United States Department of Labor
Employees' Compensation Appeals Board

E.A., Appellant	)	
and	)	**Docket No. 25-0036**
	)	**Issued: November 13, 2024**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On October 16, 2024 appellant filed a timely appeal from a September 10, 2024 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 September 10, 2024 decision, OWCP received additional evidence. 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 his burden of proof to establish greater than 14 percent permanent impairment of his left upper extremity or 14 percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[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 March 10, 2009 appellant, then a 50-year-old mail distribution clerk, filed an occupational disease claim (Form CA-2) alleging that he injured his right shoulder due to factors of his federal employment, including repetitive lifting of boxes and pushing of mail containers.[4] He noted that he first became aware of his condition and realized its relationship to his federal employment on January 23, 2009. OWCP accepted the claim for sprain of the right shoulder and upper arm. It subsequently expanded the acceptance of the claim to include cervical spondylosis without myelopathy and sprain of the shoulder and upper arm, rotator cuff, bilateral.[5]

On April 12, 2010 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP referred the case record, along with a statement of accepted facts (SOAF) to Dr. Robert Meador, a Board-certified internist serving as a district medical adviser (DMA), for review.

In a report dated May 21, 2010, Dr. Meador evaluated appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[6] He found five percent permanent impairment of the right upper extremity and opined that he had reached maximum medical improvement (MMI) as of April 20, 2010.

By decision dated September 26, 2012, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The award ran from August 26 through December 13, 2012.

---

[3] Docket No. 13-0958 (issued March 7, 2014); Docket No. 22-1344 (issued November 9, 2023).

[4] OWCP assigned the current claim OWCP File No. xxxxxx058. Appellant also has an occupational disease claim under OWCP File No. xxxxx637, alleging that he sustained an injury to his left shoulder due to repetitive lifting as of March 10, 2009. OWCP has administratively combined OWCP File Nos. xxxxxx637 and xxxxxx058, with the latter serving as the master file.

[5] Appellant underwent arthroscopic surgery on the right shoulder on October 6, 2009 and on the left shoulder on June 29, 2010, with additional manipulation of the left shoulder under anesthesia on October 6, 2010.

[6] A.M.A., *Guides* (6th ed. 2008).

Appellant requested reconsideration of OWCP's September 26, 2012 decision. By decision dated March 14, 2013, OWCP denied modification of the September 26, 2012 decision. By decision dated March 7, 2014, the Board affirmed OWCP's March 14, 2013 decision.[7]

On April 21, 2014 OWCP referred appellant to Dr. Robert D. Harper, a Board-certified orthopedic surgeon, along with the medical record and a SOAF, for a second opinion examination and evaluation of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.[8]

In a May 13, 2014 report, Dr. Harper noted his examination findings and found that appellant had 14 percent permanent impairment of the left upper extremity and 14 percent permanent impairment of the right upper extremity due to his shoulder conditions.

By decision dated July 16, 2014, OWCP granted appellant a schedule award for 14 percent permanent impairment of the left upper extremity and an additional 9 percent permanent impairment of the right upper extremity) for a total of 14 percent permanent impairment of the right upper extremity. The award ran from June 29, 2014 through November 13, 2015.

On September 24, 2019 appellant filed a Form CA-7 claim for an increased schedule award.

On July 29, 2020 OWCP referred appellant to Dr. Jack H. Henry, a Board-certified orthopedic surgeon, along with the medical record and a SOAF, for a second opinion examination and evaluation of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.[9]

In a September 16, 2020 report, Dr. Henry noted his review of the medical record and an updated SOAF, and documented his physical examination findings. He applied the A.M.A., *Guides*[10] to his findings and opined that appellant had 11 percent permanent impairment of his left upper extremity and 11 percent permanent impairment of his right upper extremity. Referencing *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), Dr. Henry determined that appellant had zero sensory or motor deficits in the upper extremities resulting in zero percent permanent impairment of the left or right upper extremity as a result of cervical spinal nerve impairments.

On November 1, 2023 appellant again filed a Form CA-7 claim for an increased schedule award.

[7] Docket No. 13-958 (issued March 7, 2014).

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

[9] *Id*.

[10] *Id*.

On December 29, 2023 OWCP referred the record and an updated SOAF to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as DMA, and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a report dated January 10, 2024, Dr. Katz indicated that he had reviewed the SOAF and the medical record, including Dr. Henry's September 16, 2020 report. He opined that appellant had reached MMI on September 16, 2020, the date of Dr. Henry's physical examination. Dr. Katz agreed with Dr. Henry that there was no ratable impairment of the upper extremities attributable to appellant's accepted cervical conditions. He also agreed that appellant had 11 percent permanent impairment of the left upper extremity and 11 percent permanent impairment of the right upper extremity in accordance with the sixth edition of the A.M.A., *Guides*. Dr. Katz noted that the present impairments did not exceed the prior awards of 14 percent of the left upper extremity and 14 percent of the right upper extremity and, therefore, no additional award was due for either upper extremity.

By decision dated February 9, 2024, OWCP denied appellant's claim for an increased schedule award.

On February 15, 2024 appellant requested reconsideration of OWCP's February 9, 2024 decision.

In an April 15, 2024 medical report, Alexandra Hartke, a nurse practitioner, noted appellant's history of chronic pain in the shoulders and neck.

On May 16, 2024 OWCP referred appellant to Dr. Ali Ashraf, a Board-certified orthopedic surgeon, along with the medical record and SOAF, for evaluation of his permanent impairment, date of MMI, and medical status.

In a report dated May 25, 2024, Dr. Ashraf noted his review of the medical record and SOAF. He performed a physical examination of the cervical spine and bilateral upper extremities. Dr. Ashraf opined that appellant had not reached MMI, noting that he would "still benefit from therapy as well as potential surgery in the future to both shoulders."

In a June 8, 2024 report, Dr. Katz, serving as DMA, reviewed Dr. Ashraf's May 25, 2024 report and opined that "MMI is more likely to be present than not, and that the potential need for further surgery and/or therapy -- so long as it is not imminent -- would not be reason to delay an impairment assessment." He further noted that the record lacked sufficient detail to permit assignment of an impairment rating on the basis of a records review. Dr. Katz recommended a second opinion evaluation by a physician Board-certified in physical medicine and rehabilitation or orthopedic surgery who was familiar with the sixth edition of the A.M.A., *Guides.*

On June 25, 2024 OWCP referred appellant, the medical record, and a SOAF to Dr. Charles W. Kennedy, Jr., an orthopedist, for evaluation of his permanent impairment, date of MMI, and medical status.

In a report dated August 13, 2024, Dr. Kennedy reviewed the SOAF and appellant's medical record. He related his physical examination findings, including three measurements for each range of motion (ROM) test in the shoulders, and opined that he had reached MMI on that

date. Dr. Kennedy explained that appellant had undergone adequate treatment for the work injuries and that there was no anticipation of significant material lasting improvement after the date of his examination. Utilizing the standards of *The Guides Newsletter*, he found zero percent permanent impairment of the left or right upper extremity as a result of cervical spinal nerve impairments. Regarding the shoulders, Dr. Kennedy applied the diagnosis-based impairment (DBI) rating method and found that appellant had one percent permanent impairment of the left upper extremity and one percent permanent impairment of the right upper extremity due to his shoulder conditions. Under Table 15-5, Shoulder Regional Grid: Upper Extremity Impairment, page 401, he found that the class of diagnosis (CDX) of nonspecific shoulder pain involving injury was a Class 1 impairment with a default rating of one percent. Dr. Kennedy assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 3, and a grade modifier for clinical studies (GMCS) of 1. He utilized the net adjustment formula, which resulted in a grade C or one percent permanent impairment for each shoulder. Dr. Kennedy also utilized the ROM impairment rating method at Table 15-34, page 475, and found 12 percent left upper extremity permanent impairment for the left shoulder and 12 percent right upper extremity permanent impairment for the right shoulder. For the left shoulder, he related that the highest obtained measurements for ROM were three percent permanent impairment for flexion of 90 degrees, two percent permanent impairment for 30 degrees of extension, six percent permanent impairment for abduction of 60 degrees, one percent impairment for 20 degrees adduction, zero percent permanent impairment for internal rotation at 80 degrees, and zero percent impairment for external rotation of 80 degrees. Dr. Kennedy added those values and found 12 percent permanent impairment of the left upper extremity. For the right shoulder, he related that the highest obtained measurements for ROM were three percent permanent impairment for flexion of 90 degrees, two percent permanent impairment for 30 degrees of extension, six percent permanent impairment for abduction of 60 degrees, one percent impairment for 20 degrees adduction, zero percent permanent impairment for internal rotation at 60 degrees, and zero percent impairment for external rotation of 80 degrees. Dr. Kennedy added those values and found 12 percent permanent impairment of the left upper extremity. He explained that, as the ROM rating method yielded the higher rating over the DBI method, appellant was entitled to a schedule award for 12 percent permanent impairment of the left upper extremity and 12 percent permanent impairment of his right upper extremity due to his shoulder conditions.

On September 7, 2024 Dr. Katz, OWCP's DMA, reviewed Dr. Kennedy's August 13, 2024 report. He applied the DBI rating method to Dr. Kennedy's findings and found that appellant had five percent permanent impairment of the left upper extremity and five percent permanent impairment of the right upper extremity due to his shoulder conditions. Under Table 15-5, Shoulder Regional Grid: Upper Extremity Impairment, pages 401 to 405, he found the CDX for labral lesion was a Class 1 impairment with a default rating of three percent. For each shoulder, Dr. Katz assigned a GMFH of 2 and a GMPE of 2 and noted that GMCS was not applicable. He utilized the net adjustment formula, (which resulted in a grade E or five percent permanent impairment for each shoulder. Dr. Katz also utilized the ROM impairment rating method at Table 15-34, page 475, and found 12 percent left upper extremity permanent impairment for the left shoulder and 14 percent permanent impairment of the right upper extremity for the right shoulder. Regarding the application of the ROM method to the right shoulder, he noted that he disagreed with Dr. Kennedy's rating as 60 degrees of internal rotation would be assigned two percent per Table 15-34, not zero percent as indicated by Dr. Kennedy. Since the ROM permanent impairment ratings of 12 percent of the left upper extremity and 14 percent of the right upper extremity

exceeded the DBI permanent impairment rating of five percent for each upper extremity, Dr. Katz found that appellant had a 12 percent permanent impairment of the left upper extremity and a 14 percent permanent impairment of the right upper extremity due to his shoulder conditions. Under Table 15-7, page 477, he noted that the 12 and 14 percent impairment ratings, respectively, were consistent with a grade modifier 2, and because under Table 15-7, page 406, appellant had a GMFH of 2, modification of the rating was not needed. Dr. Katz indicated that no additional award was due as the present impairments did not exceed the prior, overlapping awards. He also opined that appellant had reached MMI on August 13, 2024, the date of Dr. Kennedy's impairment examination.

By decision dated September 10, 2024, OWCP denied modification of its February 9, 2024 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[11] and its implementing regulations[12] 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.[13] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[14]

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.[15] OWCP procedures provide 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*.[16]

[11] *Supra* note 1.

[12] 20 C.F.R. § 10.404.

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

[14] 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).

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

[16] *Supra* note 14 at Chapter 2.808.5 (March 2017).

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.[17] 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/or GMCS.[18] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[19] 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.[20]

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.[21] 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)."[22]

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. *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.*"[23] (Emphasis in the original).

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

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

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

[19] *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.

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

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

[22] *Id.*; *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

[23] *Id.*

impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[24]

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[25]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 14 percent permanent impairment of his left upper extremity or 14 percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation

On September 7, 2024, Dr. Katz, OWCP's DMA, reviewed second opinion physician Dr. Kennedy's August 13, 2024 report. He concurred that appellant had reached MMI on August 13, 2024, the date of Dr. Kennedy's impairment evaluation. Dr. Katz applied the DBI rating method to Dr. Kennedy's findings, and found that under Table 15-5, Shoulder Regional Grid: Upper Extremity Impairment, pages 401 to 405, a labral lesion with residual loss was Class 1 impairment with a default impairment rating of three percent impairment. He assigned a GMFH of 2; a GMPE of 2; and found that GMCS was not applicable. Dr. Katz utilized the net adjustment formula and found a final grade E or five percent permanent impairment of each upper extremity due to appellant's shoulder conditions. He also applied the ROM rating method to Dr. Kennedy's findings and concurred with his impairment rating calculation for the left shoulder. Regarding the right shoulder, under Table 15-34, page 475, Dr. Katz found that the highest obtained measurements for ROM were three percent for flexion of 90 degrees, two percent for 30 degrees of extension, six percent for abduction of 60 degrees, one percent for 20 degrees adduction, two percent for internal rotation of 60 degrees, and zero percent for external rotation of 80 degrees. He added those values and found 14 percent permanent impairment of the right upper extremity. Under Table 15-7, page 477, Dr. Katz noted that the 12 and 14 percent impairment ratings, respectively, were consistent with a grade modifier 2, and because under Table 15-7, page 406, appellant had a GMFH of 2, modification of the rating was not needed. He concluded that as the ROM method yielded a higher rating over the DBI method, appellant was entitled to a schedule award for 12 percent permanent impairment of the left upper extremity and 14 percent permanent impairment of the right upper extremity due to his shoulder conditions.[26] Dr. Katz correctly noted

[24] *See supra* note 14 at Chapter 2.808.6(f) (March 2017); *see also J.T.*, Docket No. 17-1465 (issued September 25, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

[25] 20 C.F.R. § 10.404(d). *See B.C.*, Docket No. 21-0702 (issued March 25, 2022); *D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

[26] *Supra* note 23.

that no additional award was due, as the present impairment ratings did not exceed the prior, awards.[27]

The Board finds that OWCP properly relied on the opinion of Dr. Katz as he calculated appellant's left and right upper extremity permanent impairment ratings in accordance with the standards of the sixth edition of the A.M.A., *Guides*.[28]

The April 15, 2024 note by Ms. Hartke, the May 25, 2024 report by Dr. Ashraf, and the August 4, 2024 letter by Dr. Koning, do not contain an opinion in conformance with the sixth edition of the A.M.A., *Guides* establishing greater than 14 percent permanent impairment of the left upper extremity or 14 percent permanent impairment of the right upper extremity.[29]

As the medical evidence of record is insufficient to establish greater than 14 percent permanent impairment of his left upper extremity or greater than 14 percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation, the Board finds that appellant has not met his 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 his burden of proof to establish greater than 14 percent permanent impairment of his left upper extremity or 14 percent permanent impairment of his right upper extremity, for which he has received schedule award compensation.

[27] *Supra* note 25.

[28] *See K.S.*, Docket No. 24-0564 (issued June 28, 2024).

[29] *See J.C.*, Docket No. 21-0426 (issued October 12, 2021).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2024
Washington, DC

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

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

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