

FACTUAL HISTORY

On November 5, 2007 appellant, then a 60-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that he developed bursitis as a result of duties of his federal employment. OWCP accepted appellant's claim on February 1, 2008 for subacromial bursitis of the left shoulder. Appellant returned to modified work.

Appellant underwent accepted arthroscopic surgery of the left shoulder on March 19, 2008. This surgery was performed by Dr. Christopher Mancuso, a Board-certified orthopedic surgeon. Appellant returned to a modified position on April 1, 2008. He underwent a second arthroscopic procedure with debridement of the labrum and subacromial decompression on April 15, 2009, also by Dr. Mancuso. Appellant again returned to modified duty on May 21, 2010.

Appellant thereafter filed a recurrence of disability claim (Form CA-2a) alleging a recurrence of disability commencing September 13, 2011. OWCP accepted the recurrence and placed appellant on the periodic rolls from September 17, 2011 until October 7, 2013, the date he returned to full-time modified duty.

Appellant retired from the employing establishment effective December 31, 2013.

On April 1, 2014 appellant requested a schedule award by completing a Form CA-7. With his request, appellant submitted a December 17, 2013 report from Dr. Nicholas Diamond, a Board-certified osteopath, using the range of motion (ROM) method. Dr. Diamond rendered an impairment rating of seven percent permanent impairment of the left upper extremity based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ Based on a *QuickDASH* score of 65, he assigned a functional history grade modifier of 3. Dr. Diamond stated that appellant reached maximum medical improvement on December 17, 2013. He used ROM measurements to calculate appellant's percentage of impairment.

OWCP forwarded Dr. Diamond's report to a district medical adviser (DMA) on May 12, 2014. On May 13, 2014 the DMA, Dr. Morley Slutsky, Board-certified in occupational medicine, arrived at a left upper extremity permanent impairment rating of five percent. He stated that his percentage of impairment differed from Dr. Diamond's because he applied the diagnosis-based impairment (DBI) method of calculation using the diagnosis of partial thickness rotator cuff tear with residual dysfunction rating impairment.

By decision dated January 15, 2015, OWCP granted appellant a schedule award for five percent permanent impairment of his left upper extremity. It noted that the weight of medical evidence regarding appellant's percentage of impairment was assigned to the DMA, Dr. Slutsky, because he correctly applied the A.M.A., *Guides*.

On January 22, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. In advance of the hearing, appellant submitted an updated

³ A.M.A., *Guides* (6th ed. 2009).

medical report from Dr. Diamond, dated June 1, 2015. The content of this report was substantially similar to Dr. Diamond's December 17, 2013 report, containing the same calculations and impairment rating of seven percent.

The hearing was held on June 25, 2015. At the hearing, counsel noted that the DMA, Dr. Slutsky, used the DBI method of impairment rating, which was not exclusive according to the A.M.A., *Guides*. He argued that appellant was entitled to the methodology most favorable to him in a schedule award analysis, and that as such, seven percent permanent impairment rating was appropriate. In the alternative, counsel argued that there remained a conflict in the medical evidence between the DMA's analysis and Dr. Diamond's which should be resolved by an impartial medical examiner.

By decision dated September 10, 2015, the hearing representative affirmed OWCP's January 15, 2015 decision, finding that Dr. Slutsky's opinion constituted the weight of the medical evidence.

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.⁴ 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.⁵ 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 A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶

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).⁷ The Board has approved the use by OWCP of the A.M.A.,

⁴ See 20 C.F.R. §§ 1.1-1.4.

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

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

⁷ 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 2.808.5(a) (February 2013).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸

ANALYSIS

The issue on appeal is whether appellant has more than five percent permanent impairment of the left upper extremity, for which he previously received a schedule award. The Board finds that this case is not in posture for decision.

Appellant's treating physician, Dr. Diamond reported on December 17, 2013 that appellant had seven percent permanent impairment of the left upper extremity. He rated appellant's impairment using appellant's ROM measurements to calculate appellant's permanent impairment. OWCP's district medical adviser, Dr. Slutsky, determined that appellant had five percent permanent impairment of the left upper extremity, using the DBI method of calculating permanent impairment.

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 ROM methodology when assessing the extent of permanent impairment for schedule award purposes.⁹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁰ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology 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 ROM 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 ROM or DBI methodology. 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.¹¹

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 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 September 10, 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.

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁰ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹¹ *Supra* note 9.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 10, 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 19, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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