



## ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> 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 October 7, 2014 appellant, then a 45-year-old generalist claims representative, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 2014 she injured her head, right side, left big toe, and low back when she slipped and fell on a wet floor while in the performance of duty. She stopped work on October 1, 2014. OWCP initially accepted the claim for concussion with loss of consciousness of unspecified duration, and contusions of the right shoulder and wrist. It subsequently expanded the acceptance of the claim to include headache; other synovitis and tenosynovitis, right hand; and contusion of face, scalp, and neck except eye(s). OWCP paid appellant wage-loss compensation on the supplemental rolls effective November 17, 2014. Appellant returned to full-duty work on September 11, 2017.

On June 4, 2018 OWCP received appellant's claim for compensation (Form CA-7) dated September 27, 2017 for a schedule award.

By decision dated March 12, 2020, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The award ran for 18.72 weeks for the period November 28, 2017 through April 8, 2018 and based on the findings of Dr. Robert Kalb, a Board-certified orthopedic surgeon, selected as the impartial medical examiner (IME).<sup>5</sup>

On March 19, 2020 appellant, through counsel, disagreed with the March 12, 2020 decision and requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 16, 2020.

By decision dated October 1, 2020, an OWCP hearing representative vacated the March 12, 2020 decision and remanded the case to OWCP for clarification from Dr. Kalb as to the extent of permanent impairment of appellant's right upper extremity due to right wrist loss of range of motion.

OWCP, by decision dated October 6, 2022, denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award due to her accepted

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<sup>4</sup> Docket No. 23-0765 (issued October 5, 2023).

<sup>5</sup> An automated compensation payment system form dated March 9, 2020 indicated that a appellant received a schedule award payment of \$18,262.68 for the period November 28, 2017 through April 8, 2018 via direct deposit for permanent impairment of her right upper extremity.

October 1, 2014 employment injury. It accorded the weight of the medical evidence to the opinions of Dr. Douglas C. Gula, a Board-certified orthopedic surgeon, selected as a new IME, and Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as a district medical adviser, who determined that appellant had zero percent permanent impairment of the right upper extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>6</sup>

On October 12, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 13, 2023.

By decision dated April 17, 2023, a second OWCP hearing representative affirmed the October 6, 2022 decision, finding that the opinion of Dr. Gula was entitled to the special weight of the medical evidence as an IME.

Appellant appealed to the Board. By decision dated October 5, 2023,<sup>7</sup> the Board affirmed OWCP's April 17, 2023 decision. The Board found that appellant had not met her burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award.

On October 19, 2023 appellant, through counsel, requested reconsideration.

OWCP, by decision dated October 20, 2023, denied modification of its denial of appellant's schedule award claim.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>8</sup> and its implementing regulations<sup>9</sup> 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, 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>10</sup> As of May 1, 2009, schedule awards are

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

<sup>7</sup> *Supra* note 4.

<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>11</sup> 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.<sup>12</sup>

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF)*.<sup>13</sup> 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.<sup>14</sup> With respect to the wrist and shoulder, reference is made to Table 15-3 (Wrist Regional Grid) beginning on page 395<sup>15</sup> and Table 15-5 (Shoulder Regional Grid) beginning on page 401,<sup>16</sup> respectively. After the CDX is determined from the Wrist or Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).<sup>17</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>18</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>19</sup>

The A.M.A., *Guides* also provide that the ROM impairment methodology 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>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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<sup>11</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 2.808.5a (March 2017).

<sup>12</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>13</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3.

<sup>14</sup> *K.R.*, Docket No. 20-1675 (issued August 19, 2022); *M.P.*, Docket No. 13-2087 (issued April 8, 2014).

<sup>15</sup> A.M.A., *Guides* 395-97.

<sup>16</sup> *Id.* at 401-5.

<sup>17</sup> *Id.* at 494-531.

<sup>18</sup> *Id.* at 411.

<sup>19</sup> *Id.* at 23-28.

<sup>20</sup> *Id.* at 461.

<sup>21</sup> *Id.* at 473.

<sup>22</sup> *Id.* at 474.

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>23</sup> Regarding the application of 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>24</sup> (Emphasis in the original.)

The Bulletin further advises:

“If the rating physician provided an assessment using the ROM 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.”<sup>25</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>26</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>27</sup> Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if

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<sup>23</sup> FECA Bulletin No. 17-06 (issued May 8, 2017).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; *see also* *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

<sup>26</sup> 5 U.S.C. § 8123(a). *See D.C.*, DocketNos. 22-0020 and 22-0297 (issued April 24, 2023); *M.C.*, Docket No. 20-1234 (issued January 27, 2022).

<sup>27</sup> *See M.C.*, Docket No. 20-1234 (issued January 27, 2022); *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>28</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's April 17, 2023 merit decision as the Board considered that evidence in its October 5, 2023 decision.<sup>29</sup>

In his October 19, 2023 request for reconsideration, counsel argued that appellant has a protected property interest in the schedule award for which she received compensation, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Board has previously explained that OWCP and the Board do not have jurisdiction to review claims regarding constitutional due process rights.<sup>30</sup>

Appellant has not submitted additional medical evidence following OWCP's April 17, 2023 decision to establish permanent impairment of the right upper extremity, warranting a schedule award. Thus, the Board finds that she has not met her burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award.

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<sup>28</sup> *R.R.*, Docket No. 21-0212 (issued November 3, 2021); *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

<sup>29</sup> *R.A.*, Docket No. 23-0408 (issued August 14, 2023); *E.L.*, Docket No. 21-0069 (issued October 19, 2022); *C.D.*, Docket No. 18-0677 (issued November 4, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

<sup>30</sup> *See T.G.*, Docket No. 16-1741 (issued April 14, 2017). *See Robert F. Stone*, 57 ECAB 292 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board