United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
	)	
and	)	**Docket No. 19-1041**
	)	**Issued: January 3, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Compton, CA, 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
JANICE B. ASKIN, Judge

JURISDICTION

On April 10, 2019 appellant filed a timely appeal from a March 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 that he is entitled to an increased schedule award for his right shoulder, for which he previously received schedule award compensation.

FACTUAL HISTORY

On August 15, 1994 appellant, then a 39-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he injured his right hand and thumb as a result of factors

[1] 5 U.S.C. § 8101 *et seq.*

of his federal employment including repetitive hand and arm movements involved in casing mail and placing mail into mailboxes. He noted that he first realized his condition was related to his employment activities on July 20, 1994. OWCP assigned this claim File No. xxxxxx400, and accepted the claim for temporary aggravation of degenerative arthritis of the right thumb. It subsequently expanded acceptance of the claim to include a right shoulder impingement syndrome with adhesive capsulitis and right thumb degenerative arthritis. On February 17, 1995 appellant underwent arthrodesis of metaphalangeal joint with crisscross internal fixation Kirschner wire, and he then underwent removal of the Kirschner wire on June 30, 1995.[2] He underwent an OWCP-approved right shoulder arthroscopy on September 19, 2013.

On July 20, 2016 appellant filed a claim for a schedule award (Form CA-7) in connection with his accepted right thumb and right shoulder conditions. OWCP developed the claim and, by decision dated August 13, 1996, granted him a schedule award for 25 percent permanent impairment of the right hand. By decision dated November 6, 1997, it granted appellant an additional 16 percent permanent impairment, for a total 41 percent permanent impairment of the right hand. By decision dated October 18, 2016, OWCP awarded him a schedule award for eight percent permanent impairment of the right upper extremity, due to permanent impairment of his right shoulder.

On October 5, 2018 appellant filed a claim for an increased schedule award (Form CA-7).

In support thereof, appellant submitted a September 13, 2018 report from Dr. Mark A. Seldes, a Board-certified family practitioner, who noted appellant's history of injury and presented examination findings. Dr. Seldes opined that appellant reached maximum medical improvement (MMI) on September 13, 2018. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] he found that appellant had a diagnosis-based impairment (DBI) for right shoulder impingement syndrome of five percent impairment. Dr. Seldes indicated that this represented a class of diagnosis (CDX) of 1 with residual functional loss with normal motion, grade E severity under Table 15-5, page 402 of the A.M.A., *Guides.* He noted that appellant did not have normal motion of his right shoulder joint and that the A.M.A., *Guides* allowed him to alternatively assess appellant's impairment under section 15.7 as a stand-alone range of motion (ROM) impairment. Dr. Seldes calculated 25 percent right upper extremity permanent impairment based on ROM methodology, noting that the greatest of three measurements was used to calculate permanent impairment. Under Table 15-34, page 475, he calculated 35 degrees flexion which equaled 9 percent impairment, 15 degrees extension which equaled 2 percent impairment, 50 degrees abduction which equaled 6 percent impairment, 5 degrees adduction which equaled 2 percent impairment, 10 degrees external rotation which equaled 2 percent impairment, and 20 degrees internal rotation which equaled 4 percent impairment, for a total permanent impairment of 25 percent. Dr. Seldes opined that appellant had

[2] Under OWCP File No. xxxxxx760, OWCP accepted a September 3, 1996 occupational injury claim (Form CA-2) for arthralgia of the metacarpophalangeal joint of the left thumb, left shoulder strain and impingement syndrome. These claims have been administratively combined, with OWCP File No. xxxxxx760 serving as the master file.

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

25 percent permanent impairment of the right upper extremity due to loss of ROM as the ROM impairment was higher than the DBI impairment of 5 percent.

On February 14, 2019 OWCP routed Dr. Seldes' report, an updated statement of accepted facts (SOAF), the case file, and a set of questions to Dr. Morley Slutsky, a Board-certified occupational medicine specialist serving as an OWCP district medical adviser (DMA), for review. The SOAF listed appellant's accepted upper extremity conditions as temporary aggravation of degenerative arthritis of the right thumb and right shoulder impingement syndrome with adhesive capsulitis. It also noted that he had received schedule awards for a total combined 41 percent permanent right upper extremity impairment.

In a February 20, 2019 report, the DMA found that appellant reached MMI on September 13, 2018. He agreed with Dr. Seldes' final impairment rating of 25 percent based on ROM, but indicated that Dr. Seldes' shoulder adduction finding was not properly calculated. The DMA indicated that, under the A.M.A., *Guides*, the five percent shoulder adduction must be first rounded to the nearest number ending in 0, which, in this case, was 10 degrees. Under Table 15-34, the 10 degrees adduction equals one percent impairment as opposed to the two percent impairment Dr. Seldes had assigned. With this correction, the DMA indicated that the total right shoulder permanent impairment was 24 percent. Under Table 15-35, he then assigned a grade modifier 3 for the 24 percent impairment. The DMA indicated that, under Table 15-37, appellant's *Quick*DASH score of 82 percent equaled functional history grade modifier (GMFH) of 4. Under Table 15-35, he found the difference between GMFH 4 and GM 3 was 1. The DMA calculated the final 25 percent ROM impairment by multiplying the total ROM impairment of 24 percent times 5 percent, which rounded to 1, and added it to the 24 percent total upper extremity impairment.

Under the DBI impairment method, the DMA found three percent right upper extremity permanent impairment. He found, under Table 15-5, a CDX of 1 for shoulder impingement syndrome with residual loss which had a default impairment value of three percent. The DMA assigned a physical examination grade modifier (GMPE) of 1 under Table 15-8 and clinical studies grade modifier (GMCS) of 1 under Table 15-9. He indicated that GMFH under Table 15-7 was unreliable. The DMA applied the net adjustment formula and found a final adjustment of 0, which resulted in three percent final upper extremity impairment. He concurred that appellant was entitled to a schedule award based upon the ROM methodology.

The DMA noted that he was confused as to how OWCP had determined that appellant had received schedule award compensation for a total of 46 percent permanent impairment of the right upper extremity, as two of the prior schedule awards were calculated as awards for permanent impairment of the right hand. He further indicated that the prior schedule awards were unrelated to the newly calculated 25 percent ROM right shoulder permanent impairment.

By decision March 18, 2019, OWCP denied appellant's claim for an additional schedule award of his right upper extremity. It noted that his previous schedule awards to his right upper extremity totaled 46 percent. OWCP also found that the medical evidence did not support an increase in the impairment already compensated.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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 specified edition of the A.M.A., *Guides*, published in 2009.[6] 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.[7]

In addressing upper extremity impairments, the sixth edition requires identification of 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).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[9] 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.[10] 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.[11] 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.[12]

[4] *Supra* note 1 at 8107.

[5] 20 C.F.R. § 10.404.

[6] 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 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).

[7] *K.B.*, Docket No. 19-0431 (issued July 1, 2019); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[8] A.M.A., *Guides* 383-492.

[9] *Id*. at 411.

[10] *Id.* at 461.

[11] *Id.* at 473.

[12] *Id.* at 474.

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 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.*"[13] (Emphasis in the original.)
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> The Bulletin further advises:
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> "The CE should not render a decision on the schedule award impairment rating until the necessary medical evidence has been obtained."[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[15]

ANALYSIS

The Board finds that appellant has established an additional 17 percent permanent impairment of the right shoulder.

Utilizing the ROM methodology found in Table 15-34, page 475 of the A.M.A., *Guides*, both Dr. Seldes and the DMA determined that appellant's right upper extremity permanent impairment was 25 percent. Both Dr. Seldes and the DMA properly explained that appellant's current permanent impairment of the right shoulder was based on ROM methodology as it yielded a higher permanent impairment rating than the DBI methodology.[16]

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

[14] *See* FECA Bulletin, *id.*

[15] *See supra* note 6 at Chapter 2.808.6 (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

[16] *See supra* note 11.

The Board finds that OWCP should have granted appellant a schedule award of 17 percent for permanent impairment of his right shoulder by subtracting the 8 percent awarded in the October 18, 2016 schedule award from his newly rated entitlement to an award for 25 percent permanent impairment of the right shoulder. OWCP's regulations provide that benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) OWCP finds that the later impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[17] The Board has explained that simply comparing the prior percentage of impairment awarded to the current impairment for the same member is not always sufficient.[18] The issue is not whether the current impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.[19]

Upon return of the case record OWCP shall grant appellant an increased schedule award for an additional 17 percent permanent impairment of his right shoulder.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish an additional 17 percent permanent impairment of the right shoulder based on his accepted right shoulder condition.

[17] 20 C.F.R. § 404(d). *See E.B.*, Docket No. 19-0530 (issued August 9, 2019).

[18] *See T.S.*, Docket No. 16-1406 (issued August 9, 2017).

[19] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 3, 2020
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board