

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

C.C., Appellant	)	
	)	
and	)	Docket No. 24-0758
	)	Issued: August 26, 2024
U.S. POSTAL SERVICE, ALDINE BENDER	)	
DISTRIBUTION CENTER, Houston, TX,	)	
Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 15, 2024 appellant filed a timely appeal from a June 3, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the June 3, 2024 decision, OWCP received additional evidence. 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 six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

On April 22, 2022 appellant, then a 59-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 22, 2022 she sustained right elbow and arm injuries when her hand slipped when pushing a rack and her right elbow struck the rack, while in the performance of duty. She stopped work on March 23, 2022. OWCP accepted the claim for nondisplaced fracture of coronoid process of right ulna, nondisplaced fracture of olecranon process without intraarticular extension of right ulna, and spontaneous rupture of extensor tendons, right arm. Appellant underwent primary triceps muscle repair of the right elbow with debridement of tendon on November 9, 2022, and incision and drainage of multiple complicated subcutaneous abscesses of right elbow on November 21, 2022. OWCP paid her wage-loss compensation on the supplemental and periodic rolls from May 2, 2022 through October 23, 2023.

On August 25, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award. No evidence was submitted.

In a September 5, 2023 development letter, OWCP requested that appellant submit a permanent impairment evaluation addressing whether she had reached maximum medical improvement (MMI) and providing an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup> It afforded her 30 days to submit the necessary evidence.

Appellant submitted a September 5, 2023 permanent impairment rating performed by Dr. Benjamin Meshack, a chiropractor. Utilizing Table 15-10, page 412, of the A.M.A., *Guides*, he concluded that appellant had six percent permanent impairment of the right upper extremity.

On December 18, 2023 OWCP advised appellant that a physician must perform the evaluations for a permanent impairment rating. Under FECA a “physician” includes chiropractors only if there was a diagnosed spinal subluxation and it was demonstrated by x-ray.

OWCP referred appellant, to Dr. Charles F. Xeller, a Board-certified surgeon, for a second opinion evaluation. It requested that Dr. Xeller provide an opinion regarding permanent impairment of appellant’s right upper extremity under the A.M.A., *Guides*.

In a February 16, 2024 report, Dr. Xeller reviewed the statement of accepted facts (SOAF) and the medical record. He related appellant’s physical examination findings, and opined that appellant had reached MMI on November 21, 2023, one year after her last surgery. Utilizing the standards of the A.M.A., *Guides*, Dr. Xeller applied the diagnosis-based impairment (DBI) rating method and found that appellant had six percent right upper extremity impairment. Under Table

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

15-4 (Elbow Regional Grid: Upper Extremity Impairments), page 399, he found that appellant's class of diagnosis (CDX) of distal triceps tendon rupture and repair was analogous to a biceps distal rupture and resulted in a Class 1 impairment with default value of five percent. Dr. Xeller assigned a grade modifier for functional history (GMFH) of 1; grade modifier for physical examination (GMPE) of 2 and found that a grade modifier for clinical studies (GMCS) was not applicable. He utilized the net adjustment formula  $(1-1) + (2-1) = 1$ , which resulted in grade D or six percent permanent impairment of the right upper extremity. Dr. Xeller also took three measurements of active range of motion and found that the range-of-motion (ROM) impairment methodology resulted in five percent permanent impairment of the right upper extremity. Under Table 15-33 (Elbow/Forearm Range of Motion), page 474, he found that 115 degrees flexion resulted in three percent impairment, 20 degrees extension resulted in two percent impairment, 82 degrees pronation resulted in zero percent impairment, and 80 degrees supination resulted in zero percent impairment, for a total of five percent permanent impairment. Dr. Xeller opined that the DBI impairment rating of six percent yielded the highest impairment percentage. Therefore, appellant's permanent impairment of the right upper extremity was six percent.

On April 18, 2024 OWCP referred appellant's case to Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA) for determination of appellant's date of MMI and permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*. It specifically requested that Dr. Slutsky review Dr. Xeller's February 16, 2024 report.

In a May 9, 2024 report, Dr. Slutsky found that appellant had reached MMI on February 16, 2024, the date Dr. Xeller performed appellant's permanent impairment evaluation. He concurred with Dr. Xeller's impairment ratings of six percent under DBI rating methodology and five percent under ROM rating methodology but disagreed with his assessment of GMPE and GMCS. Dr. Slutsky explained that under Table 15-36, page 477, a GMPE for less than 12 percent loss of motion was consistent with a GMPE of 1. Similarly, a triceps tendon tear combined with a coronoid fracture was consistent with a GMCS of 2 and was not inapplicable as Dr. Xeller had opined. However, the calculation under the net adjustment formula still resulted in six percent upper extremity permanent impairment. Dr. Slutsky concluded that appellant had six percent right upper extremity permanent impairment as the DBI rating methodology yielded the highest impairment rating.

By decision dated June 3, 2024, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The period of the award ran for 18.72 weeks from February 16 through June 26, 2024.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>4</sup> and its implementing federal regulations,<sup>5</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,

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

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>8</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:

“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.*” (Emphasis in the original.)<sup>9</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. With respect to the shoulders, the relevant portions 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 a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>10</sup> Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>11</sup>

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in

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<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

<sup>9</sup> *Id.*

<sup>10</sup> See A.M.A., *Guides* (6<sup>th</sup> ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed shoulder conditions, permanent impairment may alternatively be assessed using Section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating. *Id.* at 398-05, 475-78.

<sup>11</sup> *Id.* at 23-28.

accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

OWCP accepted the claim for nondisplaced fracture of coronoid process of right ulna, nondisplaced fracture of olecranon process without intraarticular extension of right ulna, and spontaneous rupture of extensor tendons, right arm. Appellant subsequently filed a claim for a schedule award.

In a September 5, 2023 report, Dr. Meshack, a chiropractor, provided an impairment rating. Since he did not diagnose a subluxation as demonstrated by x-rays, he is not considered a physician under FECA.<sup>13</sup> The Board has explained that an evaluation by a chiropractor regarding permanent impairment of an extremity is of no probative medical value to a schedule award issue.<sup>14</sup>

In a February 16, 2024 report, Dr. Xeller found six percent permanent impairment of appellant's right upper extremity utilizing the DBI rating method and five percent permanent impairment of the right upper extremity utilizing the ROM rating method. Under the DBI rating method, he utilized Table 15-4, page 399 of the A.M.A., *Guides* to rate appellant's triceps tear, which he explained was analogous to a biceps distal rupture. Dr. Xeller placed appellant's impairment in Class 1, with a default impairment of five percent. He then assigned a GMFH of 1 and a GMPE of 2. He found that GMCS was not applicable. Under the net adjustment formula, Dr. Xeller found  $(1-1) + (2-1)$  resulted in a net modifier of 1, which resulted in grade D or six percent permanent impairment. In reviewing Dr. Xeller's impairment calculations, Dr. Slutsky, serving as the DMA, concurred with Dr. Xeller's impairment findings but opined that the GMPE was 1, explaining that under Table 15-36, page 477, a GMPE for loss of motion of less than 12 percent was consistent with a GMPE of 1. Dr. Slutsky also found a triceps tendon tear combined with a coronoid fracture was consistent with a GMCS of 2. He also applied the net adjustment formula of  $(1-1) + (1-1) + (2-1) = 1$ , and found that it resulted in grade D or six percent upper extremity impairment. Both Dr. Xeller and Dr. Slutsky agreed that the DBI impairment rating of six percent yielded the highest rating, with Dr. Slutsky further opining that MMI was reached February 16, 2024, the date of Dr. Xeller's impairment examination.

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<sup>12</sup> See *supra* note 8 at Chapter 2.808.6f (March 2017). See also *B.C.*, Docket No. 21-0702 (issued March 25, 2022); *D.L.*, Docket No. 20-1016 (issued December 8, 2020); *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>13</sup> See *M.T.*, Docket No. 24-0457 (issued June 6, 2024); *A.V.*, Docket No. 16-0369 (issued March 11, 2016); *Jack B. Wood*, 40 ECAB 95, 109 (1988).

<sup>14</sup> *M.T.*, *id.*; *J.W.*, Docket No. 13-1212 (issued September 20, 2013) (reports from a chiropractor regarding an impairment to the upper extremity were of no probative value.)

The Board finds that OWCP properly relied on the opinions of Drs. Xeller and Slutsky to find that appellant had no greater than six percent permanent impairment of her right upper extremity. Dr. Slutsky reached conclusions regarding appellant's permanent impairment that are in accordance with the standards of the sixth edition of the A.M.A., *Guides*.<sup>15</sup>

As appellant has not established greater than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award, 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 greater than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 3, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>15</sup> See *C.H.*, Docket No. 24-0380 (issued June 3, 2024).