

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

C.T., Appellant	)	
	)	
and	)	<b>Docket No. 18-1716</b>
	)	<b>Issued: May 16, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Memphis, TN, 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  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 11, 2018 appellant filed a timely appeal from an August 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the August 27, 2018 decision, OWCP received additional evidence. 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.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish greater than three percent permanent impairment of the left upper extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

On August 7, 2017 appellant, then a 31-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 5, 2017 she slipped on a step and fell when delivering mail while in the performance of duty. She alleged that she hurt her left shoulder, neck, and knee, with the shoulder being the most painful. Appellant stopped work that day. On October 2, 2017 OWCP accepted the claim for contusion of the left shoulder. On April 25, 2018 it expanded acceptance of the claim to include strain of the muscles and tendon of the rotator cuff of the left shoulder and impingement syndrome of the left shoulder. OWCP paid appellant intermittent wage-loss compensation on the supplement rolls commencing September 20, 2017.

On April 3, 2018 OWCP wrote to appellant's treating physician, Dr. Gregory D. Dabov, a Board-certified orthopedic surgeon, and requested clarification regarding appellant's current medical and disability status, and whether appellant had reached maximum medical improvement (MMI).

In an April 3, 2018 report, Dr. Dabov referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> provided an impairment rating for the left shoulder, and determined that appellant was at MMI as of March 8, 2018. He referred to Figure 15-13, Upper Extremity Range of Motion,<sup>4</sup> he determined that for range of motion, appellant had 120 degrees of flexion and 53 degrees of extension, which correlated to three percent upper extremity impairment. Dr. Dabov referenced Table 15-34<sup>5</sup> and found that appellant had 100 degrees of abduction, which corresponded to three percent upper extremity impairment, and full adduction. He found 81 degrees of internal rotation and 63 degrees of external rotation. Dr. Dabov combined the individual impairment ratings and determined that appellant had six percent left upper extremity permanent impairment pursuant to Table 15-11.<sup>6</sup>

In an April 17, 2018 report, responding to OWCP's April 3 2018 request, Dr. Dabov referenced his prior report and again opined that appellant had six percent left upper extremity permanent impairment.

On June 12, 2018 appellant filed a claim for a schedule award (Form CA-7).

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> *Id.* at 462-63.

<sup>5</sup> *Id.* at 475.

<sup>6</sup> *Id.* at 420.

In a June 19, 2018 report, Dr. Garelick, an OWCP district medical adviser (DMA), reviewed the medical evidence and referenced the A.M.A., *Guides* and *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (*The Guides Newsletter*) (July/August 2009). He utilized a diagnosis-based impairment (DBI) rating, referred to Table 15-5,<sup>7</sup> and explained that appellant fell into the mid-range value for impingement syndrome with residual loss. The DMA, found three percent permanent impairment of the left upper extremity. He referenced FECA Bulletin No. 17-06 and explained that if it was clear to the evaluator that a restricted range of motion (ROM) had an organic basis, three independent measurements should be obtained and the greatest ROM loss should be used for the determination of impairment.<sup>8</sup> The DMA noted that Dr. Dabov only measured appellant’s shoulder ROM one time, and concluded that Dr. Dabov’s ROM findings were not appropriate to rate impairment.

In a letter dated June 29, 2018, OWCP wrote to Dr. Dabov and provided him with a copy of the June 19, 2018 report from the DMA. It requested his opinion with regard to whether he agreed with Dr. Garelick’s assessment of three percent permanent impairment rating for appellant’s left upper extremity and, explained that if he disagreed to provide his rationale based on the A.M.A., *Guides*.

In an August 2, 2018 response, Dr. Dabov disagreed with the three percent impairment rating and explained that OWCP should refer to his rating work sheet, which supported six percent impairment rating. He noted that, if OWCP disagreed with his rating, then it should pay for a “tie breaker” third opinion.

In an August 20, 2018 report, the DMA reviewed the additional evidence provided by Dr. Dabov, and noted that he merely referred to the ROM worksheet he had previously completed. He explained that there was no objective evidence to change the opinion he had rendered in his original report dated June 19, 2018.

By decision dated August 27, 2018, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity. The decision noted that the April 17 and August 2, 2018 reports of Dr. Dabov were considered, but they did not provide sufficient rationale to support a higher permanent impairment rating. OWCP accorded the weight of the evidence to the DMA because he correctly applied the A.M.A., *Guides* to the examination findings and determined the date of MMI based on the medical evidence of record. The period of the award ran from June 11 to August 15, 2018, for a total of 9.36 weeks of compensation.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>9</sup> and its implementing regulations<sup>10</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

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<sup>7</sup> *Id.* at 402.

<sup>8</sup> FECA Bulletin No. 17-06 (May 8, 2017).

<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

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.<sup>11</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.<sup>12</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage of loss of use of a member of the body for schedule award purposes.<sup>13</sup>

The sixth edition requires identifying the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).<sup>14</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>15</sup>

The A.M.A., *Guides* also provide that the ROM impairment method 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.<sup>16</sup> If the ROM method 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.<sup>17</sup> Adjustments for functional history may be made if the evaluator determines that the resulting degree of permanent impairment does not adequately reflect functional loss and functional reports are determined to be reliable.<sup>18</sup>

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.<sup>19</sup> Regarding the application of

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<sup>11</sup> *Id.* at § 10.404. See also Ronald R. Kraynak, 53 ECAB 130 (2001).

<sup>12</sup> 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 2.808.5 (March 2017).

<sup>13</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>14</sup> A.M.A., *Guides* 411.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 461.

<sup>17</sup> *Id.* at 473.

<sup>18</sup> *Id.* at 473.

<sup>19</sup> FECA Bulletin No. 17-06 (May 8, 2017).

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).

“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.*”<sup>20</sup> (Emphasis in the original.)

The Bulletin further advises:

“If the medical evidence of record is not sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence.

“Upon receipt of such a report, and if the impairment evaluation was provided from the claimant’s physician, the CE should write to the claimant advising of the medical evidence necessary to complete the impairment assessment and provide 30 days for submission. Any evidence received in response should then be routed back to the DMA for a final determination. Should no evidence be received within 30 days of the date of the CE’s letter, the CE should proceed with a referral for a second opinion medical evaluation to obtain the medical evidence necessary to complete the rating. After receipt of the second opinion physician’s evaluation, the CE should route that report to the DMA for a final determination.”<sup>21</sup>

### ANALYSIS

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

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Dr. Dabov provided reports dated April 3 and 17, 2018, and opined that appellant had six percent permanent impairment of the left upper extremity. He formulated his opinion utilizing Figure 15-13, for Upper Extremity Range of Motion and referencing Table 15-34.<sup>22</sup>

On June 19, 2018 Dr. Garelick, the DMA, reviewed Dr. Dabov's impairment findings and explained that, since three independent ROM calculations were not of record, it was not possible to rate appellant's permanent impairment utilizing the ROM methodology, pursuant to FECA Bulletin No. 17-06. He thereafter evaluated appellant's permanent impairment using the DBI methodology.

Pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, after review of the DBI rating, the DMA should advise as to the medical evidence necessary to complete the ROM method of rating if the medical evidence of record is insufficient to rate appellant's impairment using ROM. If the claimant's treating physician has provided an impairment rating, the claims examiner should then write to the treating physician advising of the medical evidence necessary to complete the rating. If the necessary evidence is not received within 30 days, OWCP is to refer appellant for a second opinion evaluation.

Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 after the DMA advised that the necessary evidence of three independent ROM findings was not of record to rate appellant's permanent impairment utilizing the ROM methodology.<sup>23</sup> The Board notes that OWCP sent a letter to Dr. Dabov on June 29, 2018, and provided him with a copy of the DMA's opinion. OWCP did not request that Dr. Dabov provide three sets of range of motion measurements, nor were they provided in his responsive report.

As Dr. Dabov did not provide the requisite three measurements of appellant's loss of ROM, OWCP should have referred appellant for a second opinion evaluation. For this reason, this case must be remanded for OWCP to complete the proper procedures outlined in FECA Bulletin No. 17-06 to rate appellant's upper extremity permanent impairment. After such further development as necessary, OWCP shall issue a *de novo* decision.<sup>24</sup>

### **CONCLUSION**

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

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<sup>22</sup> *Supra* note 4.

<sup>23</sup> *See M.D.*, Docket No. 18-1073 (issued January 18, 2019).

<sup>24</sup> *See T.M.*, Docket No. 18-0182 (issued July 26, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: May 16, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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