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

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| **C.J., Appellant** | ) | |
| **and** | ) | **Docket No. 24-0453** |
| | ) | **Issued: June 4, 2024** |
| **U.S. POSTAL SERVICE, ENERGY CENTER STATION, Lafayette, LA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On March 27, 2024 appellant filed a timely appeal from a November 21, 2023 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.[2]

### ***ISSUE***

The issue is whether appellant has met her burden of proof to establish greater than two percent permanent impairment of her right upper extremity, and two percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the November 23, 2023 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*.

## ***FACTUAL HISTORY***

This case has previously been before the Board regarding different issues.[3] The facts and circumstances of the case as set forth in the Board's prior decisions and order are incorporated herein by reference. The relevant facts are as follows.

On December 8, 2003 appellant, then a 33-year-old part-time regular clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 6, 2003 she injured her head, right shoulder, and body when she slipped and fell while in the performance of duty. OWCP accepted the claim for open wound of the scalp, without complication; right shoulder contusion; lumbar sprain; neck sprain; post-concussion syndrome; and convulsions (post-traumatic seizure disorder). OWCP paid appellant wage-loss compensation on the supplemental rolls effective January 12, 2004, and on the periodic rolls as of January 25, 2004.

On July 5, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a July 22, 2016 development letter, OWCP informed appellant of the deficiencies of her schedule award claim. It advised her of the type of medical evidence necessary to establish her claim, including a permanent impairment rating from her treating physician utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*).[4] OWCP afforded appellant 30 days to submit the necessary evidence.

In October 12, 2017 and November 1, 2022 development letters, OWCP notified appellant that it authorized the treating physician of her choice to provide a permanent impairment rating; however, if she continued to have difficulty obtaining a permanent impairment rating, a second opinion could be arranged.

On May 19, 2023 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Gordan Gidman, a Board-certified orthopedic surgeon, for a second opinion examination.

In a June 13, 2023 report, Dr. Gidman recounted appellant's history of injury. He noted appellant's current symptoms of lumbar pain, which included throbbing, tingling, and stabbing pain, as well as numbness. Appellant's shoulder symptoms radiated down her arms. She also experienced cervical symptoms. Dr. Gidman related that appellant had some loss of range of motion (ROM) of both shoulders. Appellant displayed inconsistent testing on the lumbar spine with pain to light palpation of the skin and inconsistent straight leg raising, therefore he could not explain her symptoms to the lumbar spine. Concerning her neck, shoulders, and lower back, Dr. Gidman opined that she contused all three areas in her fall. He provided a single set of measurements for ROM of both shoulders. For the lumbar spine, Dr. Gidman utilized the A.M.A., *Guides* and explained that a soft tissue nonspecific condition would equate to three percent permanent whole-body impairment. For the neck and shoulders, he referred to the shoulder regional grid and opined that appellant had a shoulder contusion or crush injury which equated to

[3] Docket No. 14-644 (issued June 10, 2014); Docket No. 12-526 (issued June 7, 2013); and *Order Remanding Case*, Docket No. 12-197 (issued June 12, 2012).

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

three percent permanent upper extremity impairment or two percent permanent whole-body impairment. Dr. Gidman combined the lumbar and shoulder impairments and opined that appellant had five percent permanent whole-body impairment. He opined that appellant had reached maximum medical improvement (MMI) for her cervical and lumbar sprains and her bilateral shoulder contusions.

On August 28, 2023 OWCP referred Dr. Gidman's report to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA).

In a report dated September 27, 2023, Dr. Hammel reviewed Dr. Gidman's report and noted that there were no spinal nerve impairments from her accepted cervical and lumbar conditions to qualify upper or lower extremity-based ratings in accordance with the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*).[5] He also noted that the ROM of the shoulders could not be calculated due to lack of triplicate measurements. The DMA referred to the A.M.A., *Guides,* Table 15-5, page 401, Shoulder Regional Grid: Upper Extremity Impairments, and noted that the class of diagnosis (CDX) for a shoulder contusion or crush injury was a Class 1 impairment which had a default rating of two percent. Dr. Hammel applied a grade modifier for functional history (GMFH) of 1 for continued pain, a grade modifier for physical examination (GMPE) of 2 for mild motion loss and noted that a grade modifier for clinical studies (GMCS) was not applicable. The DMA concluded that appellant had two percent permanent impairment of the bilateral upper extremities due to her shoulder contusions. Dr. Hammel indicated that MMI was reached on June 13, 2023, the date of Dr. Gidman's examination.

By decision dated November 21, 2023, OWCP granted appellant a schedule award for two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity. The period of the award ran for 12.48 weeks from June 13 to September 8, 2023.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[6] and its implementing regulations[7] 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

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

adoption.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[9]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must identify the impairment CDX, which is then adjusted by a GMFH, a GMPE, and/or a GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids, and calculations of modifier scores.[12]

OWCP issued FECA Bulletin No. 17-06 to explain the use of the diagnosis-based impairment (DBI) methodology *versus* the ROM methodology for rating of upper extremity impairments.[13] 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).
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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.,] *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.*"[14] (Emphasis in the original.)
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> The Bulletin further advises:
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> "If the medical evidence of record is not sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."

[8] *Id.* at § 10.404(a); *see R.M.*, Docket No. 20-1278 (issued May 4, 2022); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[10] A.M.A., *Guides* 383-492; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[11] A.M.A., *Guides* 411.

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

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

[14] *Id.*

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*. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[17] In addressing upper or lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the impairment CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[18]

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 accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[19]

## ***ANALYSIS***

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

In a June 13, 2023 report, the second opinion physician, Dr. Gidman, provided a permanent impairment rating for the lumbar spine, finding three percent permanent whole body impairment. However, the Board notes that a schedule award cannot be granted for permanent loss of use of the spine or body as a whole.[20] The rating must be based on evidence of spinal radiculopathy affecting sensory and motor deficits of the extremities.[21] As Dr. Gidman did not find radiculopathy, his report did not provide a rating pursuant to *The Guides Newsletter* for spinal nerve impairment affecting the upper or lower extremities. Regarding appellant's accepted

[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).

[16] *Supra* note 9 at Chapter 2.808.5c(3) (February 2022).

[17] *Id.* at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[18] *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

[19] *See supra* note 9 at Chapter 2.808.6f (March 2017).

[20] *Id.*

[21] *Id.*

shoulder condition, he did not include three sets of ROM measurements as required to properly evaluate appellant's permanent impairment using the ROM method.[22]

In a September 27, 2023 report, Dr. Hammel, the DMA, reviewed Dr. Gidman's report and noted that the ROM method could not be utilized to evaluate appellant's permanent impairment of the shoulders because Dr. Gidman did not provide three sets of measurements. He applied the DBI method and opined that appellant had a two percent permanent impairment of the right and left upper extremities. After Dr. Hammel advised OWCP that the ROM methodology could not be used to determine appellant's shoulder permanent impairment because of the lack of measurements, OWCP should have requested that Dr. Gidman further examine appellant and obtain the proper measurements. As noted, FECA Bulletin No. 17-06 provides detailed instructions for obtaining sufficient ROM measurements to conduct a complete permanent impairment evaluation. Therefore, further development of the medical evidence is required in accordance with FECA Bulletin No. 17-06.[23]

The Board finds that this case is not in posture as the record does not contain the additional ROM measurements necessary to properly evaluate appellant's permanent impairment using the ROM method.[24] Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[25] Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[26]

On remand this case shall be referred for another second opinion evaluation by Dr. Gidman. The second opinion physician shall reference the sixth edition of the A.M.A., *Guides* and provide three sets of ROM measurements of appellant's bilateral shoulders. The permanent impairment rating provided by the second opinion physician, based on both the DBI and ROM methodologies, shall then be referred to a DMA for review. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's permanent impairment of the right and left upper extremities.

[22] Section 15.7 of the sixth edition of the A.M.A., *Guides* provides that ROM should be measured after a warm up, in which the individual moves the joint through its maximum ROM at least three times. The ROM examination is then performed by recording the active measurements from three separate ROM efforts and all measurements should fall within 10 degrees of the mean of these three measurements. The maximum observed measurement is used to determine the ROM impairment. A.M.A., *Guides* 464.

[23] *Supra* note 17.

[24] Section 15.7 of the sixth edition of the A.M.A., *Guides* provides that ROM should be measured after a warmup, in which the individual moves the joint through its maximum ROM at least three times. The ROM examination is then performed by recording the active measurements from three separate ROM efforts and all measurements should fall within 10 degrees of the mean of these three measurements. The maximum observed measurement is used to determine the ROM impairment. A.M.A., *Guides* 464.

[25] *See L.L.*, Docket No. 21-0625 (issued January 17, 2023); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

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

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 21, 2023 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: June 4, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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