

federal employment. He described the repetitive motion as pushing, pulling, and turning while loading and unloading trucks. The conditions attributed to this activity included left carpal and cubital tunnel syndromes, and right shoulder rotator cuff tear with impingement syndrome. On July 26, 2013 appellant had right shoulder surgery performed by Dr. Olayinka Ogunro, a Board-certified orthopedic surgeon, described as arthroscopic partial acromioplasty, arthroscopic excision of the distal clavicle, and bursectomy. He began receiving wage-loss compensation as of July 17, 2013.

With respect to permanent impairment, appellant has two other claims that are relevant to the current decision on appeal. He filed a claim for a traumatic injury on November 8, 2002, assigned File No. xxxxxx843, which was accepted for right wrist strain, sprain of third digit right hand, right hand traumatic arthropathy, and right hand chondrocalcinosis. OWCP issued a schedule award for 12 percent permanent impairment of the right upper extremity on September 20, 2011. The period of the award was 37.44 weeks from August 5, 2011. Appellant appealed to the Board. By decision dated May 23, 2012, the Board affirmed the September 20, 2011 schedule award determination.²

Appellant also filed a claim on February 2, 2006 for right cubital tunnel and carpal tunnel syndrome causally related to factors of his federal employment, assigned File No. xxxxxx980. The claim was accepted for right carpal tunnel syndrome. By decision dated March 1, 2007, OWCP issued a schedule award for 12 percent permanent impairment of the right upper extremity. The period of the award was 37.44 weeks from July 7, 2006.

In the present claim, appellant submitted a December 8, 2014 report from Dr. Jerry Franz, a Board-certified surgeon. Dr. Franz provided a history and noted results from examination. He opined, utilizing the diagnosis-based impairment (DBI) methodology, that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) appellant had 11 percent right arm permanent impairment under Table 15-5, the shoulder regional grid. Dr. Franz identified the diagnosis as acromioclavicular (AC) joint injury or disease, with grade modifiers of two for functional history, one for clinical studies, and one for physical examination. Dr. Franz concluded that under Table 15-5 appellant had a grade D, or 11 percent right arm permanent impairment.

The report of Dr. Franz was sent to an OWCP medical adviser for review. In a report dated February 25, 2015, the medical adviser concurred with Dr. Franz that appellant had 11 percent right arm permanent impairment based on the right shoulder condition. He then indicated that to determine appellant's additional impairment, the prior impairment of 24 percent should be combined with the current impairment, and then the prior impairment subtracted. In performing the calculation, the medical adviser combined 24 and 12, resulting in 33 percent, and then subtracted 24 percent to find that appellant was entitled to an additional nine percent permanent impairment of the right arm.

² Docket No. 12-0059 (issued May 23, 2012).

By decision dated February 29, 2016, OWCP issued a schedule award for an additional nine percent right upper extremity permanent impairment. The period of the award was 28.08 weeks from January 19, 2016.³

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

³ Appellant received wage-loss compensation through January 19, 2016, when he returned to work. A claimant is not entitled to both wage loss and a schedule award concurrently, and OWCP waited until wage-loss compensation ceased to begin the schedule award payments. *James A. Earle*, 51 ECAB 567 (2000).

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 2.808.5a (February 2013).

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

ANALYSIS

The issue on appeal is whether appellant had more than an additional nine percent permanent impairment to his right upper extremity, for which he 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 (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 February 29, 2016 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.

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

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

¹¹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2016 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 4, 2017
Washington, DC

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

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

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