

October 26 and December 8, 2015 and April 8, 2016 which should have been considered. He further asserts that he was not examined by Dr. Mesfin Seyoum, a family practitioner, who provided an impairment evaluation.

FACTUAL HISTORY

On January 3, 2000 appellant, then a 39-year-old letter carrier, filed an occupational disease claim (Form CA-2), alleging that employment duties as a letter carrier caused left shoulder pain. OWCP adjudicated this claim under File No. xxxxxx117, and on July 14, 2000 accepted aggravation of left shoulder impingement syndrome. Appellant had left shoulder surgery on September 5, 2000. On August 22, 2002 he was granted a schedule award for 11 percent permanent impairment of the left upper extremity.

On December 5, 2006 appellant filed a second occupational disease claim alleging that job duties caused right elbow lateral epicondylitis. He had stopped work on October 26, 2006. OWCP adjudicated the claim under File No. xxxxxx965, and on January 25, 2007 accepted the condition of right lateral epicondylitis. Under this claim appellant received intermittent wage-loss compensation from October 17, 2006 to August 2, 2008 and was placed on the periodic compensation rolls for total disability effective August 3, 2008. He continued to receive total disability compensation on the periodic rolls until he elected Office of Personnel Management retirement benefits effective January 10, 2016.

On January 3, 2008 appellant filed a third occupational disease claim alleging that bilateral carpal tunnel syndrome and a cervical disc protrusion were caused by work duties. OWCP adjudicated the claim under File No. xxxxxx005, and on April 7, 2008 accepted bilateral carpal tunnel syndrome, displacement of cervical intervertebral disc without myelopathy, and spinal stenosis in the cervical region.

By report dated March 18, 2008, Dr. Gil Tepper, an attending Board-certified orthopedic surgeon, advised that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),³ appellant had 24 percent permanent right upper extremity impairment due to loss of elbow range of motion (ROM) and decreased strength, with an additional two percent whole person permanent impairment due to pain.

Following an inquiry by appellant, on May 5, 2008 OWCP informed him that a schedule award on File No. xxxxxx965 could not be paid until such time as he was no longer receiving wage-loss compensation under that claim.

On May 7, 2008 Dr. Ellen Pichey, an OWCP medical adviser who is Board-certified in family and occupational medicine, reviewed the record, including Dr. Tepper's March 18, 2008 report. She advised that Dr. Tepper had not properly utilized the fifth edition of the A.M.A., *Guides*. Dr. Pichey concluded that appellant had 12 percent right upper extremity permanent impairment due to loss of elbow motion and 18 percent permanent impairment due to loss of strength and sensory deficit. She combined these, finding that he had a total 28 percent

³ A.M.A., *Guides* (5th ed. 2001).

permanent right upper extremity impairment with March 18, 2008 as the date of maximum medical improvement.⁴ On December 27, 2009 Dr. Pichey noted that schedule awards were now evaluated under the sixth edition of the A.M.A., *Guides*.⁵ She reiterated that appellant had 28 percent permanent right arm impairment.

By decision dated March 5, 2010, OWCP denied appellant's claim for a right upper extremity schedule award. It noted that he had previously received an award for 28 percent permanent right upper extremity impairment.

On May 2, 2010 Dr. Pichey utilized the sixth edition of the A.M.A., *Guides* and determined that appellant had 28 percent right arm permanent impairment due to loss of right elbow motion.

In correspondence and telephone calls dated May 5 to September 20, 2015, appellant informed OWCP that he had not received a schedule award for 28 percent permanent impairment of the right upper extremity.

The record includes an August 19, 2015 impairment evaluation for File No. xxxxxx965, from Dr. Seyoum. Dr. Seyoum noted appellant's workers' compensation claims, his review of records including Dr. Tepper's March 18, 2008 report, and appellant's complaint of severe right elbow pain and difficulty with activities of daily living. After examination, he diagnosed right elbow lateral epicondylitis, right elbow enthesopathy, and right ulnar neuropathy across the elbow, per electrodiagnostic testing and nerve conduction study. Dr. Seyoum advised that, under the sixth edition of the A.M.A., *Guides*, appellant had 8 percent right arm impairment for loss of elbow motion and 5 percent impairment for ulnar neuropathy, for a total 13 percent right arm permanent impairment.

On January 9, 2016 appellant filed three schedule award claims, (Form CA-7) under File Nos. xxxxxx965, xxxxxx117, and xxxxxx005. The claims under File Nos. xxxxxx117 and xxxxxx005 remain under development and are not before the Board in this appeal, which solely addresses the schedule award claim for File No. xxxxxx965.⁶

⁴ OWCP continued to develop the claim regarding appellant's work capability. In May 2007, it referred him to Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon. In a June 11, 2007 report, Dr. Sophon advised that appellant could work modified duty. OWCP then found a conflict in medical evidence between Dr. Sophon and Dr. Tepper. In May 2008, it referred appellant to Dr. Steven A. Mora, also Board-certified in orthopedic surgery, for an impartial evaluation. In a June 3, 2008 report, Dr. Mora diagnosed right elbow lateral epicondylitis, right elbow C5-6 radiculopathy, and chronic pain. He advised that appellant could return to restricted duty and agreed with Dr. Tepper's impairment evaluation.

⁵ *Supra* note 3 at (6th ed. 2009).

⁶ The record includes an August 12, 2015 report in which Dr. Seyoum evaluated appellant's left shoulder and advised that, with regard to File No. xxxxxx117, appellant had 25 percent left upper extremity impairment. In an August 26, 2015 report, he advised that, with regard to File No. xxxxxx005, appellant had bilateral 6 percent impairments due to carpal tunnel syndrome, and 25 percent cervical impairment. The Board notes that OWCP has administratively combined all three claims, with File No. xxxxxx965 serving as the Master File.

In support of his schedule award claims, appellant submitted an October 26, 2015 report in which Dr. Tepper described appellant's treatment and current complaints involving the cervical spine, both shoulders, both elbows, and both hands and wrists. These symptoms led to difficulties in activities of daily living. Dr. Tepper provided physical and neurological examination findings including cervical spine, shoulder, elbow, and wrist ROM. He diagnosed status post September 2000 left shoulder arthroscopy with residuals; cervical spine disc protrusions, severe central canal stenosis, and bilateral neural foraminal narrowing at C3-4, C4-5, C5-6 and C6-7; right-sided C5-6 radiculopathy; left upper extremity radicular pain; bilateral carpal tunnel syndrome; bilateral arm weakness; bilateral lateral epicondylitis; right ulnar neuropathy at the elbow; and bilateral shoulder impingement. Dr. Tepper advised that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant had 10 percent bilateral upper extremity permanent impairment due to peripheral sensory deficit, 4 percent left upper extremity and 6 percent right upper extremity permanent impairment due to loss of elbow ROM, 22 percent left upper extremity and 21 percent right upper extremity permanent impairment due to loss of shoulder ROM, and bilateral 20 percent upper extremity permanent impairment due to brachial plexus motor deficits, for a total 48 percent whole person permanent impairment. He opined that all conditions were caused wholly or in part to appellant's federal employment.

OWCP asked its medical adviser to review all records for evaluation of a right upper extremity schedule award. In a January 31, 2016 report, Dr. Morley Slutsky, Board-certified in occupational medicine, advised that he would only address the accepted spine conditions. He reviewed Dr. Seyoum's August 19, 2015 report and advised that it did not demonstrate a basis for granting a schedule award pursuant to the use of the July and August 2009, *The Guides Newsletter*, to be used for evaluating extremity impairments that originate in the spine.⁷

By decision dated March 24, 2016, OWCP denied appellant's claim for a schedule award under File No. xxxxxx965. It noted that he had previously received schedule awards for 28 percent of the right arm and 11 percent of the left arm.

In an April 18, 2016 decision, appellant was granted a schedule award for 28 percent permanent impairment of the right arm, to run for 87.36 weeks, from January 10, 2016 to September 12, 2017.

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.⁸ Section 8107

⁷ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments. OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in the July and August 2009, *The Guides Newsletter*. FECA Transmittal No. 10-0004 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4. Specifically, OWCP will address lower extremity impairments originating in the spine through Table 16-11 and upper extremity impairment originating in the spine through Table 15-14.

⁸ See 20 C.F.R. §§ 1.1-1.4.

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.⁹ 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.¹⁰

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).¹¹ 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.¹²

ANALYSIS

The issue on appeal is whether appellant has established that he has more than 28 percent permanent impairment of the right upper extremity, for which he previously received a schedule award on April 18, 2016. The accepted right upper extremity conditions are right lateral epicondylitis and enthesopathy of the right elbow under File No. xxxxxx965, and carpal tunnel syndrome under File No. xxxxxx005. The accepted conditions under File No. xxxxxx005 also include displacement of cervical intervertebral disc without myelopathy and spinal stenosis in the cervical region.

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 diagnosis-based impairment (DBI) or the ROM methodologies when assessing the extent of permanent impairment for schedule award purposes.¹³ The purpose of the use of uniform standards is to

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

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

¹¹ *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).

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

¹³ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

ensure consistent results and to ensure equal justice under the law to all claimants.¹⁴ 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 of 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.¹⁵

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 April 18, 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 additional right upper extremity schedule award.¹⁶

CONCLUSION

The Board finds this case not in posture for decision.

¹⁴ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁵ *Supra* note 13.

¹⁶ Regarding appellant's assertion that his impairment should be based on reports by Dr. Tepper dated October 26, 2015, December 8, 2015, and April 8, 2016, the Board finds that, the latter two impairment ratings in which Dr. Tepper utilized the sixth edition of the A.M.A., *Guides*, were not submitted to OWCP until after the issuance of the schedule award decision on April 18, 2016. Therefore, they were not before OWCP when it rendered that decision and cannot be considered by the Board on this appeal. *Supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the April 18, 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