

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

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**M.C., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Bryan, TX, Employer**

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**Docket No. 15-1757  
Issued: March 17, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 19, 2015 appellant filed a timely appeal from a July 14, 2015 merit decision 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 to review the merits of this case.

**ISSUE**

The issue is whether appellant has more than 11 percent permanent impairment of his right upper extremity.

**FACTUAL HISTORY**

On September 8, 2014 appellant, a 42-year-old teacher, sustained a traumatic injury in the performance of duty while putting a box on a shelf that was slightly above his head. He heard a popping noise from his right shoulder. Appellant dropped the box and grabbed his shoulder,

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

which had a stabbing pain. OWCP accepted his claim for right rotator cuff sprain and authorized surgery.

On January 7, 2015 appellant underwent an arthroscopic subacromial decompression and assisted biceps tenodesis of the right shoulder. The postoperative diagnosis was right superior labral tear and right partial thickness rotator cuff tear. On March 5, 2015 Dr. Brian R. Seabolt, a Board-certified orthopedic surgeon, referred appellant for a maximum medical improvement (MMI) and impairment rating evaluation. On March 16, 2015 he indicated that appellant had not reached MMI.

Dr. Steve Operstény, a Board-certified physiatrist, evaluated appellant on April 23, 2015. He related the history of injury and made the following findings on physical examination of the upper extremities: 140 degrees flexion right, 180 degrees left; 40 degrees extension right, 70 degrees left; 85 degrees abduction right, 180 degrees left; 25 degrees adduction right, 40 degrees left; 60 degrees internal rotation right, 90 left; and 55 degrees external rotation right; 90 degrees left. Dr. Operstény also found 65 degrees right elbow pronation, 80 degrees left. He diagnosed status post right shoulder tendon repair, biceps tenodesis, and rotator cuff repair.

Based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Operstény calculated 13 percent impairment of the right upper extremity due to loss of shoulder motion and 1 percent impairment due to loss of elbow motion. He concluded that appellant had a total impairment of 14 percent.

Appellant filed a claim for a schedule award (Form CA-7).

An OWCP medical adviser reviewed Dr. Operstény's evaluation and, applying the sixth edition of the A.M.A., *Guides* (2009), found that appellant had reached MMI on April 23, 2015 and had 10 percent right upper extremity impairment due to loss of shoulder motion and 1 percent impairment due to loss of elbow motion, for a total, combined impairment of 11 percent. He noted that Dr. Operstény had not recommended further modification to the rating for any grade modifiers.

In a decision dated July 14, 2015, OWCP issued a schedule award for 11 percent impairment of appellant's right upper extremity.

### **LEGAL PRECEDENT**

If there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>2</sup> The schedule award provision of FECA<sup>3</sup> and the implementing regulations<sup>4</sup> sets forth the number of weeks of compensation payable for permanent impairment

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<sup>2</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>3</sup> *Id.* at § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

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 shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.<sup>5</sup>

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.<sup>6</sup> OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>7</sup> For schedule awards after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

An employee seeking compensation for a permanent impairment under FECA has the burden to establish the essential elements of the claim, including that an employment injury contributed to a permanent impairment of a scheduled member of function of the body.<sup>9</sup> The medical evidence necessary to support a schedule award includes a physician's detailed report that provides a sufficient description of the impairment.<sup>10</sup> Pursuant to OWCP procedures, a medical report should show that the impairment has reached MMI, describe the impairment in sufficient detail for the evaluator to visualize the character and degree of disability, and give a percentage of impairment.<sup>11</sup> In addition, the report should include a history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated under the A.M.A., *Guides*.<sup>12</sup>

### ANALYSIS

Appellant has claimed a schedule award based on his accepted right upper extremity injury. The accepted condition on which impairment is at issue is a right rotator cuff sprain. The Board has reviewed the medical evidence of record and finds it is insufficient to establish that appellant has more than 11 percent impairment of his right upper extremity.

Dr. Opersteny, the physiatrist, evaluated appellant's impairment of his right upper extremity. However, he based his impairment calculation on the long-outdated fourth edition of

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<sup>5</sup> *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

<sup>6</sup> *A. George Lampo*, 45 ECAB 441 (1994).

<sup>7</sup> 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>9</sup> *See A.B.*, Docket No. 12-1392 (issued January 24, 2013).

<sup>10</sup> *See James E. Jenkins*, 39 ECAB 860 (1988).

<sup>11</sup> *Supra* note 8 at Chapter 2.808.5(b) (February 2013).

<sup>12</sup> *Id.* at Chapter 2.808.6. If the claimant does provide an appropriate report, the case is referred to an OWCP medical adviser.

the A.M.A., *Guides*. A rating of impairment not based on the proper edition of the A.M.A., *Guides* has little probative value.<sup>13</sup>

An OWCP medical adviser's report and impairment calculation dated June 8, 2015 is the only additional medical evidence currently of record as to the nature and extent of appellant's permanent impairment. Reviewing Dr. Operstény's examination findings and applying the appropriate sixth edition of the A.M.A., *Guides* (2009), the medical adviser found that appellant had a combined, total impairment of 11 percent. The 11 percent rating of the medical adviser was the basis for the schedule award in the July 14, 2015 OWCP decision.

The Board finds that appellant has failed to establish more than 11 percent impairment previously awarded. Appellant maintains the burden of proof to establish impairment greater than the 11 percent previously awarded. The only medical evidence that properly applied the A.M.A. *Guides* is that of the office medical adviser and OWCP based its schedule award decision on that report.

On appeal, appellant asserts that he should be entitled to the 14 percent permanent impairment rating assigned by Dr. Operstény, not the reduced rating of the medical adviser. He further indicates that his arm is no longer the way that it was and a low schedule award is disappointing. As noted above, there is no medical opinion of record using the appropriate edition of the A.M.A., *Guides* supporting an award greater than 11 percent.

The Board notes that 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 on an employment-related condition resulting in permanent impairment or increased impairment.<sup>14</sup>

### CONCLUSION

The Board finds that appellant has failed to establish more than 11 percent permanent impairment of his right upper extremity.

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<sup>13</sup> *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989) (an opinion that is not based upon standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

<sup>14</sup> *Paul R. Reedy*, 45 ECAB 488, 490 (1994); *A.A.*, 51 ECAB 115, 116 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 14, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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