

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

K.P., Appellant	)	
	)	
and	)	Docket No. 24-0921
	)	Issued: October 16, 2024
DEPARTMENT OF DEFENSE, DEFENSE	)	
LOGISTICS AGENCY, Whitehall, OH,	)	
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 September 12, 2024 appellant filed a timely appeal from July 15, 2024 merit and September 10, 2024 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than 12 percent permanent impairment of the right upper extremity (right arm), for which he previously received a schedule award; and (2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative, pursuant to 5 U.S.C. § 8124(b).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 27, 2022 appellant, then a 60-year-old dispatcher, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 2022 he injured his right shoulder when he pulled upward to open a door and felt a “pop” and the onset of pain while in the performance of duty. OWCP accepted the claim for strain of unspecified muscle, fascia, and tendon at shoulder and upper arm level, right arm and impingement syndrome of right shoulder.

On October 11, 2022 appellant underwent arthroscopic right supraspinatus and infraspinatus rotator cuff repair, arthroscopic biceps tenodesis, right shoulder distal clavicle resection (Mumford procedure), arthroscopic extensive debridement of a superior labrum from anterior to posterior (SLAP) tear and anterior labral tear, and arthroscopic subacromial decompression.

On May 15, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated June 30, 2023, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing whether he had reached maximum medical improvement (MMI) and providing a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> It afforded him 30 days to submit the necessary evidence.

Appellant submitted a November 8, 2023 report from Dr. Edward L. Westerheide, a Board-certified orthopedic surgeon, wherein he recounted appellant’s history of injury and treatment. On examination of the right shoulder, Dr. Westerheide found full strength, no instability, and healed arthroscopic scars. He measured abduction, internal rotation, and external rotation at 90 degrees. Dr. Westerheide noted that appellant had returned to work without restrictions and could perform his job without difficulty. He opined that appellant had reached maximum medical improvement (MMI) and had a Class 0 impairment with “no significant objective abnormal findings at MMI.”

On March 22, 2024 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Albert E. Becker, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation regarding permanent impairment for schedule award purposes.

In an April 4, 2024 report, Dr. Becker reviewed the SOAF and medical record, and noted appellant’s history of injury and medical treatment, including a history of prior right rotator cuff repair in 2004. He obtained active range of motion (ROM) measurements of the right shoulder using a goniometer with three trials, which revealed 120 degrees of forward flexion, 40 degrees extension, 95 degrees of abduction, 30 degrees of internal rotation, and 45, 45, and 50 degrees of external rotation. Dr. Becker noted that ROM testing for the unaffected left shoulder revealed 165

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

degrees of flexion, 50 degrees extension, 130 degrees of abduction, 50 degrees of external rotation, and 30 degrees of internal rotation. He found that appellant had reached MMI as of April 4, 2024.

Dr. Becker referred to the sixth edition of the A.M.A., *Guides*, and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 15-5 (Shoulder Regional Grid: Upper Extremity Impairments), page 403, the class of diagnosis (CDX) for appellant's acromioclavicular resection resulted in a Class 1 impairment, with a default grade C or 10 percent impairment. He assigned a grade modifier for functional history (GMFH) of 2 for a *QuickDASH* score of 43, and a grade modifier for physical examination (GMPE) of 2 for severe decreased right shoulder ROM in comparison to the uninjured side. Dr. Becker assigned a grade modifier for clinical studies (GMCS) of 2 based on an August 19, 2022 MRI scan.<sup>3</sup> He applied the net adjustment formula, which resulted in a shift from the default position to grade E or 12 percent permanent impairment of the right upper extremity.

Dr. Becker noted that the A.M.A., *Guides* allowed for a ROM evaluation in assessing impairment due to acromioclavicular resection. He then applied the ROM rating method and found, using Table 15-34 (Shoulder Range of Motion), page 475, flexion of 120 degrees equaled 3 percent upper extremity impairment, extension at 40 degrees equaled 1 percent upper extremity impairment, 95 degrees abduction equaled 3 percent upper extremity impairment, 20 degrees abduction equaled 1 percent upper extremity impairment, 30 degrees internal rotation equaled 4 percent upper extremity impairment, and external rotation at 50 degrees equaled 2 percent upper extremity impairment. Dr. Becker combined these impairments to find a total of 14 percent permanent right upper extremity impairment. He then referred to Table 15-35 (Range of Motion Grade Modifiers), page 477, to find that appellant had a total of 15 percent permanent impairment of the right upper extremity due to ROM deficits of the shoulder.

On May 14, 2024 an OWCP district medical adviser (DMA) reviewed the medical record, including Dr. Becker's April 4, 2024 findings. The DMA referred to the sixth edition of the A.M.A., *Guides*, and utilized the DBI rating method to find that, under Table 15-5 the CDX for appellant's acromioclavicular resection resulted in a Class 1 impairment, with a default Grade C or 10 percent impairment. The DMA concurred with Dr. Becker's assignment of a GMFH of 2 but assigned a GMPE of 1 for mild loss of motion when compared to the left shoulder, and assigned a GMCS of 4 for multiple symptomatic diagnoses of rotator cuff tear, labral lesion, and biceps tendon pathology. The DMA applied the net adjustment formula, which resulted in 12 percent permanent impairment of the right upper extremity. The DMA disagreed with Dr. Becker's ROM assessment of 14 percent permanent impairment of the right upper extremity as he did not use the left upper extremity ROM measurements as baseline normal. The DMA noted that there was a five percent add-on adjustment under Table 15-36, with functional history one grade higher than the ROM grade of 1. The DMA therefore found 12 percent permanent impairment of the right upper extremity using the DBI rating method.

By decision dated July 15, 2024, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right upper extremity (right arm). The period of the award ran for

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<sup>3</sup> See *supra* note 2.

37.44 weeks from April 4 through December 22, 2024, and was based on the medical opinion of Dr. Becker as reviewed by the DMA.

On September 2, 2024 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 10, 2024, 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 this case could equally well be addressed by requesting reconsideration before OWCP, along with the submission of new evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> 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.<sup>6</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>7</sup> 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.<sup>8</sup>

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by grade modifiers for GMFH, GMPE, and GMCS.<sup>9</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>10</sup> 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.<sup>11</sup>

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.*; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); see also Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

<sup>8</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> A.M.A., *Guides* 383-492.

<sup>10</sup> *Id.* at 411.

<sup>11</sup> *Id.* at 23-28.

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.*”<sup>15</sup> (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.<sup>16</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 12 percent permanent impairment of his right upper extremity (right arm), for which he has received a schedule award.

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<sup>12</sup> *Id.* at 461.

<sup>13</sup> *Id.* at 473.

<sup>14</sup> *Id.* at 474.

<sup>15</sup> FECA Bulletin No. 17-06 (issued May 8, 2017); *B.W.*, Docket No. 24-0223 (issued July 17, 2024); *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

<sup>16</sup> *See supra* note 9 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).

On May 24, 2024 OWCP's DMA reviewed Dr. Becker's April 4, 2024 permanent impairment rating and concurred with his use of the DBI impairment method based on the diagnosis of acromioclavicular resection under Table 15-5 with a default Grade C or 10 percent impairment. However, he found a GMPE of 1 rather than Dr. Becker's finding of 2, and a GMCS of 4 rather than 2. Application of the net adjustment formula resulted in a net modifier of +4, or 12 percent permanent impairment of the right upper extremity. The DMA disagreed with Dr. Becker's finding of 15 percent permanent impairment of the right upper extremity based on the ROM rating method as Dr. Becker did not utilize the left upper extremity measurements as baseline normal. He calculated a six percent permanent impairment of the right upper extremity utilizing the ROM rating method, a lesser percentage than under the DBI method. The DMA concluded that as the DBI method yielded a higher rating over the ROM method, appellant was entitled to a schedule award for 12 percent permanent impairment of the right upper extremity. He also opined that appellant had reached MMI on April 4, 2024, the date of Dr. Becker's impairment evaluation.

The Board finds that OWCP properly relied on the opinion of the DMA, who properly calculated appellant's right upper extremity permanent impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*.<sup>17</sup>

As the medical evidence of record is insufficient to establish greater than 12 percent permanent impairment of his right upper extremity, for which he previously received a schedule award, 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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary."<sup>18</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>19</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark, or other carrier's date marking, or the date received in the Employees' Compensation Operations & Management Portal (ECOMP), and before the claimant has requested reconsideration.<sup>20</sup> Although there is no right to a review of the written record or an oral hearing,

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<sup>17</sup> K.S., Docket No. 24-0564 (issued June 28, 2024).

<sup>18</sup> 5 U.S.C. § 8124(b)(1).

<sup>19</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>20</sup> *Id.* at § 10.616(a); *supra* note 9 at Chapter 2.1601.4a (February 2024).

if not requested within the 30-day time period, OWCP may, within its discretionary powers, grant or deny appellant's request and must exercise its discretion.<sup>21</sup>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

OWCP's regulations provide that the request for a hearing or review of the written record must be made within 30 days of the date of the decision for which a review is sought.<sup>22</sup> The evidence of record establishes that the July 15, 2024 decision was properly mailed to appellant at his last known address of record and was not returned to OWCP as undeliverable.<sup>23</sup> Because his request for an oral hearing was made on September 2, 2024, more than 30 days following the July 15, 2024 decision, it was untimely filed. Appellant was, therefore, not entitled to an oral hearing as a matter of right.<sup>24</sup>

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.<sup>25</sup> The Board finds that, in the September 10, 2024 decision, OWCP properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration, along with the submission of additional evidence.

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken, which are contrary to both logic and probable deductions from established facts.<sup>26</sup> The Board finds that the evidence of record does not indicate that OWCP abused its discretion in connection with its denial of appellant's request for an oral hearing.

Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

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<sup>21</sup> *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>22</sup> *Id.*

<sup>23</sup> The Board has held that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule. *See K.G.*, Docket No. 24-0396 (issued May 30, 2024); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *see also R.M.*, Docket No. 14-1512 (issued October 15, 2014); *V.M.*, Docket No. 06-0403 (issued December 15, 2006).

<sup>24</sup> *See J.C. (S.C.)*, Docket No. 24-0576 (issued August 28, 2024); *K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish greater than 12 percent permanent impairment of the right upper extremity (right arm) for which he previously received a schedule award. The Board further finds that OWCP properly denied his request for an oral hearing before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 15 and September 10, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 16, 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