United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 18-1757**
	)	**Issued: April 19, 2019**
DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, Kaneohe Bay, HI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 17, 2018 appellant filed a timely appeal from a March 20, 2018 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 over the merits of this case.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 20, 2018, the date of OWCP's most recent decision, was September 16, 2018. As this fell on a Sunday, appellant had until the next business day, Monday, September 17, 2018, to file the appeal. 20 C.F.R. § 501.3(f)(2). As the appeal was received by the Clerk of the Appellate Boards on September 17, 2018, it was timely filed.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

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 July 20, 2009 appellant, then a 54-year-old high voltage electrician, filed an occupational disease claim (Form CA-2) alleging that he sustained injury to his left thumb joint, right elbow, bilateral shoulders, and his neck due to factors of his federal employment. He noted that he first became aware of his alleged injury on May 20, 2009 and first realized its relation to his federal employment on June 17, 2009. OWCP accepted appellant's claim for right shoulder rotator cuff syndrome; right shoulder superior labrum, anterior to posterior (SLAP) tear; right shoulder rotator cuff tendon tear; and right shoulder tendinitis. On October 6, 2011 appellant underwent OWCP-approved right shoulder arthroscopic surgery.[4] Effective August 31, 2012, he voluntarily retired from federal service.

On August 18, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a June 14, 2016 report, Dr. Neelesh B. Fernandes, a Board-certified physiatrist and OWCP second opinion examiner, assigned 10 percent right upper extremity permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] He rated appellant based on decreased right shoulder range of motion (ROM) under Table 15-34.[6]

In a June 30, 2016 report, Dr. David H. Garelick, Board-certified in orthopedic surgery and sports medicine serving as an OWCP district medical adviser (DMA), noted his disagreement with Dr. Fernandes' June 14, 2016 second opinion report because the impairment rating was based on right shoulder loss of ROM. He explained that according to Table 15-5, Shoulder Regional Grid,

[3] Docket No. 17-1551 (issued December 4, 2017).

[4] Dr. Gary Y. Okamura, a Board-certified orthopedic surgeon, performed a right shoulder rotator cuff repair, right shoulder anterior inferior capsulorraphy repair, and right shoulder SLAP repair, and right shoulder decompression.

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

[6] Dr. Fernandes determined that appellant had 3 percent impairment for flexion to 130 degrees, 0 percent impairment for extension to 60 degrees, 3 percent impairment for abduction to 140 degrees, 0 percent impairment for adduction to 60 degrees, 2 percent impairment for internal rotation to 60 degrees, and 2 percent impairment for external rotation to 50 degrees, for a total of 10 percent right upper extremity impairment. He assigned grade modifiers of 1 for functional history (GMFH) due to appellant's *Quick*DASH score of 30, which resulted in zero net adjustment.

appellant had five percent right upper extremity permanent impairment, utilizing the diagnosis-based impairment (DBI) methodology, for a diagnosis of right shoulder rotator cuff tear.[7]

By decision dated February 24, 2017, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity, based on Dr. Garelick's June 30, 2016 report. The period of the award ran for 15.6 weeks from June 10 to September 27, 2013.

On July 7, 2017 appellant appealed to the Board.

OWCP subsequently received a March 13, 2017 progress note by Dr. Okamura. Upon right shoulder examination appellant observed pain with movement and negative impingement signs. Dr. Okamura diagnosed right shoulder pain secondary to SLAP tear, status post arthroscopy. He noted that Dr. Garelick determined that appellant had five percent right upper extremity permanent impairment for his right shoulder rotator cuff tendon tear. Dr. Okamura disagreed with Dr. Garelick's rating and explained that appellant also had permanent impairment due to residuals from his right shoulder SLAP tear. He opined that appellant was entitled to an additional five percent permanent impairment due to residuals of his right shoulder SLAP tear.

By decision dated December 4, 2017, the Board set aside the February 24, 2017 decision.[8] The Board found that OWCP had inconsistently applied Chapter 15 of the A.M.A., *Guides* regarding the proper use of either the ROM or DBI method in assessing the extent of permanent impairment. The Board remanded the case for OWCP to issue a *de novo* decision after development of a consistent method for calculating permanent impairment of the upper extremities.

Following remand, on January 10, 2018, OWCP referred appellant's claim back to Dr. Garelick. In a report dated January 11, 2018, Dr. Garelick reviewed the record, including the statement of accepted facts, the Board's recent December 4, 2017 decision, and FECA Bulletin No. 17-06.[9] He referenced his June 30, 2016 report for an explanation as to why appellant had five percent right upper extremity impairment based on the DBI method. Dr. Garelick further reported that the ROM method was applicable in this case, but explained that he could not evaluate appellant's permanent impairment utilizing the ROM method based on Dr. Fernandes' examination findings. He noted that three independent measurements of appellant's right shoulder ROM was required to use the ROM method, but Dr. Fernandes had only provided one set of measurements.

On January 16, 2018 OWCP referred appellant back to Dr. Fernandes for a supplemental report and examination in order to provide a rating of permanent impairment of appellant's right upper extremity in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06. In a February 24, 2018 report, Dr. Fernandes reviewed appellant's history and indicated that appellant underwent right shoulder arthroscopy with SLAP repair, anterior-inferior capsular repair, decompression, and rotator cuff repair surgery. He noted a *Quick*DASH score of 25 and related

[7] A.M.A., *Guides* 403, Table 15-5.

[8] *Supra* note 3.

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

that appellant currently complained of right lateral shoulder pain. Upon examination of appellant's right shoulder, Dr. Fernandes observed tenderness to palpation at the right supraspinatus and infraspinatus tendons. Neurological examination showed grossly intact light touch sensation. O'Brien's, Scarf, and Hawkins' tests were positive. Dr. Fernandes provided ROM findings and indicated that he performed ROM testing three times after an initial warm-up.

Dr. Fernandes reported a diagnosis of right shoulder pain secondary to SLAP tear and high grade partial rotator cuff tear, status post right shoulder arthroscopy. He noted a date of maximum medical improvement (MMI) of June 10, 2013. First, Dr. Fernandes utilized the DBI method to determine the degree of appellant's permanent impairment. Utilizing Table 15-5, Shoulder Regional Grid, page 404, of the sixth edition of the A.M.A., *Guides*, he indicated that a condition of SLAP tear, residual symptoms, equated to a class 1 impairment with a default value of three percent upper extremity impairment.[10] Utilizing Table 15-7, page 406, Dr. Fernandes assigned a GMFH of 1 due to a *Quick*DASH score of 25.[11] He assigned a grade modifier of 1 for physical examination (GMPE) under Table 15-8, page 408, due to a mild decrease in ROM.[12] Dr. Fernandes referenced Table 15-9, page 410, and assigned a grade modifier of 4 for clinical studies (GMCS) due to MRI scan.[13] Applying the net adjustment formula, he calculated an adjustment of +3,[14] which moved the default value up to five percent permanent impairment.

Dr. Fernandes also utilized the ROM method to determine the degree of appellant's permanent impairment. He explained that, utilizing Table 15-34, Shoulder Range of Motion, page 475, appellant had a total of eight percent right upper extremity impairment due to decreased ROM of the right shoulder.[15] Utilizing Table 15-36, page 477, Dr. Fernandes assigned a GMFH of 1 due to a *Quick*DASH score of 25.[16] He also assigned a GMPE of 1 for under Table 15-35, page 477, for ROM grade modifiers.[17] Dr. Fernandes noted zero net adjustment. He concluded that the eight percent right upper extremity permanent impairment based on ROM method was the higher impairment.

In a March 16, 2018 report, Dr. Garelick indicated that he reviewed appellant's medical records, including Dr. Fernandes' February 24, 2018 report. He related that he agreed with Dr. Okamura's impairment evaluation for three percent right upper extremity permanent impairment under Table 15-5, page 404, of the A.M.A., *Guides* due to a diagnosis of SLAP tear. Dr. Garelick indicated that, after applying the net adjustment formula, Dr. Okamura adjusted the

[10] A.M.A., *Guides* 411, Table 15-5.

[11] *Id.* at 406, Table 15-7.

[12] *Id.* at 408, Table 15-8.

[13] *Id.* at 410, Table 15-9.

[14] *Infra* note 27.

[15] A.M.A., *Guides* 475, Table 15-34.

[16] *Id.* at 477, Table 15-36.

[17] *Id.* at 477, Table 15-35.

award two places to the right for an overall award of five percent right upper extremity impairment. He explained that, although he recommended an award based on a separate diagnosis, he had no issue with Dr. Okamura's recommendation.

Dr. Garelick also utilized the ROM method for rating permanent impairment. He noted that Dr. Fernandes had measured appellant's shoulder ROM three times, and thus, the ROM method could be used. Utilizing Table 15-34, Shoulder Range of Motion, page 475, of the A.M.A., *Guides*,[18] Dr. Garelick reported that appellant had three percent permanent impairment for flexion to 130 degrees, zero percent permanent impairment for extension to 50 degrees, three percent permanent impairment for abduction to 140 degrees, zero percent permanent impairment for adduction to 60 degrees, two percent permanent impairment for internal rotation to 60 degrees, and zero percent permanent impairment for external rotation to 60 degrees for a total of eight percent right upper extremity impairment. He concluded that, because the ROM method provided a schedule award greater than the DBI method, appellant was entitled to eight percent permanent impairment of the right upper extremity. Dr. Garelick explained that, because appellant had previously been awarded five percent right upper extremity impairment, appellant was owed an additional three percent based upon the extent of his right upper extremity permanent impairment. He noted a date of MMI of February 24, 2018, the date of Dr. Fernandes' impairment rating.

On March 20, 2018 OWCP granted appellant a schedule award for an additional three percent permanent impairment of the right upper extremity, totaling eight percent permanent impairment. The period of the award ran for 9.36 weeks from February 17 to March 3, 2018.

LEGAL PRECEDENT

A claimant seeking compensation under FECA[19] has the burden of proof to establish the essential elements of his or her claim.[20] With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.[21]

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement FECA program with the Director of OWCP.[22] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[23] FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and

[18] *Supra* note 15.

[19] *Supra* note 2.

[20] *John W. Montoya*, 54 ECAB 306 (2003).

[21] *J.M.*, Docket No. 18-1469 (issued March 1, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[22] *See* 20 C.F.R. §§ 1.1-1.4.

[23] 5 U.S.C. § 8107(c).

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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[24] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[25]

In addressing impairment of the upper extremities, the sixth edition of the A.M.A., *Guides* requires identifying the impairment for the class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[26] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[27]

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).
>
> "Upon initial review of a referral for upper extremity evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, the DBI or ROM) and (2) whether the applicable table 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).[28]
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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* 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."[29]

[24] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[25] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (March 2017); *id.*, at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

[27] *Id.* at 411.

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

[29] *Id.*

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 24, 2017 decision because the Board has already considered this evidence in its December 4, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[30]

Following the Board's remand decision, OWCP referred appellant's schedule award claim back to Dr. Fernandes for examination and to provide a permanent impairment of appellant's right upper extremity in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06. In a February 24, 2018 report, Dr. Fernandes reviewed appellant's history and conducted an examination. He indicated that he performed ROM testing three times after warm-up. Dr. Fernandes reported a diagnosis of right shoulder pain secondary to SLAP tear and high-grade partial rotator cuff tear, status post right shoulder arthroscopy.

OWCP's DMA, Dr. Garelick, indicated that he rereviewed appellant's medical records and reviewed Dr. Fernandes's most recent report. In a report dated March 16, 2018, he first calculated appellant's impairment rating under the DBI rating method. Dr. Garelick related that he agreed with Dr. Okamura's impairment rating of five percent right upper extremity impairment due to a diagnosis of right shoulder SLAP tear.

Second, Dr. Garelick applied Dr. Fernandes' ROM findings from his February 24, 2018 evaluation in order to calculate permanent impairment based on the ROM rating method. Utilizing Table 15-34, Shoulder Range of Motion, page 475, of the A.M.A., *Guides*,[31] he reported that appellant had three percent permanent impairment for flexion to 130 degrees, zero percent permanent impairment for extension to 50 degrees, three percent permanent impairment for abduction to 140 degrees, zero percent permanent impairment for adduction to 60 degrees, two percent permanent impairment for internal rotation to 60 degrees, and zero percent permanent impairment for external rotation to 60 degrees for a total of eight percent right upper extremity impairment. Dr. Garelick agreed with Dr. Fernandes that, pursuant to FECA Bulletin No. 17-06, appellant was entitled to eight percent right upper extremity permanent impairment as the impairment rating based on the ROM rating method was the higher impairment.

The Board finds that the DMA properly utilized examination findings and correlated them to specific provisions in the A.M.A., *Guides.* First, he calculated permanent impairment based on DBI and determined that appellant had five percent right upper extremity permanent impairment

[30] *See K.K.*, Docket No. 17-1061 (issued July 25, 2018).

[31] A.M.A., *Guides* 475, Table 15-34.

due to a diagnosis of right shoulder SLAP tear.[32] Second, the DMA applied Dr. Fernandes' ROM findings from his February 24, 2018 evaluation in order to calculate permanent impairment based on the ROM rating method. He determined that appellant had a total of eight percent right upper extremity permanent impairment. The DMA agreed with Dr. Fernandes that, pursuant to FECA Bulletin No. 17-06, appellant was entitled to eight percent right upper extremity permanent impairment as the impairment rating based on the ROM rating method was the higher impairment. Accordingly, OWCP properly found that appellant was entitled to eight percent permanent impairment of the right upper extremity based on the March 16, 2018 DMA report.[33]

On appeal, appellant alleges that he did not receive an impairment rating for his arthritis. As noted above, however, it is his burden of proof to establish permanent impairment with respect to a schedule award.[34] Appellant has not submitted such medical evidence in support of an increased schedule award based on arthritis. The Board finds that there is no current medical evidence of record supporting an impairment rating greater than the eight percent right upper extremity permanent impairment previously awarded.

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 impairment.

CONCLUSION

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

[32] Dr. Garelick, the DMA, noted that he previously recommended a DBI rating based on a different diagnosis (full-thickness rotator cuff tear). However, he was prepared to defer to Dr. Fernandes' and Dr. Okamura's rating based on a diagnosis of SLAP tear because the award amount was the same (five percent) under Table 15-5.

[33] *See L.T.*, Docket No. 18-1031 (issued March 5, 2019).

[34] *Supra* note 21.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2019
Washington, DC

Christopher J. Godfrey, 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