United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 24-0252**
	)	**Issued: May 20, 2024**
U.S. POSTAL SERVICE, WESTVILLE POST OFFICE, Westville, NJ, Employer	)	

Appearances:
Russell T. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 12, 2024 appellant, through counsel, filed a timely appeal from a July 25, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 10 percent permanent impairment of the right upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 9, 2012 appellant, then a 47-year-old carrier technician, filed a traumatic injury claim alleging that on that date he blacked out and fell from his parked postal vehicle, injuring his right shoulder. He stopped work that day[4] and underwent right clavicle open reduction and internal fixation on April 20, 2012. On September 26, 2012 OWCP accepted the claim for a closed fracture of the right clavicle.

In a February 20, 2017 report, Dr. Jack L. Rook, a Board-certified physiatrist, related that appellant sustained a work-related right shoulder clavicle fracture on April 9, 2012. He determined that appellant reached maximum medical improvement (MMI) at the time of the examination. Dr. Rook noted that in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] appellant had 6 percent whole person impairment of the right upper extremity and 15 percent permanent impairment of the right upper extremity using the range of motion (ROM) rating method. He applied the diagnosis-based impairment (DBI) rating method and found that, under Table 15-5, page 405, appellant had three percent permanent impairment of the right upper extremity for right shoulder fracture.

On May 2, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP subsequently referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Michelle Cameron-Donaldson, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation regarding his permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

[3] Docket No. 14-1369 (issued October 23, 2014).

[4] In a May 10, 2012 statement, appellant indicated that, on April 9, 2012, as he stopped to deliver mail and began to exit the postal vehicle, he felt pain in his knee and remembered nothing further until he woke up in an ambulance. He stated that the emergency medical technician (EMT) told him he had broken his shoulder and perhaps had a seizure. Appellant was transported to the hospital and treated for a broken clavicle and possible seizure. He stated that he had never had a seizure before this incident.

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

In a report dated March 9, 2018, Dr. Cameron-Donaldson agreed with Dr. Rook's February 20, 2017 impairment rating, and provided that appellant did not want surgical intervention.

By decision dated July 27, 2018, 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 20 through July 1, 2017.

On July 31, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on December 19, 2018.

By decision dated March 1, 2019, an OWCP hearing representative set aside the September 4, 2018 decision[6] and remanded the case for OWCP to request clarification from Dr. Cameron-Donaldson, and "obtain an independent rating with multiple, independent, and reproduceable measurements."

In a report dated July 12, 2019, Dr. Cameron-Donaldson provided permanent impairment ratings under the standards of the sixth edition of the A.M.A., *Guides*. She applied the DBI rating method and found that, under Table 15-5, page 405, appellant had six percent permanent impairment of the right upper extremity for right shoulder fracture. Dr. Cameron-Donaldson then applied the ROM rating method and found, under Table 15-34, page 475, appellant had 10 percent permanent impairment of the right upper extremity due to ROM deficits of the shoulder.[7]

In a supplemental report dated October 23, 2019, Dr. Cameron-Donaldson reiterated the impairment rating provided on July 12, 2019.

By decision dated February 7, 2020, OWCP granted appellant a schedule award for an additional 4 percent permanent impairment of the right upper extremity (for a total of 10 percent permanent impairment of the right upper extremity). The period of the award ran for 12.48 weeks from July 12 through October 7, 2019.

On February 13, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 2, 2020.

By decision dated July 30, 2020, OWCP's hearing representative vacated the February 7, 2020 decision, finding the case not in posture for decision. The hearing representative remanded the case for additional development on the issue of permanent impairment, and directed that

[6] OWCP's hearing representative erroneously noted that the date of the decision was September 4, 2018; however, the case record supports that the schedule award decision was issued on July 27, 2018.

[7] Dr. Cameron-Donaldson reported that on physical examination of appellant's right shoulder she recorded appellant's range of motion findings: 160 degrees forward flexion equaling three percent impairment, 30 degrees extension equaling one percent impairment, 130 degrees abduction equaling three percent impairment, 30 degrees adduction equaling one percent impairment, 60 degrees internal rotation equaling two percent impairment, and 75 degrees external rotation equaling zero percent impairment.

Dr. Cameron-Donaldson provide the required ROM testing information to determine the appropriate basis for a schedule award in this case.

On October 20, 2020 OWCP referred appellant, the medical record, a SOAF, and a series of questions to, Dr. Cameron-Donaldson for a supplemental second opinion evaluation regarding his permanent impairment under the sixth edition of the A.M.A., *Guides*. This letter was sent to appellant's Colorado Springs, Colorado address. In correspondence dated October 28, 2020, appellant, through counsel, informed OWCP that he had moved to Great Falls, Montana, and provided his new address. On November 17, 2020 Mitchell MCN, OWCP's scheduling contractor, advised that appellant did not attend the appointment scheduled for November 13, 2020 with Dr. Cameron-Donaldson. In a letter dated December 28, 2020, counsel informed OWCP that there was a mix-up with appellant's address, which was why he did not attend the appointment on November 13, 2020. OWCP was again provided with appellant's new address in Great Falls, Montana.

On March 31, 2021 OWCP referred appellant, the medical record, a SOAF, and a series of questions to, Dr. Wilbert B. Pino, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation regarding appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In an April 23, 2021 report, Dr. Pino noted appellant's history of injury and medical treatment. He noted that active ROM measurements of the right shoulder revealed 170 degrees of forward flexion, 35 degrees of extension, 130 degrees of abduction, 30 degrees of adduction, 90 degrees of internal rotation, and 80 degrees of external rotation, and noted that the ROM measurements were performed three times. Dr. Pino referred to the A.M.A., *Guides*, and utilized the DBI rating method to find that, under Table 15-5 (Shoulder Regional Grid), page 405, the class of diagnosis (CDX) for appellant's right shoulder fracture with residual symptoms consistent with objective findings and or functional loss with normal motion resulted in a Class 1 impairment. He assigned a grade modifier for functional history (GMFH) of 1, and a grade modifier for physical examination (GMPE) of 1. Dr. Pino found that a grade modifier for clinical studies (GMCS) was not applicable because it was the basis of his assigned Class. He applied the net adjustment formula (GMFH - – CDX) + (GMPE - CDX) = (1 - 1) + (1 - 1) = 0, which resulted in a grade C or three percent permanent impairment of the right upper extremity.

Dr. Pino also used the ROM method to rate permanent impairment to appellant's right upper extremity. Utilizing Table 15-34, page 475, he noted 170 degrees flexion equaling three percent impairment, 35 degrees extension equaling one percent impairment, 130 degrees abduction equaling 3 percent impairment, 30 degrees adduction equaling 1 percent impairment, 90 degrees internal rotation equaling zero percent impairment, and 80 degrees external rotation equaling zero percent impairment, totaling eight percent permanent impairment of the right upper extremity. Dr. Pino noted that appellant reached MMI at the time of his examination on April 23, 2021.

On July 1, 2021 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed the medical record, including Dr. Pino's April 23, 2021 report. He concurred with Dr. Pino's permanent impairment calculation. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides*, Dr. Harris referred to Table 15-5, page 405, and identified a CDX of clavicle fracture that resulted in a Class 1 impairment with a default

value of three. He applied the net adjustment formula, (which resulted in a grade C or three percent permanent impairment of the right upper extremity.

Dr. Harris also referred to the ROM method to rate permanent impairment to appellant's right upper extremity. Utilizing Table 15-34, page 475, he found 170 degrees flexion equaling three percent impairment, 35 degrees extension equaling one percent impairment, 130 degrees abduction equaling three percent impairment, 30 degrees adduction equaling one percent impairment, 90 degrees internal rotation equaling zero percent impairment, and 80 degrees external rotation equaling zero percent impairment, totaling eight percent permanent impairment of the right upper extremity. Dr. Harris explained that if the appropriate section of the A.M.A., *Guides* provides more than one method to rate a particular impairment condition the method producing the higher rating must be used. He noted that appellant reached MMI at the time of Dr. Pino's examination on April 23, 2021. Dr. Harris concluded that appellant was previously awarded a total of 10 percent permanent impairment of the right upper extremity and would therefore not be entitled to an increase in right upper extremity impairment.

By decision dated July 12, 2021, OWCP denied appellant's claim for an increased schedule award. It accorded the weight of the medical evidence to Dr. Harris, the DMA, who determined that appellant had no greater permanent impairment than the 10 percent previously awarded for the right upper extremity.

On August 12, 2022 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 9, 2022, OWCP denied appellant's request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP, along with the submission of new evidence.

In a letter dated October 31, 2022, counsel indicated that his office was not copied on the July 12, 2021 decision, and did not receive a copy until after the appeal deadline. On November 24, 2022 OWCP reissued the July 12, 2021 decision.

On December 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 May 11, 2023.[8]

By decision dated July 25, 2023, OWCP's hearing representative affirmed the November 24, 2022 decision.

[8] By decision dated January 24, 2023, OWCP expanded the acceptance of appellant's claim to include generalized idiopathic epilepsy and epileptic syndromes, intractable, with status epilepticus closed fracture of the right clavicle.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] and its implementing regulations[10] 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.[11] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[12] 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.[13]

In addressing upper extremity impairment, the sixth edition requires identification of the CDX, which is then adjusted by grade modifiers or GMFH, GMPE, and GMCS.[14] The net adjustment formula is (GMH - CDX) + (GME - CDX) + (GMS - CDX).[15] 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.[16]

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.[17] 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.[18] Adjustments for functional history may be made if the evaluator

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

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

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

[13] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[14] A.M.A., *Guides* 383-492.

[15] *Id.* at 411.

[16] *Id.* at 23-28.

[17] *Id.* at 461.

[18] *Id.* at 473.

determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[19]

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).
>
> "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*."[20] (Emphasis in the original.)

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.[21]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation.

OWCP referred appellant for a second opinion evaluation with Dr. Pino on April 23, 2021, who determined that appellant had reached MMI. Regarding permanent impairment of the right shoulder, Dr. Pino determined that under the DBI methodology, the CDX for appellant's clavicle fracture resulted in a Class 1 impairment. He assigned a GMPE of 1, GMFH of 1, and found that a GMCS was not applicable. Dr. Pino applied the net adjustment formula, which resulted in a default value of grade C or three percent permanent impairment of the right upper extremity. He referenced Table 15-34, page 475, and found 170 degrees flexion equaling three percent impairment, 35 degrees extension equaling one percent impairment, 130 degrees abduction equaling three percent impairment, 30 degrees adduction equaling one percent impairment, 90

[19] *Id.* at 474.

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

[21] *See supra* note 12 at Chapter 2.808.6f (March 2017). *See also P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

degrees internal rotation equaling zero percent impairment, and 80 degrees external rotation equaling zero percent impairment, totaling eight percent impairment of the right upper extremity.

In accordance with its procedures,[22] OWCP properly referred the evidence of record to Dr. Harris, serving as the DMA, who reviewed Dr. Pino's report and concurred in his findings. He utilized the DBI method and determined that a CDX of clavicle fracture was Class 1 impairment with a default value of grade C or three percent permanent impairment under Table 15-5, page 405. Dr. Harris applied the net adjustment formula and concluded that appellant had three percent permanent impairment of the right upper extremity due to clavicle fracture. Utilizing the ROM rating method under Table 15-34, page 475, he found 170 degrees flexion equaling three percent impairment, 35 degrees extension equaling one percent impairment, 130 degrees abduction equaling three percent impairment, 30 degrees adduction equaling one percent impairment, 90 degrees internal rotation equaling zero percent impairment, and 80 degrees external rotation equaling zero percent impairment, totaling eight percent permanent impairment of the right upper extremity. Dr. Harris concluded that appellant's right shoulder permanent impairment under the ROM rating method was greater than his right shoulder impairment using the DBI rating method. He concurred with Dr. Pino, pursuant to the sixth edition of the A.M.A., *Guides*, finding that the ROM rating method established eight percent permanent impairment of the right upper extremity.

Dr. Harris properly applied the standards of the A.M.A., *Guides* to the physical examination findings of Dr. Pino.[23] As Dr. Harris' opinion is detailed, well rationalized, and based on a proper factual background, the Board finds that it constitutes the weight of the medical evidence.[24]

OWCP therefore properly relied on the opinion of Dr. Harris, the DMA, to find that appellant had no greater than eight percent permanent impairment of his right upper extremity.

As there is no probative medical evidence of record demonstrating greater impairment than that previously awarded, the Board finds that appellant has not met his burden of proof to establish an increased schedule award.

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 impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation.

[22] *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004). *See also D.J.*, Docket No. 19-0352 (issued July 24, 2020).

[23] *L.H.*, Docket No. 20-1550 (issued on April 13, 2021).

[24] *J.M., id.*; *G.J., id.*

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2024
Washington, DC

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

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

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