In a January 11, 2023 report, Dr. Simonich noted appellant's history of the injury, her medical course, and her January 10, 2023 examination findings. He provided impressions of left cervical radiculopathy at C5 ("most probable diagnosis"), cervical disc disease at C5-6, kyphosis deformity of cervical spine at C5-6, Parsonage-Turner syndrome, brachial plexus ("doubtful"); and thoracic outlet syndrome, neurogenic ("unlikely"). Dr. Simonich opined that appellant's symptoms were related to a cervical spine etiology, likely C5-6, and indicated that he would like to review the diagnostic images or repeat the cervical spine MRI scan. He also indicated that an evaluation by a spine surgeon was needed to collaborate symptoms and treatment. Dr. Simonich further opined that appellant's shoulder symptoms were likely due to splinting due to radicular pain and secondary stiffness over time without pathology directly related to the initial injury. He recommended that appellant remain out of work until a diagnosis and treatment could be confirmed. Until a diagnosis and treatment were confirmed, Dr. Simonich stated that he could not render an opinion on MMI or conduct a permanent impairment evaluation. On January 11, 2023 Dr. Simonich also completed a work capacity evaluation (Form OWCP-5c) holding appellant off work due to ongoing symptoms affecting strength and function of the left upper extremity.

By decision dated February 22, 2023, OWCP 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.

LEGAL PRECEDENT

The schedule award provision of FECA,⁵ and its implementing federal 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

specified edition of the A.M.A., *Guides*, published in 2009.⁷ 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.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.¹³ OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates that the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹⁴ Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.¹⁵ If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.¹⁶

⁷ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ B.W., Docket No. 21-0174 (issued June 7, 2021); P.R., Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* at 521.

¹² B.W., *supra* note 8; R.R., Docket No. 17-1947 (issued December 19, 2018); R.V., Docket No. 10-1827 (issued April 1, 2011).

¹³ J.P., Docket No. 21-0801 (issued December 22, 2021); N.S., Docket No. 21-0508 (issued September 22, 2021); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *Supra* note 7 at Chapter 2.808.5 (March 2017).

¹⁵ *Id.* at Chapter 2.808.6a. (March 2017).

¹⁶ *Id.* at Chapter 2.808.6c. (March 2017).

ANALYSIS

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

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 7, 2022 decision as the Board considered that evidence in its September 26, 2022 decision.¹⁷

Following the Board's September 26, 2022 decision, OWCP prepared an October 31, 2022 addendum to the SOAF and requested that Dr. Smith provide a supplemental opinion as to whether appellant had any additional conditions causally related to the October 14, 2019 employment injury. It also asked Dr. Smith to conduct a permanent impairment evaluation of all of appellant's accepted conditions. However, appellant had relocated to Colorado.

OWCP then proceeded to develop the evidence and referred appellant for a second opinion evaluation with Dr. Simonich, who examined appellant on January 10, 2023. In a January 11, 2023 report, Dr. Simonich provided several impressions. He opined that appellant's symptoms were related to a cervical spine etiology, likely C5-6, and indicated that he would like to review the diagnostic images or repeat the cervical spine MRI scan. Dr. Simonich also indicated that an evaluation by a spine surgeon was needed to collaborate symptoms and treatment. He further opined that appellant's shoulder symptoms were likely due to splinting due to radicular pain and secondary stiffness over time without pathology directly related to the initial injury. Dr. Simonich indicated that until a diagnosis and treatment were confirmed, he could not render an opinion on MMI or conduct a permanent impairment evaluation.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁸ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁹

OWCP referred appellant to Dr. Simonich, and he opined that further medical investigation of appellant's continuing symptoms was needed, including further review of diagnostic studies and referral to another spine surgeon specifically regarding her cervical condition. In light of that finding, Dr. Simonich concluded that it was premature to render a permanent impairment rating of appellant's accepted conditions. This case must, therefore, be remanded for further development of the medical evidence by OWCP. OWCP should then obtain a supplemental opinion by

¹⁷ *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁸ *See C.L.*, Docket No. 20-1631 (issued December 8, 2021); *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁹ *See S.A.*, Docket No. 18-1024 (issued March 12, 2020); *R.S.*, Docket No. 17-0344 (issued February 15, 2019); *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Richard F. Williams*, 55 ECAB 343, 346 (2004).

Dr. Simonich to determine whether appellant has any additional conditions causally related to the October 14, 2019 employment injury. It should then obtain a permanent impairment evaluation of all of appellant's accepted conditions causally related to the accepted employment injury. 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.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 7, 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