United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
	)	**Docket No. 17-1551**
and	)	**Issued: December 4, 2017**
DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, Kaneohe Bay, HI, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 7, 2017 appellant filed a timely appeal from a February 24, 2017 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 over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On July 20, 2009 appellant, then a 54-year-old high voltage electrician, filed an occupational disease claim (Form CA-2) alleging that he experienced pain and discomfort in his

[1] 5 U.S.C. § 8101 *et seq.*

left thumb joint, right elbow, back of his neck, and bilateral shoulders as a result of his federal employment. The claim form did not indicate whether appellant stopped work.

OWCP accepted appellant's claim for right shoulder rotator cuff syndrome, right shoulder superior labrum, anterior to posterior (SLAP) tear, right shoulder rotator cuff tendon tear, and right shoulder tendinitis. On October 6, 2011 appellant underwent right shoulder arthroscopic rotator cuff repair, right shoulder arthroscopic anterior inferior capsulorraphy repair, and right shoulder arthroscopy with SLAP repair and decompression.

Effective August 31, 2012 appellant retired from federal service.

On August 18, 2015 appellant filed a claim for a schedule award (Form CA-7).

Appellant submitted a July 29, 2015 report from Dr. Gary Okamura, a Board-certified orthopedic surgeon. He noted that a July 22, 2015 x-ray examination showed mild glenohumeral joint narrowing due to some subchondral cyst and some arthritic changes over his acromioclavicular (AC) joint. Upon examination of appellant's right shoulder, Dr. Okamura reported good rotator cuff strength and normal range of motion. Impingement signs and O'Brien's tests were negative.

By letter dated September 17, 2015, OWCP requested that appellant provide a medical report from his treating physician with an opinion on whether he had reached maximum medical improvement (MMI) and whether he had a permanent impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] Appellant was afforded 30 days to submit the additional evidence.

Appellant continued to receive medical treatment from Dr. Okamura. In reports dated September 28, 2015 to June 13, 2016, Dr. Okamura related appellant's complaints of right shoulder pain and tightness. Upon physical examination of appellant's right upper extremity, he reported good rotator cuff strength and normal strength of the elbow flexors and supinators. Dr. Okamura indicated that range of motion of appellant's right shoulder was forward flexion to 170 degrees, external rotation to 40 degrees, and internal rotation to L1. He diagnosed status-post right shoulder repair, anterior inferior capsulorraphy repair, and SLAP repair. Dr. Okamura related that appellant required an impairment rating and noted that he did not perform impairment ratings.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Neelesh B. Fernandes, Board-certified in physical medicine and rehabilitation, for a second opinion examination in order to determine whether appellant sustained any ratable impairment of his accepted right shoulder condition in accordance with the A.M.A., *Guides.* In a June 14, 2016 report, Dr. Fernandes reviewed appellant's history, including the SOAF, and noted that appellant underwent right shoulder surgery on October 6, 2011. He related appellant's current complaints of right lateral shoulder pain and tightness. Dr. Fernandes reported that appellant had a *Quick*DASH score of 30, involving the right upper extremity. Neurological

[2] A.M.A., *Guides* (6th ed. 2009).

examination of the bilateral upper extremities showed grossly intact light touch sensation and 2+ reflexes. Dr. Fernandes provided range of motion findings. He indicated that Speed's, Resisted internal and external, O'Brien's, Neer's, and Hawkin's tests of appellant's right shoulder were positive. Dr. Fernandes reported tenderness to palpation at appellant's right shoulder supraspinatus and infraspinatus tendons.

Dr. Fernandes diagnosed right shoulder pain secondary to SLAP tear and high grade partial rotator cuff tear status post right shoulder arthroscopy. He noted a date of MMI of June 10, 2013. Dr. Fernandes explained that utilizing the A.M.A., *Guides*, Table 15-34,[3] for decreased range of motion of the right shoulder, appellant had three percent impairment for flexion to 130 degrees, zero percent impairment for extension to 60 degrees, three percent impairment for abduction to 140 degrees, zero percent impairment for adduction to 60 degrees, two percent impairment for internal rotation to 60 degrees, and two percent impairment for external rotation to 50 degrees for a total of ten percent right upper extremity impairment. He assigned grade modifiers of 1 for functional history due to appellant's *Quick*DASH score, which resulted in zero net adjustment. Dr. Fernandes concluded that appellant had 10 percent permanent impairment of his right upper extremity.

In a June 30, 2016 report, Dr. David H. Garelick, an OWCP medical adviser, noted that appellant underwent right shoulder surgery on October 6, 2011, but continued to complain of ongoing pain on the top of the right shoulder. He reviewed Dr. Fernandes' June 14, 2016 second opinion report and related that Dr. Fernandes' 10 percent right upper extremity permanent impairment rating should be disregarded because it was based on the loss of range of motion. Dr. Garelick opined that according to Table 15-5,[4] of the A.M.A., *Guides* appellant had five percent right upper extremity impairment due to a diagnosis of right shoulder rotator cuff tear. He noted a date of MMI of June 10, 2013.

OWCP requested clarification from Dr. Garelick regarding the date of MMI. In a December 8, 2016 addendum report, Dr. Garelick explained that he chose June 10, 2013 as the date of MMI because Dr. Okamura, appellant's treating physician, noted in a June 10, 2013 report that appellant was "permanent, stationary, and ratable." He opined that the medical evidence, specifically the attending physician's statements, supported a date of MMI contrary to the date of the impairment rating.

In a December 19, 2016 report, Dr. Okamura noted appellant's complaints of right shoulder pain. He reported examination findings of good rotator cuff strength and negative impingement signs. Dr. Okamura related that forward flexion and supination produced pain in the shoulder. He diagnosed a status of post right shoulder repair.

On February 24, 2017 OWCP granted appellant a schedule award for five percent permanent impairment of his right upper extremity, based on Dr. Garelick's June 30, 2016 report. The award ran from June 10 to September 27, 2013.

[3] *See id*. at 475, Table 15-34.

[4] *See id.* at 403, Table 15-5.

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.[5] 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.[6] 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.[7]

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).[8] 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.[9]

ANALYSIS

The issue on appeal is whether appellant has more than five percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

Dr. Fernandes, OWCP's second opinion examiner, opined in a June 14, 2016 decision that appellant had 10 percent permanent impairment of the right upper extremity due to loss of range of motion. In a June 30, 2016 report, Dr. Garelick, an OWCP medical adviser, explained that Dr. Fernandes' decision to use loss of range of motion for calculating impairment was incorrect. He determined that, according to Table 15-5,[10] of the sixth edition of the A.M.A.,

[5] *See* 20 C.F.R. §§ 1.1-1.4.

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

[7] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[8] *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).

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

[10] *Supra* note 4.

Guides, appellant had five percent permanent impairment of the right upper extremity for the diagnosis of full-thickness rotator cuff tear. Appellant thereafter received a schedule award for five percent permanent impairment of the right upper extremity, based upon this June 30, 2016 report.

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

The Board has found that OWCP had 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 the range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.[11] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[12] 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 has 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.[13]

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 February 24, 2017 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.[14]

CONCLUSION

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

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

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

[13] *Supra* note 11.

[14] *See* FECA Bulletin No. 17-06 (issued May 8, 2017).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 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: December 4, 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