United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 24-0504**
	)	**Issued: June 18, 2024**
U.S. POSTAL SERVICE, POST OFFICE, Albany, NY, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On April 13, 2024 appellant filed a timely appeal from a December 6, 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]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the December 6, 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*.

ISSUE

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

FACTUAL HISTORY

On July 17, 2022 appellant, then a 49-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a work-related left shoulder condition as a result of factors of her federal employment which included repetitive lifting, reaching, and carrying mail and heavy packages over the past 17 years. She first became aware of her condition and its relation to her employment on June 15, 2019. Appellant stopped work on August 25, 2022 and underwent a left shoulder arthroscopic synovectomy, debridement of labrum, biceps tenotomy, and biceps tenodesis. OWCP accepted the claim for left shoulder biceps tenodesis and unspecified injury of muscle, fascia and tendon of long head of biceps, left arm, resolved. It paid appellant wage-loss compensation for the period September 17 through November 25, 2022.

On September 8, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a September 11, 2023 development letter, OWCP indicated that appellant's claim had been accepted for unspecified injury of muscle, fascia and tendon of long head of biceps, left arm. It noted that no medical evidence had been received in support of her schedule award claim and requested that she provide a medical report, which included a permanent impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] OWCP afforded appellant 30 days to submit the requested information.

OWCP received October 18 and November 1, 2023 reports from Dr. John P. Sullivan, a Board-certified orthopedic surgeon, post appellant's August 25, 2022 arthroscopy of the left shoulder. In his November 1, 2023 report, Dr. Sullivan utilized the diagnosis-based impairment (DBI) methodology for rating permanent impairment. He opined that appellant had three percent permanent impairment of left upper extremity status post arthroscopy of left shoulder. Dr. Sullivan indicated that the class of diagnosis (CDX) for the left shoulder arthroscopy resulted in a CDX 1, Grade C impairment with a default impairment value of 1. He assigned a grade modifier for functional history (GMFH) of 2; a grade modifier for physical examination (GMPE) of 2; and a grade modifier for clinical studies (GMCS) of 2. Dr. Sullivan utilized the net adjustment formula and found a net adjustment of 3, resulting in 3 percent left upper extremity permanent impairment.

On November 15, 2023 OWCP routed Dr. Sullivan's November 1, 2023 report, along with a June 16, 2023 statement of accepted facts, and the case record, to Dr. Michael Minev, an internist serving as an OWCP district medical adviser (DMA), for review and evaluation of appellant's permanent impairment pursuant to the A.M.A., *Guides*.

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

In a November 27, 2023 report, Dr. Minev indicated his review of the statement of accepted facts (SOAF) and the medical record, including Dr. Sullivan's November 1, 2023 report. He related that the accepted condition was unspecified injury of muscle, fascia and tendon of long head of biceps, left arm, initial encounter. Dr. Minev opined that appellant reached maximum medical improvement (MMI) on November 1, 2023, the date of Dr. Sullivan's impairment examination. He utilized the DBI rating method to find that, under Table 15-5 (Shoulder Regional Grid), page 403, the CDX for biceps tendon dislocation with residual symptoms was a CDX 1 Grade C impairment with a default value of three percent. Dr. Minev assigned GMFH of 1 given the presence of left shoulder pain with strenuous activities; GMPE of 1 for deficit of left shoulder abduction to 120 degrees; and no GMCS as clinical studies were not available. He utilized the net adjustment formula, which resulted in a final left upper extremity impairment rating of three percent. Dr. Minev noted his agreement with Dr. Sullivan's November 1, 2023 permanent impairment rating. He also indicated that the record did not contain sufficient information to calculate permanent impairment under the range of motion (ROM) method.

By decision dated December 6, 2023, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity. The period of the award ran for 9.36 weeks for the period November 1, 2023 through January 5, 2024. OWCP noted that the weight of the medical evidence rested with Dr. Minev as the DMA, who applied the A.M.A., *Guides* to Dr. Sullivan's November 1, 2023 findings.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] and its implementing regulations[5] 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. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[7]

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[8] OWCP procedures provide

[4] *Supra* note 1.

[5] 20 C.F.R. § 10.404.

[6] *Id.*; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[8] *E.D.*, Docket No. 19-1562 (issued March 3, 2020); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[9]

In addressing 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.[10] After a CDX is determined (including identification of a default grade value), the impairment class is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

Regarding the application of ROM or DBI 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)."[13]

The FECA Bulletin further advises:

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

The Bulletin further provides:

> "If the medical evidence of record is [in]sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence

[9] *Supra* note 7 at Chapter 2.808.5 (March 2017).

[10] *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

[12] *Id.* at 405-12. Table 15-4 and Table 15-5 also provide that, if motion loss is present for a claimant with certain diagnosed elbow and 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.

[13] FECA Bulletin No. 17-06 (issued May 8, 2017); *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

[14] *Id.*

[15] *Id.*

necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[16]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[17]

ANALYSIS

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

In his November 1, 2023 report, Dr. Sullivan, appellant's treating physician, utilized the DBI methodology for rating permanent impairment. He opined that appellant had three percent permanent impairment of the left upper extremity status post arthroscopy of left shoulder. OWCP referred Dr. Sullivan's report to Dr. Minev, its DMA, who concurred that appellant had three percent permanent impairment of the left upper extremity under the DBI methodology, based on the diagnosis of biceps tendon dislocation with residual symptoms. Dr. Minev also indicated that appellant's record did not contain sufficient information to calculate impairment under the ROM method.

The Board finds that the case record does not contain three sets of ROM measurements necessary to properly evaluate appellant's permanent impairment rating under the ROM method.[18] As noted above, FECA Bulletin No. 17-06 provides detailed instructions for obtaining sufficient evidence to conduct a complete permanent impairment evaluation. However, such instructions were not fully carried out in this case, and therefore further development of the medical evidence is required in accordance with FECA Bulletin No. 17-06.[19]

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.[20] Once

[16] *Id.*; *R.L.*, Docket No. 19-1793 (issued August 7, 2020).

[17] *Supra* note 7 at Chapter 2.808.6f (March 2017); *S.H.*, Docket No. 23-0216 (issued December 7, 2023); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

[18] 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.

[19] *Supra* note 13.

[20] *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).

it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[21]

On remand, OWCP shall refer appellant, along with the SOAF and the case record, to a second opinion physician in the appropriate field of medicine consistent with OWCP's procedures. The second opinion physician shall provide three sets of ROM measurements of appellant's 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.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 6, 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 18, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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