

FACTUAL HISTORY

On January 6, 2014 appellant, then a 55-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his right arm when he fell on ice at work that same date within the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for closed dislocation of the right elbow. The record does not reflect that appellant received wage-loss compensation for the accepted injury.

On January 29, 2014 Dr. Robert H. Ablove, an attending Board-certified orthopedic surgeon, performed an authorized open repair of the right elbow capsule, reattachment by brachialis, and repair of the medial ulnar collateral ligament. He diagnosed right elbow dislocation with tear of the medial ulnar collateral, brachialis, and capsule.

On July 22, 2014 appellant returned to full-time, full-duty work.

In a January 20, 2015 medical report, Dr. Ablove noted that appellant was seen for a follow-up evaluation of his right elbow. He indicated that appellant had not gained any additional motion, but was able to use his arm and had no complaints. On physical examination of the right elbow, Dr. Ablove reported a well-healed incision and range of motion (ROM) measurements. Appellant had 20 degrees to 100 degrees of flexion with minimal supination and approximately 10 degrees of pronation. He had no focal sensibility or motor deficits distally. Appellant had right elbow and forearm stiffness following a right elbow fracture dislocation. Dr. Ablove assessed closed dislocation of the elbow, unspecified, and closed fracture of the ulna coronoid process. He advised that appellant was doing well. Dr. Ablove checked a box marked "yes" indicating that appellant was working. He also checked boxes marked "yes" indicating that the incident described by appellant was the competent medical cause of his injury/illness, that his complaints were consistent with his history of injury/illness, and that his history of injury was consistent with objective findings. Dr. Ablove concluded that he had no temporary impairment.

On March 24, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated March 27, 2015, OWCP requested that appellant submit a detailed report from his treating physician which provided an impairment evaluation pursuant to the sixth edition of the A.M.A., *Guides*. It specifically requested an opinion as to whether he had reached maximum medical improvement (MMI) and detailed descriptions of any restriction of motion in terms of degrees of retained active motion, objective findings including decreased strength, atrophy, ankyloses, and sensory changes, subjective complaints such as pain or discomfort, and permanent impairment under the applicable criteria and tables in the A.M.A., *Guides*.

OWCP received a permanent impairment worksheet completed by Dr. Ablove on April 24, 2015. He indicated that appellant was examined on January 20, 2015. Dr. Ablove assigned class 2 impairment due to decreased ROM of the right elbow. He found 10 percent impairment for supination, 3 percent impairment for pronation, 5 percent impairment for extension, and 8 percent impairment for flexion, totaling 26 percent permanent impairment of the right upper extremity.

In a May 1, 2015 decision, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record failed to establish permanent impairment of his right arm based on the A.M.A., *Guides*.

OWCP received an August 5, 2014 ancillary medical report and an October 31, 2014 right elbow x-ray report from Dr. Charles S. Tirone, a Board-certified radiologist, who addressed appellant's right elbow conditions.

In an appeal request form and letter dated April 3, 2016, and received on April 13, 2016 by OWCP, appellant requested reconsideration of the May 1, 2015 decision. He resubmitted Dr. Ablove's January 20, 2015 report. This report was identical to his prior report but, added a new paragraph regarding appellant's impairment. Dr. Ablove opined that, based on appellant's overall elbow and forearm mobility loss, his findings were compatible with 40 percent loss of use of the right arm according to New York State Workers' Compensation Board guidelines. Utilizing the sixth edition of the A.M.A., *Guides*, Table 15-33 (elbow/forearm ROM),³ he reiterated his prior finding that appellant had 8 percent impairment for loss of elbow flexion, 5 percent impairment for loss of elbow extension, 3 percent impairment for loss of forearm pronation, and 10 percent impairment for loss of forearm supination, which resulted in 26 percent permanent impairment of the right upper extremity.

Appellant submitted a June 6, 2014 letter and a June 12, 2014 duty status report (Form CA-17) from Dr. Ablove in which he released appellant to return to work on June 16, 2016 with restrictions. He also submitted *QuickDASH* questionnaires dated April 3, 2016, an undated Activities of Daily Living questionnaire, and photographs illustrating his limited right arm motion while performing certain activities and general deformity of his right arm.

In a December 7, 2016 decision, OWCP denied modification of its May 1, 2015 schedule award decision. It found that Dr. Ablove's January 20, 2015 addendum report failed to provide a date of MMI and an explanation, supported by objective findings, for the selection of that date. OWCP further found that his report did not provide rationale explaining the calculation of his 26 percent right upper extremity impairment rating based on the applicable criteria and/or tables of the sixth edition of the A.M.A., *Guides*.

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.⁴ 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.⁵ 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

³ *Id.* at 474.

⁴ *See* 20 C.F.R. §§ 1.1-1.4.

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

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.⁶

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).⁷ 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.⁸

ANALYSIS

The issue on appeal is whether appellant has established ratable permanent impairment of his right upper extremity, warranting 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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or ROM methodology when assessing the extent of permanent impairment for schedule award purposes.⁹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁰ 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 have 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

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

⁷ 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 (March 2017).

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁰ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

inconsistent in the application of the A.M.A., *Guides*, the Board has found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹¹

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the December 7, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after 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.

On appeal appellant contends that he sustained a work-related arm injury for which he is entitled to a schedule award. He asserts that his surgeon quoted from the sixth edition of the A.M.A., *Guides*. As set forth above, the case is not in posture for decision and will be remanded for further action consistent with this decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 7, 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: August 22, 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

¹¹ *Supra* note 9.