

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

E.P., Appellant)	
)	
and)	Docket No. 19-1708
)	Issued: April 15, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Stone Mountain, GA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 12, 2019 appellant filed a timely appeal from a May 2, 2019 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 his burden of proof to establish greater than 10 percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

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

On October 18, 2011 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a right shoulder and arm injury when lifting trays of mail and performing repetitive motions while in the performance of duty. He did not immediately stop work. OWCP accepted this claim for sprain of the shoulder and upper arm other specified sites on the right, rotator cuff syndrome of the shoulder and allied disorders on the right, and brachial neuritis or radiculitis.

On January 24, 2014 OWCP granted appellant a schedule award for 10 percent permanent impairment of the right arm.

On February 5, 2016 appellant filed a claim for an increased schedule award (Form CA-7).

In support of his claim, appellant submitted a February 2, 2016 impairment rating from Dr. John Foster, III, a Board-certified orthopedic surgeon. In the February 2, 2016 report, Dr. Foster noted his examination of appellant, provided findings, and utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He reported findings for range of motion (ROM) of appellant's right shoulder and determined that there was no instability and motor and sensory examinations were normal. Dr. Foster concluded that appellant had 13 percent permanent impairment of the right upper extremity.

Dr. Jovito B. Estaris, a physician specializing in occupational medicine and preventive occupational medicine and serving as an OWCP district medical adviser (DMA), reviewed the report of Dr. Foster and utilized the sixth edition of the A.M.A., *Guides*. He explained that his impairment calculation was based on the diagnosis of tendinitis as there was no rotator cuff tear or impingement. Dr. Estaris referenced the applicable Table of the A.M.A., *Guides* and determined that appellant had three percent permanent impairment of the right arm.

After further development of the record, OWCP denied appellant's request for an additional schedule award by decision dated February 15, 2017.

On May 15, 2017 appellant appealed to the Board. By decision dated December 10, 2018, the Board set aside the February 15, 2017 schedule award decision finding that the case was not in posture for decision. The Board remanded the case for OWCP to utilize a consistent method

² Docket No. 17-1218 (issued December 10, 2018).

³ A.M.A., *Guides* (6th ed. 2009).

for calculating the permanent impairment of the upper extremities and perform other further development deemed necessary followed by *de novo* decision on appellant's schedule award claim.

By development letters dated January 29 and February 21, 2019, OWCP requested that Dr. Foster, a Board-certified orthopedic surgeon and a treating physician, provide an impairment rating utilizing the A.M.A., *Guides*.

In a March 13, 2019 report, Linda LeBlanc, a nurse, indicated that Dr. Foster examined appellant and provided his findings.⁴ She noted that Dr. Foster utilized the A.M.A., *Guides* and that appellant previously received a rating of 10 percent permanent impairment rating of the right upper extremity on September 13, 2013. Appellant's physical examination findings were reported as active ROM of the right shoulder is to 90 degrees in abduction, 130 degrees in forward flexion, 50 degrees in external rotation, and 60 degrees internal rotation. No instability was noted of the right shoulder and motor and sensory examinations were within normal limits. Ms. LeBlanc reported that Dr. Foster opined that appellant had an additional 3 percent impairment of the right upper extremity following revision surgery, resulting in a total of 13 percent right upper extremity permanent impairment. She noted that the rating of 13 percent permanent impairment of the right shoulder was derived utilizing the ROM "as well diagnos[is]-based impairment" rating methods.

In a report dated April 27, 2019, Dr. Estaris, OWCP's DMA, reviewed the report from Dr. Foster. He calculated appellant's right shoulder permanent impairment under the DBI method for distal clavicle resection and found that appellant had 10 percent permanent impairment rating. Dr. Estaris noted that, only one set of ROM measurements had been documented, even though the A.M.A., *Guides* caution that, if it is clear that restricted ROM has an organic basis, three independent measurements should be documented. Using the ROM measurements provided by Dr. Foster, Dr. Estaris calculated that these measurements resulted in a 10 percent permanent impairment rating of appellant's right shoulder. He found that appellant did not have any additional impairment to the right upper extremity, greater than the 10 percent previously awarded.

By decision dated May 2, 2019, OWCP denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provisions 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.

⁴ OWCP accepted the findings of Dr. Foster as transcribed by Ms. LeBlanc.

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

OWCP evaluates the degree of permanent impairment according to the standards set forth in the sixth 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 (DBI) utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted grade modifier functional history (GMFH), grade modifier physical examination (GMPE), and grade modifier 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

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 diagnosis-based sections are applicable.¹³ 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.¹⁴ 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.¹⁵

Regarding the application of ROM or DBI 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

⁷ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* (2009) is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *See W.M.*, Docket No. 19-1531 (issued February 25, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* 3, section 1.3, ICF: A Contemporary Model of Disablement.

¹⁰ *Id.* at 383-492.

¹¹ *Id.* at 411.

¹² *See R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ A.M.A., *Guides* 461.

¹⁴ *Id.* at 473.

¹⁵ *Id.* at 474.

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.”¹⁷

The Bulletin further advises:

“If the rating physician provided an assessment using the DBI 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.

“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.”¹⁸

“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.”¹⁹

ANALYSIS

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

Upon further development of the claim, OWCP requested that Dr. Foster provide an updated impairment rating. Dr. Foster’s March 13, 2019 report reflected a rating using the ROM method, however, only one set of measurements was provided. The DMA reviewed Dr. Foster’s

¹⁶ V.L., Docket No. 18-0760 (issued November 13, 2018); FECA Bulletin No. 17-06 (May 8, 2018).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

impairment findings and explained that three independent ROM calculations were not of record, however, he rated appellant's permanent impairment under the ROM method using the one set of ROM findings provided. The DMA also 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, and the ROM findings are incomplete, 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. As the claimant's treating physician has provided an impairment rating, the CE should follow OWCP's procedures and advise of the medical evidence necessary to complete the rating. If the necessary evidence is not received within 30 days, OWCP shall refer appellant for a second opinion evaluation.²⁰

Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 after the DMA advised that the necessary three independent ROM findings were not of record to rate appellant's permanent impairment utilizing the ROM methodology.²¹

As the record contains only one set of ROM measurements, the Board finds that, a proper impairment examination was not conducted and, as such, the reports of Dr. Foster and the DMA are insufficient to resolve the issue in this claim.

On remand OWCP should obtain three independent ROM measurements as required under FECA Bulletin No. 17-06.²² After it obtains the evidence necessary to complete the rating as described above, the case should be referred to a DMA to independently calculate impairment to the right upper extremity using both ROM and DBI methods and identify the higher rating.²³ Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.²⁴

CONCLUSION

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

²⁰ *Id.*

²¹ *See C.T.*, Docket No. 18-1716 (issued May 16, 2019).

²² *J.S.*, Docket No. 19-0483 (issued October 10, 2019).

²³ *See J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

²⁴ *J.F.*, Docket No. 17-1726 (issued March 12, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2019 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: April 15, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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