

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

_____)	
J.D., Appellant)	
)	
and)	Docket No. 21-0425
)	Issued: January 24, 2022
DEPARTMENT OF THE AIR FORCE, TINKER)	
AIR FORCE BASE, OK, 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 January 11, 2021 appellant filed a timely appeal from a November 12, 2020 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 47 percent permanent impairment of the right upper extremity, more than 31 percent permanent impairment

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

of the left upper extremity, and more than 12 percent permanent impairment of each lower extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 8, 1999 appellant, then a 45-year-old illustrator, filed a traumatic injury claim (Form CA-1) alleging that on April 16, 1999 he sustained rotator cuff injury while in the performance of duty. By decision dated August 31, 1999, OWCP accepted appellant's claim for right wrist strain, left rotator cuff tear, and lumbar strain.

Appellant subsequently filed a claim for compensation (Form CA-7) for a schedule award. By decision dated February 27, 2001, OWCP granted appellant a schedule award for 42 percent permanent impairment of the right upper extremity, 24 percent permanent impairment of the left upper extremity, 3 percent permanent impairment of the right lower extremity, and 10 percent permanent impairment of the left lower extremity. The period of the award ran for 228.96 weeks from January 9, 2001 through May 30, 2005.⁴

By decision dated February 22, 2011, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the right upper extremity. The period of the award ran for 9.36 weeks from July 21 through September 24, 2009.

On August 2, 2017 appellant filed a Form CA-7 claim for compensation for an additional schedule award.

By decision dated April 13, 2018, OWCP granted appellant a schedule award for an additional nine percent permanent impairment of the right lower extremity and an additional two percent permanent impairment of the left lower extremity. It denied his request for an additional schedule award for permanent impairment of the upper extremities.

On July 3, 2018 appellant timely appealed the April 13, 2018 merit decision to the Board.

By decision dated August 12, 2019, the Board noted that appellant had previously received schedule award compensation for 47 percent permanent impairment of the right upper extremity, 31 percent permanent impairment of the left upper extremity, and 12 percent permanent

³ Docket No. 18-1355 (issued April 12, 2019).

⁴ In OWCP File No. xxxxxx055, appellant filed an occupational disease claim (Form CA-2) on June 20, 1996. OWCP accepted left olecranon spur and granted him a schedule award for seven percent permanent impairment of the left lower extremity. Additionally, OWCP File No. xxxxxx500 granted appellant a schedule award for two percent permanent impairment of the right upper extremity. These claims have been administratively combined with the present claim and OWCP File No. xxxxxx490 serves as the master file.

impairment of each lower extremity.⁵ The Board found that the case was not in posture for decision as OWCP failed to provide a complete statement of accepted facts (SOAF) to the second opinion physician. The Board directed OWCP to update the SOAF to include all of the accepted conditions and refer appellant for a second opinion examination to determine the extent of any additional permanent impairment due to his accepted conditions. After this and other such further development, OWCP was to issue a *de novo* decision.

OWCP prepared a SOAF dated February 5, 2020. The accepted conditions were listed as: olecranon bursitis, left; bilateral carpal tunnel syndrome; injury to left ulnar nerve, lesion of left ulnar nerve; strain of muscles and tendons of the rotator cuff of right shoulder, other sprain of the right shoulder joint; sprain of the shoulder and upper arm, rotator cuff, bilateral; displacement of lumbar intervertebral disc without myelopathy; sprain of the shoulder and upper arm, acromioclavicular, bilateral; and primary osteoarthritis, shoulder region, bilateral.

On May 13, 2020 OWCP prepared a memorandum containing questions for the second opinion physician. The second opinion physician was asked to provide an impairment evaluation of the bilateral upper and lower extremities, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

On July 23, 2020 OWCP referred appellant for a second opinion examination with Dr. Michael S. Brown, a Board-certified general surgeon. In an August 26, 2020 report, Dr. Brown noted that it was his understanding that he was to rate permanent impairment of appellant's bilateral shoulders. He noted the history of injury and treatment, examined appellant, utilized the A.M.A., *Guides* and concluded that she had 13 percent permanent impairment of each upper extremity, based upon loss of range of motion (ROM).

On October 5, 2020 OWCP requested that the DMA review Dr. Brown's August 16, 2020 impairment rating and provide his opinion and comments.

In an October 23, 2020 report, the DMA noted appellant's history of injury and treatment and explained that he was asked to review the August 26, 2020 report of Dr. Brown. He noted that only her shoulders were evaluated and provided an opinion for the upper extremities. The DMA utilized the A.M.A., *Guides* and concluded that appellant had 13 percent right upper extremity impairment and 13 percent left upper extremity impairment. He indicated that she reached maximum medical improvement on August 26, 2020.

By decision dated November 12, 2020, OWCP denied appellant's claim for an additional schedule award. It noted that she had previously received a schedule award of 40 percent for the right upper extremity and 24 percent for the left upper extremity and the medical evidence did not support an increase in the impairment already compensated.

⁵ Docket No. 18-1355 (issued August 12, 2019).

⁶ A.M.A., *Guides* (6th ed. 2009).

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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. 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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.¹¹ Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment of the class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹³ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹⁴

Neither FECA, nor its implementing regulations, provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹⁵ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁶ The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides*

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* See *A.D.*, Docket No. 20-0553 (issued April 19, 2021); see also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

¹¹ A.M.A., *Guides*, page 3, section 1.3(a).

¹² *Id.* at 493-556.

¹³ *Id.* at 521.

¹⁴ *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁵ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁶ See *supra* note 10 at Chapter 2.808.5c(3) (March 2017).

Newsletter).¹⁷ Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹⁸ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures provide that *The Guides Newsletter* is to be applied.¹⁹

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of the April 13, 2018 decision because the Board considered that evidence in its August 12, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.²⁰

In the prior appeal, the Board directed that OWCP prepare a SOAF that included all of the accepted conditions, and thereafter refer appellant for a second opinion evaluation to determine the extent of any additional permanent impairment due to his accepted conditions. While, in the May 13, 2020 memorandum, OWCP requested that the second opinion physician perform an impairment evaluation of the bilateral upper and lower extremities under the A.M.A., *Guides*, both the second opinion physician, Dr. Brown, in his August 26, 2020 report and the DMA in his October 23, 2020 report only provided a permanent impairment rating addressing permanent impairment of her bilateral shoulders.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.²¹ 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.²² Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve all of the relevant issues in the case.²³

¹⁷ *Supra* note 10 at Chapter 3.700, Exhibit 4 (January 2010).

¹⁸ *Supra* note 10 at Chapter 2.808.5(c)(3).

¹⁹ *Supra* note 10 at Chapter 3.700, at Exhibit 4.

²⁰ *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²¹ *See R.R.*, Docket No. 18-0914 (issued February 24, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

²² *C.T.*, Docket No. 20-0043 (issued April 20, 2021); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²³ *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

On remand OWCP shall refer appellant and the case record, including an updated SOAF,²⁴ to a second opinion physician for an examination and impairment ratings for appellant's right and left upper and lower extremities. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 12, 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: January 24, 2022
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

²⁴ The Board also notes in this regard that the SOAF should include a proper statement regarding the previous schedule awards totaling 47 percent permanent impairment of the right upper extremity, 31 percent permanent impairment of the left upper extremity, and 12 percent permanent impairment of each lower extremity.