United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 17-0393**
	)	**Issued: April 7, 2017**
DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 12, 2016 appellant filed a timely appeal from a July 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has established more than three percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

On appeal appellant contends that he is entitled to a greater than three percent left upper extremity permanent impairment based on the reports of his treating physicians.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 31, 2014 appellant, then a 38-year-old deputy U.S. Marshal, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2014 he injured his left shoulder while exercising during authorized fitness time. He did not stop work following the injury. OWCP accepted the claim for left shoulder partial rotator cuff tear.

In a February 11, 2015 report, Dr. Dennis W. Ivill, an examining Board-certified physiatrist, found 16 percent left upper extremity permanent impairment, which he attributed to left shoulder loss of range of motion (ROM) and partial intrasubstance distal subscapularis tear, tendinitis and/or distal anterior supraspinatus tendon tear with no labral tear. He reported ROM figures of 100 degrees flexion and abduction; 30 degrees adduction, internal rotation, and extension; and 40 degrees external rotation. Dr. Ivill referenced various tables using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On February 27, 2015 appellant filed a claim for a schedule award (Form CA-7).

On July 28, 2015 OWCP referred Dr. Ivill's February 11, 2015 impairment rating to a district medical adviser (DMA) for review. In a report dated August 28, 2015, Dr. Morley Slutsky, Board-certified in occupational medicine, disagreed with Dr. Ivill's left shoulder ROM impairment rating. He noted that Dr. Ivill used the "less preferred" ROM method of calculating permanent impairment with invalid measurements. Dr. Slutsky explained that diagnosis-based impairment (DBI) was the "preferred" methodology. He quoted section 15.2, page 461 in the second printing of the A.M.A., *Guides* noting that ROM was used primarily as a physical examination adjustment factor and only to determine actual impairment values when no other approach to impairment rating was available. Dr. Slutsky also questioned the validity of Dr. Ivill's ROM measurements, noting he documented only one measurement per joint, which was considered inconsistent with the criteria for assessing motion under section 15.7, A.M.A., *Guides* 464.

Dr. Slutsky applied the DBI method and found three percent permanent impairment of the left upper extremity for left shoulder partial thickness rotator cuff tear with residual dysfunction under Table 15-5, A.M.A., *Guides* 402.[2] He determined that appellant had reached maximum medical improvement (MMI) as of February 11, 2015, the date of Dr. Ivill's examination.

In a letter dated March 10, 2016, OWCP informed appellant that the DMA disagreed with Dr. Ivill's impairment rating and provided a copy of the DMA's August 28, 2015 report for review by his treating physician.

[2] The DMA noted that appellant's left shoulder partial thickness rotator cuff tear with residual dysfunction represented class 1, Class of Diagnosis (CDX) impairment, with a default upper extremity rating of three percent. Additionally, the DMA calculated a net adjustment of 0, which resulted in a final right upper extremity rating of three percent. The net adjustment formula uses was (GMFH 1 - CDX 1) + (GMPE 1 - CDX 1). The DMA noted Clinical Studies (GMCS) were not applicable. *See* section 15.3d, A.M.A., *Guides* 409-12 (6th ed.).

In a report dated May 4, 2015, Dr. Stanley R. Askin, an examining Board-certified orthopedic surgeon, determined that appellant had 13 percent left upper extremity permanent impairment using the sixth edition of the A.M.A., *Guides*. Dr. Askin noted that appellant's left shoulder partial thickness rotator cuff tear represented class 1, CDX impairment. He assigned grade modifiers of 2 for Functional History (GMFH), Physical Examination (GMPE) findings, and clinical studies. Dr. Askin calculated a net adjustment of 2 or grade E, resulting in a final right upper extremity permanent impairment rating of 13 percent.

On May 18, 2016 OWCP referred Dr. Askin's May 4, 2016 impairment rating to a DMA for review. In a May 19, 2016 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon, reviewed Dr. Askin's report and disagreed with his impairment rating of 13 percent. Dr. Garelick noted the highest impairment rating for a partial thickness rotator cuff tear was five percent using Table 15-5, page 402 of the A.M.A., *Guides*. Thus, he recommended that Dr. Askin's report be disregarded and that appellant be granted a schedule award for three percent permanent impairment. He found that appellant had reached MMI as of February 11, 2015.

In a July 12, 2016 decision, OWCP granted a schedule award for three percent permanent impairment of the left upper extremity. The award covered a period of 9.36 weeks beginning February 11, 2015. OWCP based the schedule award on Dr. Garelick's May 19, 2016 impairment rating. The claims examiner stated that Dr. Garelick determined appellant's treating physician had provided an incorrect application of the A.M.A., *Guides* to the physical examination findings. Thus, OWCP found the Dr. Garelick's May 16, 2016 report constituted the weight of the evidence and established that appellant had three percent permanent impairment of the left 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.[3] 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.[4] 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.[5]

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

[3] *See* 20 C.F.R. §§ 1.1-1.4.

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

[5] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).[6] 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.[7]

ANALYSIS

The issue on appeal is whether appellant has established more than three percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

Appellant's treating physician, Dr. Ivill initially found that appellant had 16 percent permanent impairment of the left upper extremity due to loss of ROM of his left shoulder. Dr. Askin, appellant's other treating physician, determined appellant's permanent impairment of the left upper extremity was 13 percent permanent impairment using the ROM method. Dr. Slutsky, OWCP's DMA rated appellant's permanent impairment pursuant to the DBI rating methodology and found that appellant had three percent permanent impairment of the left upper extremity. Dr. Garelick, another OWCP DMA concurred with Dr. Slutsky's DBI rating of three percent permanent impairment of the left upper extremity.

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 ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[8] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[9] 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

[6] *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).

[7] *Isidoro Rivera*, 12 ECAB 348 (1961).

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

[9] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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.[10]

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 July 12, 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 decision of the July 12, 2016 Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 7, 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

[10] *Supra* note 8.