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

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| **J.G., Appellant** | ) | |
| | ) | **Docket No. 23-1132** |
| **and** | ) | **Issued: February 13, 2024** |
| **U.S. POSTAL SERVICE, ROSE CITY CARRIER ANNEX POST OFFICE, Norwich, CT, 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 August 31, 2023 appellant filed a timely appeal from an April 6, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[1] The Board notes that, following the April 6, 2023 decision, OWCP received additional evidence. 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*.

[2] 5 U.S.C. § 8101 *et seq*.

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish greater than 35 percent permanent impairment of the right upper extremity for which he previously received schedule award compensation.

## ***FACTUAL HISTORY***

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

On May 1, 2009 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim alleging that on April 29, 2009 he was attacked by two dogs as he was delivering mail while in the performance of duty.[4] He stopped work on April 30, 2009. OWCP initially accepted the claim for right shoulder dislocation, left forearm fracture, multiple bilateral leg lacerations and multiple bilateral arm lacerations, and neck lacerations. It subsequently expanded acceptance of the claim to include a right rotator cuff tear and secondary renovascular hypertension. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing June 17, 2009 and on periodic rolls commencing July 5, 2009. On March 17, 2012 appellant returned to full-time limited-duty work.

Appellant underwent several surgeries including an April 30, 2009 surgical repair of 16 complex lacerations on the right forearm and five complex lacerations on his posterior neck, a June 24, 2009 right shoulder arthroscopy, labral repair, rotator cuff repair, and hemiarthroplasty, and a November 16, 2009 left wrist scaphoid excision, four corner wrist fusion with a bone graft, and posterior interosseous nerve neurectomy. On October 16, 2014 appellant underwent a left thumb carpometacarpal joint arthroplasty with tendon harvest and transfer.

By decision dated October 22, 2014, OWCP granted appellant a schedule award for 36 percent impairment of his left wrist/upper extremity due to loss of range of motion and two percent impairment for the right forearm/right upper extremity due to nerve deficit. The award ran for 118.56 weeks from March 19, 2012 through June 26, 2014. Appellant appealed this decision to the Board. The Board, by decision dated September 23, 2016,[5] found that appellant had not met his burden of proof to establish greater than 36 percent permanent impairment of the left upper extremity, and two percent permanent impairment of the right upper extremity for which he had previously received schedule award compensation.

[3] Docket No. 15-0467 (issued September 23, 2016).

[4] Appellant subsequentially filed a Form CA-1 alleging that on March 20, 2012 he sustained anxiety and high blood pressure due to an additional dog attack on that date while in the performance of duty. OWCP assigned this claim File No. xxxxxx342 and accepted the claim for anxiety with panic attack. It administratively combined this claim, with that currently before the Board, OWCP File No. xxxxxx990, serving as the master file.

[5] *Supra* note 3.

On October 16, 2020 appellant underwent an OWCP-authorized revision to reverse right shoulder total arthroplasty.

In an October 21, 2021 report, Dr. Ammar Anbari, a Board-certified orthopedic surgeon, found that appellant had reached maximum medical improvement (MMI) and applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[6] (A.M.A., *Guides*) reaching an additional 15 percent permanent impairment of the right upper extremity. On January 6, 2022 he opined that in accordance with the sixth edition of the A.M.A., *Guides*[7] appellant had 39 percent permanent impairment of his right upper extremity due to his accepted shoulder conditions and surgeries.

On January 18, 2022 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

On February 25, 2022 OWCP routed Dr. Anbari's October 21, 2021 and January 6, 2022 reports, a statement of accepted facts (SOAF), and the case record to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as a DMA, for review and determination regarding appellant's right upper extremity permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* and the date of MMI.

In his February 28, 2022 report, Dr. Katz reviewed the SOAF and medical evidence of record, including Dr. Anbari's October 21, 2021 and January 6, 2022 reports. He requested a supplemental report applying the specific provisions of the A.M.A., *Guides* including three measurements of each ROM provided.

In a March 17, 2022 development letter, OWCP requested that Dr. Anbari provide additional findings and an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. Dr. Anbari responded on April 4, 2022 and requested that another physician complete the impairment rating.

On June 1, 2022 OWCP referred appellant and the case record, along with a SOAF and a series of questions, for a second opinion examination and evaluation with Dr. John W. Golberg, a Board-certified orthopedic surgeon. It requested that Dr. Golberg provide an opinion regarding appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. Dr. Golberg produced reports dated June 20 and December 5, 2022. However, Dr. Katz, serving as the DMA, found that Dr. Golberg's evaluations were incomplete, particularly with regard to evaluation of permanent impairment related to range of motion (ROM) deficits. On December 27, 2022 Dr. Katz requested an additional second opinion examination to determine appellant's permanent impairment for schedule award purposes in accordance with the A.M.A., *Guides*.

[6] A.M.A., *Guides* 5th ed. (2001).

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

On January 31, 2023 OWCP referred appellant and the case record, along with a SOAF and a series of questions, for a second opinion examination and evaluation with Dr. Ira Spar, a Board-certified orthopedic surgeon. It requested that Dr. Spar provide an opinion regarding appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a March 7, 2023 report, Dr. Spar reviewed the SOAF, discussed appellant's factual and medical history, and reported the findings of his physical examination. He described the dog bite laceration volar ulna mid-forearm with mild diminished sensation in the distribution of the medial antebrachial cutaneous nerve, intact pin prick and diminished light touch. Referencing Table 15-18, (Impairment for Sensory Only Peripheral Nerve Injury Impairment) page 429, of the A.M.A., *Guides* and applying this to the diagnosis of medial antebrachial cutaneous nerve laceration he reached two percent permanent impairment of the right upper extremity, as OWCP previously awarded on October 22, 2014.

Dr. Spar measured the ROM of the right shoulder three times following a warmup, and averaged the measurements to result in forward flexion of 77 degrees; extension of 30 degrees; abduction of 77 degrees; adduction of 27 degrees; internal rotation of 23 degrees; and external rotation of 30 degrees. He found that in utilizing the ROM methodology of the A.M.A., *Guides* in accordance with Table 15-34 (Shoulder Range of Motion) page 475, appellant's right upper extremity demonstrated 9 percent permanent impairment due to loss of flexion, 1 percent permanent impairment due to loss of extension, 6 percent permanent impairment due loss of abduction, 2 percent impairment due to loss of adduction, 4 percent permanent impairment due to loss if internal rotation, and 2 percent permanent impairment due to loss of external rotation for a total of 24 percent permanent impairment.

Dr. Spar also referenced Table 15-5, (Shoulder Regional Grid) page 405, of the A.M.A., *Guides* and identified the class of diagnosis (CDX) for shoulder arthroplasty as a Class 3 impairment, complicated, with a default value of 40. He assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 3, and a grade modifier for clinical studies (GMCS) of 2. Dr. Spar utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS -CDX) = (2 -3) + (3-3) + (2-3) = -2, which resulted in a grade A or 34 percent permanent impairment of the right shoulder. He added appellant's right upper extremity impairments to reach 36 percent permanent impairment.

On March 15, 2023 OWCP requested that the DMA review a SOAF and the medical record, including Dr. Spar's March 7, 2023 report, and provide a supplemental opinion regarding the extent of appellant's permanent impairment. In a March 18, 2023 report, Dr. Katz concurred with Dr. Spar's application of the A.M.A., *Guides* and the impairment ratings of 34 percent permanent impairment of the right upper extremity due to the diagnosis of shoulder arthroplasty, and the 2 percent permanent impairment for medial antebrachial cutaneous nerve laceration. However, he found that these impairment ratings should be combined in accordance with Appendix A., page 604, of the A.M.A., *Guides* rather than added resulting in a total of 35 percent permanent impairment of right upper extremity. Dr. Katz agreed that this rating was greater than the 24 percent permanent impairment based on the ROM methodology. The DMA found that appellant reached MMI on March 7, 2023.

By decision dated April 6, 2023, OWCP granted appellant a schedule award for an additional 33 percent permanent impairment of the right upper extremity (right arm). The award covered a period of 102.96 weeks and ran from March 7 through 25, 2023.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[8] and its implementing regulations[9] 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[10] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[11] 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.[12]

In addressing 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.[13] After a CDX is determined (including identification of a default grade value), the impairment class is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15]

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

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

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

[11] *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).

[12] *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[13] *B.B.*, Docket No. 20-1187 (issued November 18, 2021); *M.D., id.*; *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[14] A.M.A., *Guides* 383-492; *see B.B., id.*; *M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[15] *Id*.

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)."[16]

FECA Bulletin further advises:

"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.)

The Bulletin also advises:

"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."[17]

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.[18]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to establish greater than 35 percent permanent impairment of the right upper extremity for which he previously received schedule award compensation.

On prior appeal, the Board reviewed the medical evidence submitted prior to OWCP's October 22, 2014 schedule award decision. The Board found that appellant had no more than 36 percent permanent impairment of the left upper extremity and 2 percent permanent impairment of the right upper extremity due to nerve impairment for which he had previously received schedule award compensation. The Board notes that it is unnecessary to consider the evidence

[16] FECA Bulletin No. 17-06 (issued May 8, 2017); *B.B.*, *id.*; *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

[17] *Id.*

[18] *See supra* note 11 at Chapter 2.808.6f (March 2017). *See also D.H.*, Docket No. 23-1148 (issued January 22, 2024); *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

that was previously considered in its September 23, 2016 decision. Findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA.[19]

In support of his claim for a schedule award, appellant submitted a January 6, 2022 impairment evaluation from Dr. Anbari, wherein he opined that in accordance with the sixth edition of the A.M.A., *Guides* appellant had 39 percent permanent impairment of his right upper extremity due to his accepted shoulder conditions and surgeries. He did not, however, correlate his findings and conclusions with the provisions of the A.M.A., *Guides* and did not provide adequate explanation of how his conclusions were derived in accordance with the A.M.A., *Guides*.[20] The Board has held that an opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.[21]

On March 7, 2023 Dr. Spar, OWCP's second opinion physician, examined appellant and reviewed the medical record. He applied the A.M.A., *Guides* and determined that appellant had 34 percent permanent impairment of the right upper extremity due to the diagnosis of shoulder arthroplasty, and 2 percent permanent impairment for medial antebrachial cutaneous nerve laceration for which he had previously received schedule award compensation.

Dr. Spar's report was referred to the DMA, Dr. Katz, who agreed with the methodology and impairment ratings based on Dr. Spar's examination findings. The Board notes that both physicians determined that the DBI methodology provided a greater impairment rating than the application of the loss of ROM methodology. Dr. Katz further determined that appellant's right upper extremity impairment ratings should be combined rather than added in accordance with A.M.A., *Guides*, section 15.4 (Peripheral Nerve Impairment), page 419 and that the combination of 34 and 2 percent permanent impairment resulted in 35 percent permanent impairment, from which he then subtracted the 2 percent permanent impairment previously awarded to reach an additional 33 percent permanent impairment of the right upper extremity.

OWCP granted appellant a schedule award based on the opinions of the second opinion physician, Dr. Spar, and the DMA, Dr. Katz, who concurred that appellant had 34 percent permanent impairment of the right upper extremity due to the diagnosis of shoulder arthroplasty and had previously received 2 percent permanent impairment for medial antebrachial cutaneous nerve laceration. Dr. Katz offered medical reasoning in support of his conclusion that these right upper extremity impairments should be combined to reach 35 percent permanent impairment of

[19] *V.D.*, Docket No. 22-0123 (issued April 20, 2023); *G.H.*, Docket No. 20-0892 (issued July 9, 2021); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

[20] *See C.A.*, Docket No. 21-0971 (issued June 1, 2023); *L.J.*, Docket No. 20-1044 (issued July 9, 2021); *L.D.*, Docket No. 19-0495 (issued February 5, 2020); *S.R.*, Docket No. 18-1307 (issued March 27, 2019).

[21] *See T.S.*, Docket No. 22-0924 (issued April 27, 2023); *N.A.*, Docket No. 19-0248 (issued May 17, 2019); *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

the right upper extremity, less the 2 percent previously awarded to reach 33 percent additional permanent impairment of the right upper extremity. The Board finds that the DMA's report constitutes the weight of the evidence, and establishes that appellant has no more than 35 percent permanent impairment of the right upper extremity.[22] The record contains no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of impairment of the right upper extremity.

As the medical evidence of record does not contain a rationalized impairment rating, in conformance with the sixth edition of the A.M.A., *Guides*, supporting greater than 35 percent permanent impairment of the right upper extremity previously awarded, the Board finds that appellant 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.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish greater than 35 percent permanent impairment of the right upper extremity for which he previously received schedule award compensation.

[22] *M.C.*, Docket No. 23-0130 (issued July 17, 2023).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 6, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2024
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