

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

L.M., Appellant)	
)	
and)	Docket No. 24-0620
)	Issued: September 9, 2024
U.S. POSTAL SERVICE, ASHVILLE POST OFFICE, Ashville, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 21, 2024 appellant, through counsel, filed a timely appeal from an April 12, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 her burden of proof to establish permanent impairment of her left upper extremity, warranting a schedule award.

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.*

FACTUAL HISTORY

On February 28, 2007 appellant, then a 41-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 21, 2007, she injured her left biceps area when pulling a bundle of mail from the back seat of her vehicle while in the performance of duty. OWCP assigned File No. xxxxxx056 and accepted her claim for left shoulder sprain.

Appellant did not stop work but underwent a period of physical therapy. In a discharge summary report dated April 13, 2007, physical therapist, Joshua Madison, related that appellant had been seen from February 27, 2007 until April 12, 2007. He indicated that appellant had attained full active and passive range of motion (ROM) in all planes, that she had no complaints of pain and only experienced minor popping at times with extension movements, and that appellant had related that she could now perform her work and home activities without restrictions.

On March 16, 2020 appellant filed a Form CA-1 alleging that on November 29, 2019 she sustained neck pain while unloading a heavy parcel while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx452. The Board, in two separate decisions, affirmed OWCP's finding that appellant had not met her burden of proof to establish a cervical or left upper extremity condition causally related to the accepted November 29, 2019 employment incident.³

On April 13, 2022, under OWCP File No. xxxxxx452, appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated June 1, 2022, OWCP denied the schedule award claim as the traumatic injury claim had not been accepted and there was no evidence to support an impairment. By decision dated August 18, 2022, an OWCP hearing representative performed a preliminary review and reversed the June 1, 2022 decision, finding in pertinent part that the schedule award claim should be placed in a developed but suspended status.

On May 12, 2022, under OWCP File No. xxxxxx056, appellant filed a claim for a schedule award. No medical evidence was submitted in support of her claim.

In a development letter dated May 16, 2022, OWCP requested that appellant submit an impairment evaluation from her attending physician that addressed whether she had obtained maximum medical improvement (MMI) and to provide a permanent impairment rating in accordance with the sixth edition of the of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ It afforded her 30 days to submit the necessary evidence.

In a June 29, 2022 report, Dr. Sami E. Moufawad, a Board-certified physiatrist, reported that appellant initially injured her left shoulder/arm on February 21, 2007 while picking up a strapped bundle of mail at work. He noted that she consulted with an orthopedic surgeon who noted a small tear and recommended conservative treatment. Appellant underwent physical therapy but did not have any injections or surgery. She also did not lose time from work. Dr. Moufawad indicated that while appellant's symptoms from the February 2007 injury improved, they did not completely go away. He reported that appellant returned to full-time work following the February 2007 injury and worked in that capacity until 2019, when repeated pulling,

³ Docket No. 22-0667 (issued November 1, 2022); Docket No. 23-0709 (issued January 10, 2024).

⁴ A.M.A., *Guides* (6th ed. 2009).

pushing, lifting and doing regular activities during her workday worsened her left shoulder pain. Dr. Moufawad noted appellant's physical examination findings, including active ROM testing, which were repeated three times. He opined that appellant reached MMI based on his examination, but noted that she would have been at MMI at an earlier date but for the 2019 work incident which aggravated her left shoulder condition. Dr. Moufawad noted that OWCP had accepted a left shoulder sprain. Using the A.M.A., *Guides*, he calculated 2 percent left upper extremity impairment based on the diagnosis-based impairment (DBI) methodology and 16 percent left upper extremity impairment based on the ROM methodology. Dr. Moufawad opined that as the ROM impairment methodology yielded the higher impairment, appellant had 16 percent left upper extremity impairment as a result of the February 21, 2007 accepted work injury.

On July 7, 2022 OWCP routed the case file and a July 7, 2022 statement of accepted facts (SOAF) to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of appellant's date of MMI and the permanent impairment of the left upper extremity under the sixth edition of A.M.A., *Guides*.

In a July 17, 2022 report, Dr. Katz concluded that the evidence did not demonstrate permanent impairment of appellant's left upper extremity. He recounted that the sole accepted condition was a left shoulder sprain, which was successfully treated with physical therapy and observation, and that appellant was discharged from care on April 13, 2007 with no pain and full motion and strength per the report of Joshua Madison, the physical therapist. Appellant also did not seek any additional medical treatment after April 13, 2007. Dr. Katz opined that appellant reached MMI, effective April 12, 2007, the day she was released from further physical therapy. He stated that the isolated work-related injury of February 21, 2007 would not be competent 15 years later to account for Dr. Moufawad's findings of severe pain and restriction of motion that he recorded on his June 29, 2022 examination. Dr. Katz additionally opined that Dr. Moufawad's assertion that the workplace injury in 2019 aggravated the accepted condition was not supported by the records.

By decision dated July 28, 2022, OWCP denied appellant's schedule award claim under OWCP File No. xxxxxx056, finding that "the current impairment is not related to the work-related injury of February 21, 2007." It accorded the weight of the medical evidence to Dr. Katz' July 17, 2022 opinion.

On August 5, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held December 6, 2022.

By decision dated January 20, 2023, a hearing representative vacated OWCP's July 28, 2022 decision as a conflict in medical opinion existed between Dr. Moufawad and Dr. Katz with regard to whether appellant has permanent impairment in her left upper extremity as a result of the accepted February 21, 2007 work injury. The hearing representative directed OWCP to administratively combine OWCP File Nos. xxxxxx056 and xxxxxx452, and to refer appellant and the case file to an impartial medical examiner (IME) to resolve the conflict in medical opinion.

On February 1, 2023 OWCP indicated that, per the January 20, 2023 remand instructions, it was scheduling appellant for a second opinion medical evaluation to obtain an assessment of appellant's work-related condition and any resulting impairment. It neither updated the SOAF nor combined the current file with OWCP File No. xxxxxx452.

In an April 11, 2023 report, Dr. Mitchell E. Antin, a Board-certified osteopathic orthopedic surgeon serving as the second opinion physician, opined that appellant reached MMI on April 12, 2007 for the accepted left shoulder sprain when she was discharged from physical therapy with full range of motion and no pain, and the medical record documented complete lack of complaint/treatment of the left shoulder between 2007 through 2019. He indicated that appellant's current range of motion testing was considered invalid as a result of surgery performed on November 30, 2022.

By decision dated May 11, 2023, OWCP denied appellant's claim for a schedule award. It accorded the weight of the medical evidence to Dr. Antin's second opinion report.

On May 22, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On June 12, 2023, OWCP administratively combined the current claim, OWCP File No. xxxxxx056, with OWCP File No. xxxxxx452, with the former serving as the master file number.

Following a preliminary review, by decision dated August 10, 2023, OWCP's hearing representative set aside and remanded OWCP's May 11, 2023 decision. It noted that OWCP did not administratively combine the case until June 12, 2023, the SOAF was not updated prior to the second opinion referral to Dr. Antin, and Dr. Antin was not provided with the records from OWCP File No. xxxxxx452. It also found that the conflict in medical opinion between Dr. Moufawad and Dr. Katz, the DMA, remained unresolved and the case must be remanded for resolution of the conflict.

On August 28, 2023 OWCP found a conflict in medical opinion between Dr. Moufawad and Dr. Katz regarding whether appellant has incurred permanent impairment of her left upper extremity as a result of the February 21, 2007 accepted work-related injury. It referred appellant along with the medical record and an updated SOAF dated August 24, 2023 to Dr. Ralph Salvagno, a Board-certified orthopedic surgeon, for an impartial medical opinion to resolve the conflict in the medical evidence.

In an October 25, 2023 report, Dr. Salvagno, serving as the IME, noted the history of appellant's 2007 and 2019 left shoulder injuries. He noted that between 2007 and 2019 appellant reported no significant symptoms regarding the left shoulder, no limitations, no restrictions of mobility and no work restrictions, and that she was able to perform all duties of a rural carrier. After her 2019 injury, appellant eventually saw an orthopedic surgeon, who performed a left rotator cuff repair. Dr. Salvagno indicated that appellant still had pain in the trapezius and motion limitation of the left shoulder and that she took disability retirement in June 2020 as a result of inability to perform her prior duties. He reviewed appellant's medical records and noted examination findings. Dr. Salvagno found that Dr. Moufawad's physical examination results were invalid because of the subsequent treatment of the left shoulder, as well as no consideration given to the documentation in the medical record which showed complete recovery from the 2007 injury. He indicated that it was not appropriate to offer the date of his examination as the date of MMI of the 2007 injury after a subsequent injury in 2019 and subsequent surgery. Dr. Salvagno opined that appellant had impairment of the left shoulder related to the 2019 injury, but there was no evidence in the record or in his examination that appellant had any impairment related to the 2007 injury. Therefore, he concluded that appellant had zero percent impairment of the left shoulder as a result of the 2007 injury based upon both the DBI and ROM impairment methodologies.

By decision dated December 6, 2023, OWCP denied appellant's schedule award claim. It accorded the special weight of the medical opinion evidence to Dr. Salvagno's opinion that there was no evidence to support permanent impairment of appellant's left shoulder related to the accepted December 21, 2007 work injury.

On December 12, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Additional evidence, including diagnostic testing, pre- and postsurgical reports were submitted. The evidence reflected that on November 30, 2022 appellant underwent a left shoulder arthroscopy with biceps tendinitis, debridement of rotator cuff tear, subacromial decompression.

A telephonic hearing was held on March 7, 2024. By decision dated April 12, 2024, OWCP's hearing representative affirmed OWCP's December 6, 2023 decision. He concluded that the evidence of record did not establish that appellant had permanent impairment of the left shoulder causally related to the accepted February 21, 2007 employment injury.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal 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 shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹⁰ *Id.* at 383-492.

¹¹ *Id.* at 411.

choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

FECA Bulletin No. 17-06 provides guidance in applying ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities.¹³ 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 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.*”¹⁴ (Emphasis in the original.)

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 necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence.”¹⁵

Section 8123(a) of FECA provides in pertinent part: “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.”¹⁶ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁷

¹² *A.T.*, Docket No. 23-0309 (issued August 13, 2024); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ FECA Bulletin No. 17-06 (issued May 8, 2017).

¹⁴ *Id.*

¹⁵ *Id.*; *R.L.*, Docket No. 19-1793 (issued August 7, 2020).

¹⁶ 5 U.S.C. § 8123(a).

¹⁷ *See J.P.*, Docket No. 23-0075 (issued March 26, 2023); *C.M.*, Docket No. 20-1647 (issued October 5, 2021); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP's procedures provide that, if a case has been referred to an IME to resolve a conflict regarding permanent impairment, it is unnecessary to route the file to a DMA as long as the IME explains his or her impairment rating and cites to the appropriate tables and the A.M.A., *Guides*. The DMA should not resolve the conflict in medical opinion.¹⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the left upper extremity, warranting a schedule award.

OWCP properly determined that there was a conflict in medical opinion evidence between Dr. Moufawad, appellant's treating physician, and Dr. Katz, an OWCP DMA, regarding the extent, if any, of permanent impairment of appellant's left upper extremity due to the accepted February 21, 2007 left shoulder sprain. In order to resolve the conflict, it properly referred her, pursuant to 5 U.S.C. § 8123(a), to Dr. Salvagno for an impartial medical examination.¹⁹

Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently rationalized and based on a proper factual and medical background, must be given special weight.²⁰

In a report dated October 25, 2023, Dr. Salvagno noted the history of both appellant's 2007 and 2019 left shoulder injuries, reviewed medical records and provided examination findings. He recounted that during the interval between 2007 to 2019 appellant reported no significant symptoms regarding the left shoulder, no limitations, no restrictions of mobility and no work restrictions, and that she was able to perform all duties of a rural carrier. After her 2019 injury, appellant eventually saw an orthopedic surgeon, who performed a left rotator cuff repair. Dr. Salvagno indicated that appellant continued with pain in the trapezius and motion limitation of the left shoulder and that she took disability retirement in June 2020. He opined that appellant had an impairment of the left shoulder related to the 2019 injury, but there was no evidence in the record or in his examination that appellant had any impairment related to the 2007 injury. Therefore, Dr. Salvagno concluded that appellant had zero percent impairment of the left shoulder as a result of the February 21, 2007 employment injury based upon both the DBI and ROM impairment methodologies.

The Board finds that Dr. Salvagno's October 25, 2023 opinion, as the IME, establishes that appellant does not have any permanent impairment of her left upper extremity due to her accepted February 21, 2007 left shoulder sprain. based on a proper factual and medical history and provided detailed findings on examination.²¹ Dr. Salvagno provided a well-rationalized

¹⁸ See *supra* note 11 at Chapter 2.808.6g (March 2017). See also *L.Y.*, Docket No. 20-0398 (issued February 9, 2021); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

¹⁹ *A.K.*, Docket No. 23-1135 (issued April 11, 2024); *L.Y.*, Docket No. 20-0398 (issued February 9, 2021); *B.S.*, Docket No. 19-1717 (issued August 11, 2020).

²⁰ *J.K.*, Docket No. 20-0907 (issued February 12, 2021); *B.T.*, Docket No. 24-0736 (issued August 23, 2024); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, *supra* note 17.

²¹ *S.V.*, Docket No. 23-0474 (issued August 1, 2023); *J.S.*, Docket No. 20-1409 (issued September 1, 2021).

opinion that appellant had no evidence of a ratable impairment from the 15-year-old accepted left shoulder strain, explaining that the medical record showed complete recovery from the 2007 injury as her medical treatment by her physical therapist and treating provider had concluded.²² As the IME, Dr. Salvagno’s opinion is entitled to the special weight of the evidence. Accordingly, OWCP properly relied upon his report in denying schedule award benefits.

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 her burden of proof to establish permanent impairment of the left upper extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2024 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: September 9, 2024
Washington, DC

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

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

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

²² See *J.P.*, Docket No. 23-0075 (issued March 26, 2023); *J.S.*, Docket No. 20-1409 (issued September 1, 2021).