

ISSUE

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

FACTUAL HISTORY

Appellant, a 52-year-old former mail handler, has an accepted occupational disease claim (Form CA-2) for lumbar radiculopathy, cervical sprain, and right medial and lateral epicondylitis, which arose on or about October 30, 2004.⁴

In May 2007, appellant filed a claim for a schedule award (Form CA-7). However, she did not submit any medical evidence of permanent impairment in support of his claim. Consequently, OWCP denied the schedule award claim by decision dated February 5, 2009.

In February 2012 appellant filed another claim for a schedule award (Form CA-7).

In a report dated February 17, 2012, Dr. William N. Grant, a Board-certified orthopedic surgeon, found that appellant had 17 percent permanent impairment of the right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*). His right upper extremity rating included 13 percent brachial plexus impairment, and two percent each for lateral and medial epicondylitis.⁵

On April 19, 2012 OWCP's district medical adviser (DMA) opined that the report from Dr. Grant contained inaccurate impairment ratings and that appellant should be referred to another physician for an impairment rating examination.⁶

In a report dated June 14, 2012, Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon and OWCP-referral physician, opined that appellant's accepted work injuries had completely resolved and that there were no objective findings to support residual permanent impairment from these injuries.

OWCP found that there was a conflict in medical opinion evidence between Dr. Grant and Dr. Ghanma regarding the extent of appellant's permanent impairment. In April 2014 it referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding permanent impairment.

In a May 21, 2014 report, Dr. Kaffen determined that appellant's accepted work injuries had resolved and that there was no objective evidence of permanent impairment of her extremities.

⁴ Appellant voluntarily retired effective March 30, 2007.

⁵ A.M.A., *Guides* 399, 434 (6th ed. 2009) Table 15-4 and Table 15-20. Dr. Grant also found 14 percent bilateral lower extremity impairment under Proposed Table 2, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

⁶ The DMA mistakenly believed that Dr. Grant rated appellant's left upper extremity instead of her right.

By decision dated July 22, 2014, OWCP denied appellant's schedule award claim finding that she had failed to establish permanent impairment to a scheduled member due to her accepted work injuries.

Appellant requested a review of the written record by an OWCP hearing representative. In a January 2, 2015 decision, the hearing representative determined that the referral to Dr. Kaffen was improper because he had previously been associated with appellant's claim.⁷ Accordingly, she remanded the case to OWCP for referral to a new impartial medical examiner.

In a report dated April 10, 2015, Dr. James H. Rutherford, a Board-certified orthopedic surgeon and impartial medical examiner, determined that appellant had one percent permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*. He found that, under the diagnosis-based impairment (DBI) rating method found on Table 15-4, Elbow Regional Grid, A.M.A., *Guides* 399 (6th ed. 2009), appellant's right upper extremity condition of lateral epicondylitis fell under the class 1 default value of one percent. Dr. Rutherford determined that appellant had a grade modifier for functional history of 1 and grade modifier for physical examination of 1, and that a grade modifier for clinical studies was not applicable. He indicated that application of the net adjustment formula meant that there was no movement from the default value of one percent and he concluded that appellant had a total right upper extremity permanent impairment of one percent.⁸

On June 21, 2015 Dr. Daniel D. Zimmerman, an internist and the DMA, indicated that he agreed with Dr. Rutherford's assessment that appellant had one percent permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*.⁹

In a decision dated August 7, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of her right upper extremity. The award ran for 3.12 weeks and was based on the opinion of Dr. Rutherford, the impartial medical examiner.

Appellant requested a telephone hearing with an OWCP hearing representative and a hearing was held on April 13, 2016. By decision dated May 20, 2016, the hearing representative affirmed OWCP's August 7, 2015 decision finding one percent permanent impairment of appellant's right upper extremity.

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.¹⁰ Section

⁷ Dr. Kaffen had previously examined appellant in January 2007.

⁸ OWCP requested that Dr. Rutherford provide a supplemental report regarding permanent impairment of the lower extremities and Dr. Rutherford responded by submitting a May 22, 2015 report. The record does not contain a final decision of OWCP regarding permanent impairment of appellant's lower extremities. As such, the matter of lower extremity impairment is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

⁹ Dr. Zimmerman is a Board-certified orthopedic surgeon.

¹⁰ *See* 20 C.F.R. §§ 1.1-1.4.

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.¹¹ 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.¹²

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).¹³ The Board has approved OWCP’s use 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.¹⁴

ANALYSIS

The issue is whether appellant has met her burden of proof to establish that she has greater than one 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 (ROM) methodologies when assessing the extent of permanent impairment for schedule award purposes.¹⁵ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁶ 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

¹¹ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

¹² 20 C.F.R. § 10.404; *see also* *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹³ *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).

¹⁴ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁵ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁶ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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 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.¹⁷

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 May 20, 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.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 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 6, 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

¹⁷ *Supra* note 15.