United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 15-1455**
	)	**Issued: April 10, 2017**
U.S. POSTAL SERVICE, IRVING PARK ROAD PROCESSING & DISTRIBUTION CENTER, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 25, 2015 appellant filed a timely appeal from a May 13, 2015 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.

ISSUE

The issue is whether appellant met her burden of proof to establish more than five percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

On appeal appellant generally asserts that she is entitled to an increased award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 27, 2010 appellant, then a 41-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she dislocated her right shoulder while attempting to catch a falling bag of mail. OWCP accepted the claim for closed anterior dislocation of her right shoulder, sprain of right shoulder and upper arm, and other specified sites of the right upper extremity. Appellant stopped work and received continuation of pay and wage-loss compensation benefits. On February 15, 2011 Dr. Jonathan Nassos, a Board-certified orthopedic surgeon, performed an authorized right shoulder arthroscopic rotator cuff repair, subacromial decompression, and biceps tendon tenotomy. Appellant returned to full-time, full duty on January 9, 2012.

Appellant filed a schedule award claim (Form CA-7) on November 13, 2013. In an October 8, 2013 report, Dr. Christos Giannoulias, Board-certified in orthopedic surgery and an associate of Dr. Nassos, noted a complaint of right shoulder pain. Right shoulder examination demonstrated crepitation with abduction and internal rotation and diminished range of motion in all planes. Dr. Giannoulias diagnosed shoulder impingement and advised that appellant had reached maximum medical improvement.[2]

On November 29, 2013 OWCP expanded the accepted conditions to include partial tear of right rotator cuff and right shoulder impingement. It also asked appellant to have her physician provide an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[3] Dr. Giannoulias' office responded that he did not perform impairment evaluations.

In October 2014 OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation.[4] In a November 28, 2014 report, Dr. Brecher described the history of injury and appellant's medical and surgical history that included right shoulder arthroscopy and surgery for carpal tunnel syndrome and de Quervain's tenosynovitis. He noted that he had reviewed the statement of accepted facts and discussed the medical record submitted. Physical examination of the right shoulder demonstrated flexion to 170 degrees, extension to 50 degrees, abduction to 140 degrees, adduction to 40 degrees, internal rotation to 80 degrees, and external internal rotation to 60 degrees with no crepitation. Dr. Brecher advised that maximum medical improvement had been reached. He indicated that rotator cuff tear was the most impairing diagnosis and utilized Table 15-34, Shoulder Range of Motion, to rate appellant's impairment. Dr. Brecher found three percent impairment for lack of flexion and three percent impairment for lack of abduction, for a total of six percent permanent impairment. He reported modifiers of 2 for functional history and 1 for physical examination,

[2] Appellant initially filed a schedule award claim in July 2012. On August 27, 2012 OWCP informed her that the medical evidence did not establish that maximum medical improvement had been reached and, therefore, no action could be taken on her schedule award claim at that time.

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

[4] On October 16, 2014 OWCP administratively terminated collection of an overpayment of compensation in the amount of $611.56.

and a *Quick*DASH score of 44. Dr. Brecher concluded that appellant had six percent right upper extremity permanent impairment.

Dr. David H. Garelick, an OWCP medical adviser who is Board-certified is orthopedic surgery, reviewed the medical record, including Dr. Brecher's report. He reported that the A.M.A., *Guides* stated on page 387: "[Range of motion] is used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment." Dr. Garelick advised that Dr. Brecher's impairment rating should therefore be disregarded. OWCP's medical adviser continued that, based on appellant's continued subjective complaints of right shoulder pain, physical examination findings of healed surgical incisions, near normal range of motion, and magnetic resonance imaging (MRI) scan study findings, the right rotator cuff tear had healed. He advised that, based on Table 15-5, Shoulder Regional Grid, appellant had five percent impairment for a full-thickness rotator cuff tear under the diagnosis-based impairment (DBI) methodology. The medical adviser found no change with the use of the net adjustment formula, and concluded that the date of maximum medical improvement would have occurred one year postoperatively, or February 15, 2012.

On May 12, 2015 OWCP found the weight of the medical evidence rested with OWCP's medical adviser, noting that he determined that Dr. Brecher had incorrectly applied the A.M.A., *Guides* by use of the range of motion methodology.[5] OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity, for a total of 15.6 weeks, to run from February 15 to June 3, 2012.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[6] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[7] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[8]

[5] The decision incorrectly states that Dr. Brecher was a treating physician rather than on OWCP referral physician.

[6] *See* 20 C.F.R. §§ 1.1-1.4.

[7] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[9] 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.[10]

ANALYSIS

The issue on appeal is whether appellant met her burden of proof to establish more than five percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

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

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the range of motion methodologies when assessing the extent of permanent impairment for schedule award purposes.[11] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[12] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodologies for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and range of motion methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either range of motion or DBI methodologies. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[13]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[10] *Isidoro Rivera*, 12 ECAB 348 (1961).

[11] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[12] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] *Supra* note 11.

regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the May 13, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 10, 2017
Washington, DC

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

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

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