



## ISSUE

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

## FACTUAL HISTORY

On December 6, 2012 appellant, then a 65-year-old casual worker, filed a traumatic injury claim (Form CA-1) alleging that she developed an upper back condition on December 4, 2012 while lifting and placing various size containers of mail into coded bins. She felt a twinge in her back, but continued to work.

Appellant returned to work on December 6, 2012 with restrictions and continued to work through December 13, 2012. The employing establishment could not accommodate her restrictions. It noted that appellant had started work on November 28, 2012 and filed a claim for traumatic injury (Form CA-1) on December 6, 2012. The employing establishment terminated appellant from employment on December 31, 2012 as she was a casual worker and her appointment had expired. It noted that appellant would have been terminated regardless of whether she was injured on the job.<sup>3</sup>

In a decision dated May 13, 2013, OWCP accepted appellant's claim for cervical strain, thoracic strain, and left shoulder strain.

Appellant filed a schedule award claim (Form CA-7) on November 24, 2014. In a letter dated December 18, 2014, OWCP noted that the medical evidence of record did not support a finding that appellant had reached maximum medical improvement. OWCP requested additional medical evidence and afforded appellant 30 days to respond.

In a report dated September 26, 2014, Dr. Martin Fritzhand, a Board-certified urologist, noted appellant's history of lifting in the performance of duty as well as her accepted employment injuries of thoracic, cervical and left shoulder strains. He noted that appellant's left hand was dominant and reviewed appellant's medical records. Dr. Fritzhand opined that appellant had experienced musculoskeletal distress since her injury in December 2012 and that she had "remained refractory to medical management." On physical examination, he found that appellant's forward flexion of her left shoulder was 130-140-130 degrees, that extension was normal at 90 degrees, and that abduction was diminished to 40 degrees. Dr. Fritzhand reported that appellant's internal rotation of the left shoulder was 60-60-70 degrees and that external rotation was normal at 90 degrees. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and found that appellant had a class 1 impairment of the left shoulder due to a sprain/strain.<sup>4</sup> Dr. Fritzhand noted that Table 15-5 of the

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<sup>3</sup> Appellant filed a claim for compensation (Form CA-7) for the period December 6, 2012 through April 19, 2013. OWCP denied appellant's claim for compensation by decision dated September 12, 2013. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review and by decision dated June 3, 2014 a hearing representative affirmed the denial of wage-loss compensation.

<sup>4</sup> A.M.A., *Guides* 401, Table 15-5.

A.M.A., *Guides* provided in regard to the sprain/strain impairment class that, “If motion loss is present, this impairment may alternatively be assessed using section 15-7, Range of Motion Impairment. Range of motion impairment stands alone and is not combined with diagnosis impairment.”<sup>5</sup> He concluded that appellant’s decreased range of motion due to her accepted conditions more accurately reflected her permanent impairment and afforded her a higher impairment rating than the diagnosis-based impairment (DBI) method in keeping with the goals of the A.M.A., *Guides*.<sup>6</sup> Dr. Fritzhand applied Table 15-34 of the A.M.A., *Guides*<sup>7</sup> and, using the range of motion method, determined that appellant had three percent permanent impairment of her left shoulder due to loss of flexion, three percent permanent impairment due to loss of abduction, and two percent permanent impairment due to loss of internal rotation. He concluded, “It is my opinion that [appellant] has sustained a permanent partial impairment to the left upper extremity of eight percent.”

OWCP referred Dr. Fritzhand’s report to OWCP’s medical adviser on April 27, 2015. He determined that appellant had reached maximum medical improvement on September 26, 2014, the date of Dr. Fritzhand’s report. OWCP’s medical adviser found one percent impairment for the left upper extremity. He based his impairment rating on the DBI method rather than the range of motion method utilized by Dr. Fritzhand. OWCP’s medical adviser used the diagnosis of left shoulder sprain and found that appellant had a class 1 impairment<sup>8</sup> or one percent impairment of the left arm. He applied the net adjustment formula of the A.M.A., *Guides*, grade modifier for Functional History (GMFH) - Class of Diagnosis (CDX) (Regional Grid) + grade modifier for Physical Examination (GMPE) - CDX) + grade modifier for Clinical Studies (GMCS) - CDX<sup>9</sup> to reach a final permanent impairment rating of one percent of the left upper extremity.

In a decision dated September 10, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of her left arm. Counsel requested an oral hearing with a representative from OWCP’s Branch of Hearings and Review on September 21, 2015.

Appellant testified at the oral hearing on May 17, 2016 before an OWCP hearing representative. Counsel contended that OWCP’s medical adviser consistently reduced the permanent impairment rating for schedule award purposes of every claimant whose medical evidence he reviewed. He further contended that there was an unresolved conflict of medical opinion evidence which required referral to an impartial medical examiner.

By decision dated August 1, 2016, OWCP’s hearing representative reviewed appellant’s claim for a schedule award. He determined that OWCP’s medical adviser properly applied the

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<sup>5</sup> *Id.* at 405.

<sup>6</sup> *Id.* at 20, Table 2-1.

<sup>7</sup> *Id.* at 475, Table 15-34.

<sup>8</sup> *Id.* at 401, Table 15-5.

<sup>9</sup> *Id.* at 411.

A.M.A., *Guides* and determined that appellant had no more than one percent permanent impairment of her left upper extremity warranting a schedule award.

### **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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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).<sup>13</sup> 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.<sup>14</sup>

### **ANALYSIS**

The issue on appeal is whether appellant has more than one percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

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

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<sup>10</sup> See 5 U.S.C. § 8149; 20 C.F.R. §§ 1.1-1.4.

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

<sup>12</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>13</sup> 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).

<sup>14</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

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 methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>15</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>16</sup> 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 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 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.<sup>17</sup>

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 August 1, 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.

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

<sup>16</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>17</sup> *Supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision the August 1, 2016 of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 17, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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