United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
	)	
and	)	**Docket No. 20-1579**
	)	**Issued: August 6, 2021**
U.S. POSTAL SERVICE, ROCKFORD CARRIER ANNEX, Rockford, MI, Employer	)	
	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2020 appellant filed a timely appeal from March 24 and June 19, 2020 merit decisions 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.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the June 19, 2020 decision, appellant submitted additional evidence to OWCP. 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 16 percent permanent impairment of her right upper extremity, for which she 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 August 9, 2016 appellant, then a 59-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 6, 2016 she injured her right shoulder and upper back when she reached out to try and stop a package from falling while in the performance of duty.[4] She stopped work on August 6, 2016 and accepted a full-time, modified-duty job offer as a sales, services, and distribution associate on August 17, 2016. OWCP accepted appellant's claim for right shoulder joint sprain.

On June 26, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

Appellant submitted a May 8, 2018 impairment rating report by Dr. Mark Seldes, a Board-certified family medicine specialist. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] Dr. Seldes determined that according to Table 15-34, range of motion (ROM), page 475, she had 24 percent right upper extremity permanent impairment due to loss of ROM of her right shoulder.

OWCP subsequently referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Arthur Dinenberg, a Board-certified orthopedic surgeon, for a second-opinion examination. In a November 14, 2018 report, Dr. Dinenberg noted his review of the SOAF and her accepted conditions under the present claim and her previous claims. He indicated that he was unable to provide an impairment rating because appellant was unable to complete her physical examination due to increased pain.

In a December 31, 2018 report, Dr. Jovito Estaris, a Board-certified preventive and occupational medicine specialist, serving as an OWCP district medical adviser (DMA), indicated

[3] Docket No. 19-0965 (issued December 3, 2019).

[4] OWCP assigned the present claim OWCP File No. xxxxxx361. Appellant has a previously accepted occupational disease claim (Form CA-2) under OWCP File No. xxxxxx468 for back sprain, thoracic sprain, right rotator cuff sprain, and right shoulder adhesive capsulitis causally related to factors of her federal employment. Under the previous claim, OWCP File No. xxxxxx468, OWCP granted appellant a schedule award for 16 percent right upper extremity permanent impairment. OWCP administratively combined OWCP File No. xxxxxx468 with OWCP File No. xxxxxx361, designating OWCP File No. xxxxxx468 as the master file.

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

that he was unable to complete an impairment rating because there were no physical examination findings from Dr. Dinenberg for him to review.

In a January 10, 2019 decision, OWCP denied appellant's schedule award claim finding that the medical evidence of record was insufficient to establish that she sustained a permanent impairment due to her accepted August 6, 2016 employment injury.

Appellant appealed to the Board. In a December 3, 2019 decision, the Board set aside the January 10, 2019 OWCP decision and remanded the case to OWCP for referral back to Dr. Dinenberg in order to complete his examination or to another appropriate specialist for a second-opinion examination.

On remand OWCP referred appellant's case to Dr. Patrick J. Horan, a Board-certified orthopedic surgeon, for a second-opinion evaluation and opinion in order to determine whether she had sustained additional right upper extremity permanent impairment in accordance with the A.M.A., *Guides*. In a February 4, 2020 report, Dr. Horan noted that his review of the SOAF and that appellant's present claim was accepted for right shoulder sprain. Upon physical examination, he recounted her complaints of pain even on light touch of her right shoulder. Dr. Horan provided ROM measurements, performed three times after warm up, and indicated that appellant was less participatory with each attempt. He noted that her ROM testing was limited by her participation and the fact that she did not want to put herself in any discomfort. Dr. Horan reported that appellant's maximum ROM of her right shoulder revealed 85 degrees forward flexion, 30 degrees extension, 70 degrees abduction, 30 degrees adduction, 45 degrees external rotation, and 50 degrees internal rotation.

To determine the degree of appellant's permanent impairment, Dr. Horan first utilized the ROM method. He calculated that she had 3 percent permanent impairment due to 90 degrees of forward flexion, rounded from 85 degrees, 1 percent permanent impairment due to 30 percent extension, 6 percent permanent impairment due to 70 degrees abduction, 1 percent permanent impairment due to 30 degrees adduction, 2 percent permanent impairment due to 50 degrees internal rotation, and 2 percent permanent impairment due to 50 degrees of external rotation, rounded from 45 degrees, for a total of 15 percent right upper extremity permanent impairment. Regarding the diagnosis-based impairment (DBI) method to determine permanent impairment, Dr. Horan referenced Table 15-5, *Shoulder Regional Grid*, page 403, of the A.M.A., *Guides*, and reported that a condition of rotator cuff injury, full-thickness tear with residual loss of function and loss of function equated to a class of diagnosis (CDX) of 1-E with a default value of seven percent lower extremity permanent impairment.[6] He explained that because the impairment rating method by ROM was more substantial, he would choose the ROM impairment rating. Dr. Horan noted that appellant had reached maximum medical improvement (MMI) as of February 4, 2020.

In a March 21, 2020 report, Dr. Estaris, serving as the DMA, reviewed the case file and indicated that he was unable to apply the ROM method to determine appellant's impairment rating because the ROM measurements provided by Dr. Horan were unreliable. He noted that Dr. Horan documented that appellant was less participatory with each ROM measurement attempt. Dr. Estaris further explained that the ROM measurements for flexion and extension did not fall

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

within 10 degrees of the mean as required on page 464 of the A.M.A., *Guides*. Utilizing the DBI rating method, he referenced Table 15-5, page 403, of the A.M.A., *Guides* and assigned a CDX of 1 for a default impairment rating of five percent due to rotator cuff injury, full-thickness tear with residual loss, function, and motor deficits. Dr. Estaris assigned a grade modifier for functional history (GMFH) of 2 due to pain with normal activity, a grade modifier for physical examination (GMPE) of 2 due to mild-to-moderate ROM limitation, and a grade modifier for clinical studies (GMCS) of 2 due to diagnostic testing. After applying the net adjustment formula, (2-1) + (2-1) + (2-1) = 3, he calculated that appellant had a final upper extremity impairment of seven percent right upper extremity permanent impairment. Dr. Estaris explained that since she had a previous schedule award of 16 percent permanent impairment for the right shoulder, she was not entitled to an additional award. He also reported a date of MMI of February 4, 2020 the date of Dr. Horan's examination.

By decision dated March 24, 2020, OWCP denied appellant's claim for an increased schedule award. It found that she had not submitted medical evidence demonstrating greater than the 16 percent permanent impairment of the right upper extremity previously awarded.

On May 12, 2020 appellant requested reconsideration and submitted additional medical evidence.

In a May 3, 2020 report, Dr. Seldes indicated that he had reviewed Dr. Horan's February 4, 2020 report, and alleged that the first ROM measurement was valid to the point where appellant moved it prior to having significant pain. Applying Dr. Horan's ROM test findings, he determined that appellant had 9 percent permanent impairment for 80 degrees flexion, 1 percent permanent impairment for 30 degrees extension, 6 percent permanent impairment for 70 degrees abduction, 1 percent permanent impairment for 30 degrees abduction, 4 percent permanent impairment for 40 degrees external rotation, and 2 percent permanent impairment for 50 degrees internal rotation for a total of 24 percent right upper extremity permanent impairment. Dr. Seldes explained that he rounded ROM measurements to the nearest whole number down ending in zero in accordance with the A.M.A., *Guides*, page 461, paragraph 15.7a. He concluded that since appellant was previously awarded 16 percent right upper extremity permanent impairment for her right shoulder, she was entitled to an additional 8 percent permanent impairment for the right upper extremity.

In a June 13, 2020 report, Dr. Estaris indicated that he disagreed with Dr. Seldes's May 3, 2020 report, and his calculation of rounding ROM measurements down. He asserted that according to the mathematical formula for rounding numbers, any number that ends in five through nine is rounded up and any number that ends in four through one is rounded down. Dr. Estaris reiterated his previous opinion that the ROM method for rating impairment was not applicable in this case as Dr. Horan's ROM measurements were unreliable and not in accordance with the A.M.A., *Guides.*

By decision dated June 19, 2020, OWCP denied modification of the March 24, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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 of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[10]

In determining 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. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of the default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX).[12] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[13]

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).
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> "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.,]

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides* 405-12; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[12] *Id.* at 411.

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

> *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.)[14]
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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."[15]

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[16] The medical evidence must include a detailed description of the permanent impairment.[17]

ANALYSIS

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

Following the Board's previous December 3, 2019 decision, OWCP referred appellant's case to Dr. Horan for a second-opinion evaluation and opinion in order to determine whether she had sustained additional right upper extremity permanent impairment in accordance with the A.M.A., *Guides*. In a February 4, 2020 report, Dr. Horan provided three ROM measurements for her right shoulder and indicated that ROM testing was limited by her participation. He utilized the ROM method under the A.M.A., *Guides* and calculated that appellant had 3 percent permanent impairment due to 90 degrees of forward flexion, 1 percent permanent impairment due to 30 percent extension, 6 percent permanent impairment due to 70 degrees abduction, 1 percent permanent impairment due to 30 degrees adduction, 2 percent permanent impairment due to 50 degrees internal rotation, and 2 percent permanent impairment due to 50 degrees of external rotation, for a total of 15 percent right upper extremity permanent impairment. Under the DBI method, Dr. Horan referenced Table 15-5 of the A.M.A., *Guides*, and indicated that appellant had seven percent right upper extremity permanent impairment for the CDX of rotator cuff injury, full-thickness tear with residual loss of function and loss of function. He explained that, since the ROM impairment rating method was more substantial, she had 15 percent right upper extremity permanent impairment.

In reports dated March 21 and June 4, 2020, Dr. Estaris, the DMA, identified multiple concerns he had with Dr. Horan's permanent impairment rating and explained that it was not carried out in accordance with the sixth edition of the A.M.A., *Guides.* He indicated that the ROM

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

[15] *Id.*

[16] *See Rose V. Ford*, 55 ECAB 449 (2004).

[17] *See Vanessa Young*, 55 ECAB 575 (2004).

measurements provided by Dr. Horan were unreliable since appellant was less participatory with each ROM measurement attempt. Dr. Estaris also noted that the ROM measurements for flexion and extension did not fall within 10 degrees of the mean as required on page 464 of the A.M.A., *Guides*. The Board finds that the DMA's concerns regarding Dr. Horan's impairment rating are valid and it was improper for OWCP to deny appellant's claim for an increased schedule award without addressing these concerns.[18]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[19] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[20] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[21] Accordingly, as OWCP undertook development of the evidence by referring appellant to a second-opinion physician, it has a duty to secure an appropriate report addressing the relevant issues.[22]

The Board thus finds that further development of the medical evidence is required to determine the extent of appellant's permanent impairment for schedule award purposes since Dr. Horan failed to provide an opinion on permanent impairment in accordance with the relevant standards.[23] On remand, OWCP should refer her back to Dr. Horan or to another second-opinion physician in the appropriate field of medicine. The second-opinion physician should obtain ROM findings based upon three ROM trials in accordance with the A.M.A., *Guides* in order to determine whether appellant has loss of ROM of the right shoulder from her accepted employment injury. Additionally, OWCP should apprise her of the penalty provisions of section 8123(d) of FECA.[24] If applicable, it should impose such sanctions, in the proper manner, upon making a finding that appellant malingered or otherwise obstructed the examination.[25] After such further development as OWCP deems necessary, a *de novo* decision shall be issued regarding her permanent impairment.

[18] *See N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[19] *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[20] *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[21] *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[22] *M.S.*, Docket No. 19-1401 (issued July 8, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

[23] *M.A.*, Docket No. 19-1732 (issued September 9, 2020).

[24] 5 U.S.C. § 8123(d); *see Charles A. McNeely*, 40 ECAB 484 (1989). On remand, the Board directed OWCP to retest appellant and apprise him of the penalty provisions of 5 U.S.C. § 8123(d) and to impose stated sanctions, if applicable, if there was a finding of malingering or obstruction of the examination.

[25] *Id.*

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2020 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: August 6, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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