United States Department of Labor
Employees' Compensation Appeals Board

M.O., Appellant	)	
and	)	**Docket No. 23-0529**
	)	**Issued: May 15, 2024**
U.S. POSTAL SERVICE, POST OFFICE, Montgomery, AL, Employer	)	

Appearances:
Aaron Aumiller, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 4, 2023 appellant, through counsel, filed a timely appeal from a February 1, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 12 percent permanent impairment of the right upper extremity, for which he previously received schedule award compensation.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

FACTUAL HISTORY

On September 30, 1997 appellant, then a 42-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right arm when throwing a bundle of flats while in the performance of duty. OWCP accepted the claim for right shoulder impingement syndrome and rotator cuff tear. On December 2, 1997 appellant underwent OWCP-approved right shoulder surgery.[2]

By decision dated June 30, 1998, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The period of the award ran for 15.60 weeks from April 23 to August 10, 1998.

A March 30, 2011 magnetic resonance imaging (MRI) scan report of the right shoulder demonstrated probable degenerative thinning of the supraspinatus tendon distally and subacromial narrowing.

On April 20, 2011 appellant underwent another OWCP-approved right shoulder surgery, including a comprehensive arthroscopy with distal clavicle excision and subacromial decompression.

In a February 28, 2022 report, Dr. Joshua B. Macht, a Board-certified internal medicine specialist, related appellant's history of injury to his right shoulder. He noted that appellant also described a history of ongoing problems with his left shoulder that "developed a traumatically and progressed gradually over the years." Dr. Macht diagnosed postoperative state of right shoulder. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and rated appellant's permanent impairment under both the diagnosis-based impairment (DBI) and range of motion (ROM) methods. Dr. Macht first discussed the DBI methodology using the Shoulder Regional Grid from Table 15-5, page 403, and placed appellant's impairment in Class 1 based upon a diagnosis of acromioclavicular (AC) joint disease status post distal clavicle resection, which yielded a default value of 10 percent. He applied the net adjustment formula for a grade modifier for functional history (GMFH) of 4, a grade modifier for physical examination (GMPE) of 2, and found that a grade modifier for clinical studies (GMCS) was used to determine impairment class and thus not additionally used. Dr. Macht concluded that appellant had 11 percent permanent impairment of the right upper extremity. He also utilized the ROM impairment rating methodology and recorded three sets of ROM measurements for both the right and left shoulders. Dr. Macht measured maximum right shoulder flexion of 45 degrees, extension of 25 degrees, abduction of 35 degrees, adduction of 15 degrees, external rotation of 15 degrees, and internal rotation of 90 degrees. For the left shoulder, he measured 72 degrees flexion, 35 degrees extension, 70 degrees abduction, 25 degrees adduction, 30 degrees external rotation, and 90 degrees internal rotation. Dr. Macht indicated that he elected to use the stand-alone ROM methodology for calculating permanent impairment, as appellant's left shoulder "also has chronic issues and limitations in range of motion" and therefore "[could not] be used as a normal comparator." He calculated 21 percent permanent impairment of the right

[2] Appellant underwent debridement of under-surface rotator cuff tear and arthroscopic subacromial decompression.

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

upper extremity due to loss of ROM after applying grade modifiers. Dr. Macht further indicated that, when the DBI and ROM ratings were different, the greater rating was used. Therefore, he concluded that appellant had 21 percent right upper extremity permanent impairment.

On March 30, 2022 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

On April 5, 2022 OWCP forwarded appellant's medical records, including Dr. Macht's February 28, 2022 report, and a statement of accepted facts scan to a district medical adviser (DMA) for evaluation of his right shoulder permanent impairment.

In an April 18, 2022 report, Dr. James W. Butler, Board-certified in occupational medicine, serving as a DMA for OWCP, indicated that he had reviewed appellant's surgical and medical history, and opined that appellant had reached maximum medical improvement (MMI) on February 28, 2022. Utilizing the DBI rating method, under Table 15-5, page 403, he found that his most impairing diagnosis was distal clavicle excision which represented a class of diagnosis (CDX) of 1 with a default value of 10 percent impairment. Dr. Butler assigned a GMFH of 2, a GMPE of 2, and a GMCS of 2. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) + (2 - 1) = 3, yielding net adjustment of 3 and moving two places to the right of the default position, to E, to find that appellant had a 12 percent right upper extremity permanent impairment. Dr. Butler also utilized the ROM methodology in Table 15-34, page 475, and found nine percent impairment for 50 degrees of flexion, one percent impairment for 30 degrees of extension, six percent impairment for 40 degrees of abduction, one percent impairment for 20 degrees of adduction, zero percent impairment for 90 degrees of internal rotation, and two percent impairment for 20 degrees of external rotation. He noted the same impairments in ROM of the left shoulder, which was neither involved nor previously injured.[4] Dr. Butler thus concluded that appellant had zero percent permanent impairment of his right upper extremity under the ROM methodology, which was less than the DBI rating of 12 percent permanent impairment of the right upper extremity. He also noted that, since he was previously granted a schedule award for five percent permanent impairment of the right upper extremity, an additional award of seven percent was warranted.

In a May 3, 2022 report, Dr. Macht reviewed Dr. Butler's April 18, 2022 report and asserted that the DMA improperly reduced the percentage of impairment for appellant's right shoulder using the left shoulder as appellant's normal, uninjured base status. He reiterated that he had chronic problems in the left shoulder that had progressed gradually over the years with progressive arthritis and degenerative changes and that surgery had been recommended. Dr. Macht opined that one could not consider the left shoulder as "normal." He contended that appellant has had to rely upon his left shoulder for the majority of his activities since his right shoulder injury in 1997.

[4] Pursuant to Table 15-34 on page 475 of the A.M.A., *Guides*, Dr. Macht found that 72 degrees flexion yielded 9 percent impairment, 25 degrees extension yielded 1 percent impairment, 70 degrees abduction yielded 6 percent impairment, 25 degrees adduction yielded 1 percent impairment, 30 degrees external rotation yielded 2 percent impairment, and 90 degrees internal rotation yielded no impairment, for a total impairment due to reduced ROM of 19 percent.

On May 9, 2022 OWCP requested clarification from the DMA and provided a copy of Dr. Macht's May 3, 2022 report.

In a May 30, 2022 supplemental report, Dr. Butler reviewed the reports from Dr. Macht. He related that there was no documentation of any injury to appellant's left shoulder and advised that, pursuant to the A.M.A., *Guides*, page 461, section 15.7a, clinical measurements of motion, "If the opposite extremity is neither involved nor previously injured, it must be used to define normal for that individual any losses should be made in comparison to the opposite normal extremity." Dr. Butler noted that appellant had long-term arthritic degenerative changes but "no evidence of injury to the left shoulder other than long-term changes of life." As there was no documented injury to the left shoulder, he opined that the degenerative changes were "normal for [appellant]" and therefore range of motion "must be compared to that per the direction of the *Guides*." Dr. Butler further opined that his rating of 7 percent additional right upper extremity impairment for a total of 12 percent right upper extremity impairment remained unchanged.

By decision dated June 2, 2022, OWCP granted appellant a schedule award for an additional 7 percent permanent impairment of the right upper extremity, due to permanent impairment of his right shoulder, for a total of 12 percent permanent impairment of the right upper extremity. The period of the award, equal to 21.84 weeks of compensation, ran from February 28 through May 21, 2022.

On July 2, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 18, 2022.

By decision dated February 1, 2023, OWCP's hearing representative affirmed the June 2, 2022 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[6] 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 of a member 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 has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[8] The Board has

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

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.[9]

Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS and the net adjustment formula is applied. The grade modifiers are used on the net adjustment formula described above to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C, by the calculated net adjustment.[10] OWCP 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 permanent impairment specified.[11]

The A.M.A., *Guides* also provide that 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.[12] 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.[13] 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.[14]

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.[15] 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 [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

[9] *T.G.*, Docket No. 20-0660 (issued June 3, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[10] A.M.A., *Guides* 387.

[11] *T.G.*, *supra* note 9; *M.S.*, Docket No. 19-0282 (issued August 2, 2019); *supra* note 8 at Chapter 2.808.6(f) (March 2017).

[12] A.M.A., *Guides* 461.

[13] *Id*. at 473.

[14] *Id*. at 474.

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

> 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.*"[16] (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 [claims examiner]."[17]

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.[18] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[19]

ANALYSIS

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

In a February 28, 2022 report, Dr. Macht, appellant's attending physician, found that, using the DBI impairment method, appellant had a class 1 impairment due to AC joint disease after a distal clavicle resection, which yielded a default value of 10 percent. He applied a GMFH of 4, a GMPE of 2, and found a GMCS was not applicable, which after application of the net adjustment formula yielded 11 percent permanent impairment of the right upper extremity. Dr. Macht further provided three sets of ROM measurements and calculated 21 percent permanent impairment of appellant's right shoulder due to loss of ROM. He explained that he used the stand-alone ROM methodology for calculating permanent impairment, as appellant's left shoulder "also has chronic issues and limitations in range of motion" and therefore "cannot be used as a normal comparator."

On April 18, 2022 Dr. Butler, the DMA, rated appellant's right shoulder permanent impairment utilizing both the DBI methodology under Table 15-5 and the ROM method under Table 15-34. According to the DBI rating method, he concluded that under Table 15-5 appellant had 12 percent permanent impairment of the right shoulder due to his distal clavicle resection. Dr. Butler then rated appellant's right shoulder permanent impairment under the ROM

[16] *See* A.M.A., *Guides* 477.

[17] *Id.* at 474; *J.S.*, Docket No. 23-0439 (issued September 18, 2023); *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *A.R.*, Docket No. 19-1284 (issued January 14, 2020); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[18] 5 U.S.C. § 8123(a); *see S.H.*, Docket No. 23-0216 (issued December 7, 2023); *R.C.*, Docket No. 18-0463 (issued February 7, 2020).

[19] 20 C.F.R. § 10.321; *P.H.*, Docket No. 21-0233 (issued May 10, 2023); *R.C.*, 58 ECAB 238 (2006).

methodology. He correctly noted that the A.M.A., *Guides* on page 461 provided that if the opposite member is neither involved, nor previously injured, any losses should be made in comparison to the opposite normal extremity. Using ROM measurements for both shoulders, Dr. Butler found no significant difference in impairment rating, resulting in zero percent permanent impairment of the right upper extremity. As the impairment under the DBI rating method was higher than that, found under the ROM methodology, he concluded that appellant's permanent impairment was best represented by the DBI rating of 12 percent permanent impairment of the right upper extremity. Dr. Butler noted that appellant was previously awarded five percent for the right upper extremity impairment and advised that an additional seven percent award was warranted.

Counsel thereafter submitted a May 3, 2022 narrative report by Dr. Macht, who reiterated his opinion that appellant's left shoulder was not normal, and therefore could not be used as a comparator. Dr. Macht noted that appellant had chronic problems in the left shoulder that had progressed gradually over the years with arthritis and degenerative changes, and that surgery had been recommended. He further indicated that appellant had to rely upon his left shoulder for most of his activities following his right shoulder injury in 1997.

The Board notes that the A.M.A., *Guides* explains that in evaluating ROM measurements "If the opposite extremity is neither involved nor previously injured, it must be used to define normal for that individual; any losses should be made in comparison to the opposite normal extremity."[20] Dr. Butler, after reviewing Dr. Macht's reports, explained that appellant's left shoulder must be used to define normal for the impairment rating of the right shoulder. He referred to the A.M.A., *Guides* and noted that there was no documentation of any injury to the left shoulder. Dr. Butler noted that appellant had long-term arthritic degenerative changes but "no evidence of injury to the left shoulder other than long-term changes of life." As there was no documented injury to the left shoulder, he opined that the degenerative changes were "normal for [appellant]" and therefore range of motion "must be compared to that per the direction of the [A.M.A.,] *Guides*." Dr. Butler explained that appellant had the same impairments in ROM of the left shoulder when compared to the injured right shoulder, which resulted in a zero percent permanent impairment of his right upper extremity under the ROM methodology. Using the higher rating under the DBI methodology, he found that appellant had 12 percent permanent impairment of the right upper extremity, due to permanent impairment of his right shoulder. Dr. Butler noted that he previously received an award of five percent and was therefore entitled to an additional award of seven percent for the right upper extremity.

The Board finds that there is a conflict in medical opinion evidence between the opinion and methodologies of Dr. Macht, appellant's attending physician, and Dr. Butler, the DMA, regarding the extent of appellant's right upper extremity and proper application of the A.M.A., *Guides* to the ROM measurements for the right shoulder.[21] As there is an unresolved conflict in

[20] *Id*. at 461.

[21] *S.H.*, Docket No. 23-0216 (issued December 7, 2023).

the medical evidence, the case must be remanded to OWCP for referral to an impartial medical examiner (IME) for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).[22]

On remand, OWCP shall refer the case record, the SOAF, and appellant to a specialist in the appropriate field of medicine, to serve as an IME, for a reasoned opinion regarding the extent of permanent impairment of appellant's right upper extremity. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 1, 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: May 15, 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

[22] 5 U.S.C. § 8123(a).