

ISSUE

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

FACTUAL HISTORY

On April 2, 2014 appellant, then a 38-year-old lieutenant, filed a traumatic injury claim (Form CA-1) alleging that on March 25, 2014 he injured both shoulders, his back, and neck while participating in required annual firearms training.

On May 22, 2014 OWCP accepted appellant's claim for biceps tendinitis in the left shoulder and impingement with bursitis-tendinitis in the right shoulder.

Appellant filed a schedule award claim (Form CA-7) on February 3, 2015. By decision dated April 24, 2015, OWCP granted him a schedule award for 12 percent permanent impairment of his left upper extremity.

On August 4, 2015 appellant filed a claim for an additional schedule award (Form CA-7). In support of that claim, he submitted a May 8, 2015 disability impairment rating for his right arm from Robert J. Hammond, an occupational therapist.

In a letter dated August 17, 2015, OWCP requested a report from appellant's attending physician, Dr. Joseph Leith, a Board certified orthopedic surgeon, addressing appellant's right shoulder permanent impairment. Dr. Leith completed a form report on September 2, 2015 and opined that appellant had reached maximum medical improvement. He found that he had 10 percent permanent impairment of the right arm based on right shoulder range of motion (ROM).

OWCP referred the record to an OWCP district medical adviser (DMA). In a report dated December 19, 2015, the DMA determined that Dr. Leith had utilized the ROM methodology to determine appellant's permanent impairment. He disagreed with the application of the ROM methodology and concluded that appellant's right shoulder permanent impairment should be evaluated based on the diagnosis-based impairment (DBI) methodology for an impingement syndrome, which warranted one percent permanent impairment of the right upper extremity for schedule award purposes.

By decision dated March 25, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of his right upper extremity.

On April 18, 2016 appellant requested an oral hearing from OWCP's Branch of Hearings and Review regarding the March 25, 2016 decision. Following his request, he authorized a representative before OWCP.

During the oral hearing held on December 5, 2016, appellant's representative contended that Dr. Leith had properly used the ROM methodology for calculating appellant's permanent impairment of the right upper extremity. He further argued that OWCP improperly relied on the DMA's application of the DBI methodology to reach appellant's impairment rating for schedule

award purposes as the ROM method resulted in a higher impairment rating and should, therefore, have been used.

In a January 27, 2017 decision, OWCP's hearing representative affirmed the March 25, 2016 decision finding that the DMA properly used the DBI methodology to rate permanent impairment rather than the ROM methodology used by Dr. Leith.

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 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 However, it 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (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., *Guides* issued a 52-page document entitled "Clarifications and Corrections, [s]ixth [e]dition, [A.M.A.,] *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).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 met his burden of proof to establish more than one percent permanent impairment of his right upper extremity.

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).

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 2.808.5a (February 2013).

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

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 had 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 were 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 observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹⁰

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the January 27, 2017 decision. Utilizing 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.

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

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

¹⁰ *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: August 15, 2017
Washington, DC

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

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

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