United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 22-0962**
	)	**Issued: May 19, 2023**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearny, NJ, Employer	)	

Appearances:
Stephen Carl Larkin, 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 June 7, 2022 appellant, through counsel, filed a timely appeal from an April 7, 2022 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.[3]

[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.*

[3] The Board notes that appellant submitted additional evidence on appeal. However, 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 her burden of proof to establish greater than two percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 4, 2002 appellant, then a 49-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that, on September 17, 2002, she sustained muscle spasm, wrist pain, and arm pain radiating up to her neck when lifting flat trays from postal containers while in the performance of duty. On November 21, 2022 OWCP accepted the claim for left arm strain.[5]

On August 25, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated October 9, 2015, OWCP denied appellant's schedule award claim, finding that she failed to submit a permanent impairment rating that was calculated in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[6]

Appellant disagreed with the October 9, 2015 decision and requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 7, 2016.

By decision dated August 25, 2016, OWCP's hearing representative affirmed the October 9, 2015 decision.

On May 15, 2017 appellant again filed a Form CA-7 claim for a schedule award.

By decision dated July 14, 2017, OWCP denied appellant's May 15, 2017 schedule award claim.

On August 24, 2017 appellant requested reconsideration of the July 14, 2017 decision. She submitted additional evidence, including several diagnostic tests and an August 1, 2017 report from Dr. Neil Sinha, a Board-certified pain medicine specialist.

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[4] Docket No. 18-0065 (issued June 11, 2018).

[5] OWCP assigned the present claim OWCP File No. xxxxxx014. Appellant has a prior occupational disease claim (Form CA-2) filed on March 26, 2002. She alleged that she experienced pain and tingling in her wrists due to factors of her federal employment. Appellant noted that she first became aware of her condition and realized its relation to her federal employment on March 19, 2002. OWCP assigned that claim OWCP File No. xxxxxx977 and, by decision dated April 24, 2002, accepted it for bilateral carpal tunnel syndrome. It has administratively combined the two above-noted claims, with OWCP File No. xxxxxx014 designated as the master file.

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

By decision dated August 31, 2017, OWCP denied modification of its July 14, 2017 decision.

Appellant appealed to the Board. By decision dated June 11, 2018,[7] the Board affirmed OWCP's August 31, 2017 decision.

On December 20, 2018 appellant filed another Form CA-7 claim for a schedule award. In support thereof, she submitted an October 22, 2018 report, wherein Dr. Sinha opined that appellant had 18 percent permanent impairment of her left upper extremity under the sixth edition of the A.M.A., *Guides* due to range of motion (ROM) deficits of the left shoulder.

On March 14, 2019 OWCP referred appellant's case to Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In an April 2, 2019 report, Dr. Slutsky advised that the case record did not contain adequate ROM findings upon which to base a permanent impairment rating.

On June 26, 2019 OWCP referred appellant, along with the case record and a statement of accepted facts (SOAF), to Dr. Frank J. Corrigan, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation. It requested that he assess the permanent impairment of appellant's upper extremities under the sixth edition of the A.M.A., *Guides*. Dr. Corrigan initially produced reports dated July 25, 2019, December 5, 2019, and March 26, 2020. However, Dr. Slutsky, serving as the DMA, found that Dr. Corrigan's evaluations were incomplete, particularly with regard to evaluation of permanent impairment related to ROM deficits.[8]

On August 11, 2020 OWCP again requested that Dr. Corrigan assess the permanent impairment of appellant's upper extremities under the sixth edition of the A.M.A., *Guides*.

In a November 11, 2021 report, Dr. Corrigan discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that examination of the neck revealed no tenderness to palpation and sensation was intact in the upper extremities. Examination of the left shoulder showed 5/5 strength, intact sensation, and no instability or pain on ROM. Dr. Corrigan provided ROM findings for the cervical spine and shoulders, but did not provide findings for adduction of the shoulders. He diagnosed sprain of the left shoulder/upper arm and brachial neuritis/radiculitis, and conducted a diagnosis-based impairment (DBI) rating for appellant's left shoulder. Dr. Corrigan determined that, under Table 15-5 on page 401 of the sixth edition of the A.M.A., *Guides*, appellant's left shoulder sprain warranted a finding of two percent permanent impairment of the left upper extremity under the DBI rating method. He also determined that, under the ROM rating method found in Table 15-34 on page 475, appellant's deficits in ROM of the left shoulder warranted a finding of 18 percent permanent impairment of the left upper extremity. Dr. Corrigan concluded that appellant had 18 percent permanent

[7] *Supra* note 4.

[8] OWCP then referred appellant for further evaluation by Dr. Stanley R. Askin, a Board-certified orthopedic surgeon. It initially referred appellant to Dr. Askin to perform an impartial medical examination, but it later determined that Dr. Askin served as a second opinion physician because there was no conflict in the medical opinion evidence regarding permanent impairment. Dr. Askin produced reports dated April 23 and August 10, 2021. However, OWCP found deficiencies in Dr. Askin's impairment evaluation and determined that referral of appellant to another second opinion physician was necessary.

impairment of the left upper extremity because the ROM rating method yielded greater impairment than the DBI rating method.

On December 10, 2021 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA. In a December 20, 2021 report, Dr. Harris indicated that he had reviewed the November 11, 2021 report of Dr. Corrigan. He applied the A.M.A., *Guides* to the findings provided by Dr. Corrigan and concluded that appellant had two percent permanent impairment of the left upper extremity based on application of the DBI rating method to the left shoulder sprain. Dr. Harris determined that appellant did not have impairment related to a cervical condition through use of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which in the present case, would be used to evaluate impairment that radiated from the cervical spine into an upper extremity. He found that there was insufficient information in the case file to calculate the impairment rating utilizing the ROM rating method as the report from Dr. Corrigan did not contain the complete measurements for the left shoulder and there was no documentation of retained shoulder adduction.

OWCP requested that Dr. Corrigan provide clarification of his November 11, 2021 report regarding the absence of complete ROM findings. In a supplemental February 2, 2022 report, Dr. Corrigan provided a review of the medical record and noted, "I specifically reviewed Dr. Harris[']s report dated [December 20, 2021]. Based solely on the DBI method, I agree with the 0 percent impairment for the right upper extremity and 2 percent impairment for the left upper extremity."

By decision dated April 7, 2022, OWCP granted appellant a schedule award for two percent permanent impairment of her left upper extremity (left arm/shoulder). The award ran for 6.24 weeks for the period November 11 through December 24, 2011.

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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12] The sixth edition requires identifying the class for the class of diagnosis (CDX), which is then adjusted by grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id.*

[12] 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).

studies (GMCS).[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14]

Regarding the application of ROM or DBI impairment 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).
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> "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.*" (Emphasis in the original.)
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> "If the rating physician provided an assessment using the DBI 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 CE.
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> "If the medical evidence of record is not 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]

ANALYSIS

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

In a November 11, 2021 report, Dr. Corrigan, an OWCP referral physician, provided ROM findings for the cervical spine and shoulders, but did not provide findings for adduction of the shoulders. He determined that, under Table 15-5 on page 401 of the sixth edition of the A.M.A., *Guides,* appellant's left shoulder sprain warranted a finding of two percent permanent impairment for the left upper extremity under the DBI rating method. Dr. Corrigan also determined that, under the ROM rating method found in Table 15-34 on page 475, appellant's ROM deficits of the left shoulder warranted a finding of 18 percent permanent impairment of the left upper extremity. He

[13] A.M.A., *Guides* 494-531.

[14] *Id.* at 521.

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

concluded that appellant had 18 percent permanent impairment of the left upper extremity because the ROM rating method yielded greater impairment than the DBI rating method. On December 20, 2021 Dr. Harris, the DMA, applied the A.M.A., *Guides* to the findings provided by Dr. Corrigan and concluded that appellant had two percent permanent impairment of the left upper extremity based on application of the DBI rating method to the left shoulder sprain. He found that appellant did not have impairment related to a cervical condition and found that there was insufficient information in the case file to calculate the impairment rating utilizing the ROM rating method as the report from Dr. Corrigan did not contain the complete measurements for the left shoulder and there was no documentation of retained shoulder adduction. OWCP attempted to obtain clarification from Dr. Corrigan regarding use of the ROM rating method, but none was forthcoming in Dr. Corrigan's supplemental February 2, 2022 report.

The Board notes that since Dr. Harris, the DMA, provided a rating using the DBI rating method and appellant's left shoulder condition provided for application of the ROM rating method, he was required to independently calculate his impairment using both the DBI and ROM methods and identify the higher rating for the claims examiner.[16] Although Dr. Harris attempted to conduct a rating calculation under the ROM method, the case record does not contain recent ROM findings for properly conducting an upper extremity permanent impairment rating under the ROM method.

Section 15.7 of the sixth edition of the A.M.A., *Guides* provides that ROM should be measured after a "warm up," in which the individual moves the joint through its maximum ROM at least three times. The ROM examination is then performed by recording the active measurements from three separate ROM efforts and all measurements should fall within 10 degrees of the means of these three measurements. The maximum observed measurement is used to determine the ROM impairment.[17] It remains unclear whether these requirements for evaluating permanent impairment due to ROM deficits have been met in this case.

The case must, therefore, be remanded for further development of the medical evidence.[18] On remand OWCP shall obtain the raw data from Dr. Corrigan's ROM testing for the left upper extremity. If the data is obtained, it shall be evaluated and considered under the relevant standards of the A.M.A., *Guides* and FECA Bulletin No. 17-06, including referral to a DMA. If no such data is obtained, OWCP shall take appropriate action for further examination by a new second opinion physician to obtain the necessary ROM measurements. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

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

[16] *Id*.

[17] A.M.A., *Guides* 464.

[18] *Id*.; *see also D.C.*, Docket No. 22-0961(issued January 20, 2023).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 19, 2023
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