United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 15-0022**
	)	**Issued: February 14, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 7, 2014 appellant filed a timely appeal from a September 8, 2014 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.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish more than 28 percent permanent impairment of her right arm, for which she previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

[2] On appeal, appellant stated that she was not contesting the schedule award she received for 12 percent permanent impairment of her left arm and the matter of her entitlement to left arm schedule award compensation is not currently before the Board.

FACTUAL HISTORY

On November 16, 2004 appellant, then a 48-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging injury to her arms due to performing work activities such as handling and casing mail. OWCP initially accepted that she sustained right carpal tunnel syndrome, but her case was later amended to reflect the accepted conditions of bilateral carpal tunnel syndrome, aggravation of Kienbock's disease of the right wrist, right cubital tunnel syndrome, bilateral medial and lateral epicondylitis, right osteochondropathies, acquired deformity of bone/cartilage, left aseptic necrosis, and temporary aggravation of major depression and anxiety.[3] Appellant stopped work on November 15, 2004 and received compensation on the periodic rolls beginning January 23, 2005.

In a June 2, 2006 report, Dr. Huey Y. Tien, an attending Board-certified hand surgeon, indicated that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), appellant had 46 percent permanent impairment of the right arm and 21 percent permanent impairment of the left arm based on restricted range of motion. In a follow-up report dated July 6, 2006, he indicated that, although a functional capacity evaluation was performed on June 2, 2006,[4] he felt that the problems with appellant's wrists needed to be further addressed and that maximum medical improvement had not been reached.

On October 8, 2012 Dr. Tien performed OWCP-authorized proximal carpectomy and radial styloidectomy on appellant's left wrist.

In a December 12, 2013 report, Dr. Tien determined that, under the standards of the sixth edition of the A.M.A, *Guides* (6th ed. 2009),[5] appellant had 12 percent permanent impairment of her left arm. He used a diagnosis-based impairment (DBI) rating methodology under Table 15-3 (Wrist Regional Grid) on page 397 and chose the diagnosis of proximal row carpectomy as the basis for his rating.

On April 24, 2014 appellant filed a claim for a schedule award (Form CA-7).

On May 6, 2014 Dr. Howard Hogshead, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, noted that appellant underwent a surgical fusion of her right wrist in 2005 and noted that the record did not include a "continued impairment rating, schedule award, or [maximum medical improvement] date for the right wrist." He noted that, for the right arm, the findings of a functional capacity evaluation from June 2006 showed that appellant had 21 percent permanent impairment for flexion of -10 percent and extension of 10 percent as well as 9 percent permanent impairment for ulnar deviation of 5 percent and radial deviation of -5 percent. Dr. Hogshead referenced Table 15-32 (Wrist Range of Motion) on page 473 of the sixth edition of the A.M.A., *Guides* and indicated that combining the 21 percent and 9 percent impairment

[3] Appellant underwent OWCP-authorized surgical procedures, including a left carpal tunnel release on June 23, 2005 and a right carpal tunnel release and total fusion surgery on October 3, 2005.

[4] A copy of the June 2, 2006 functional capacity evaluation is of record.

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

ratings (using the Combined Values Chart on page 604) totaled a right arm permanent impairment of 28 percent. He indicated that "other sources of impairment [of the right upper extremity] are of much less importance. *See* A.M.A., *Guides,* 387, 389, 419, 499. The fusion of the wrist is of greatest value as it concerns [activities of daily living]." Dr. Hogshead then explained that appellant had 12 percent permanent impairment of her left arm based on the DBI rating methodology.

In a July 9, 2014 decision, OWCP granted appellant a schedule award for 12 percent permanent impairment of her left arm and 28 percent permanent impairment of her right arm. The award ran for 124.8 weeks from June 29, 2014 to November 18, 2016 and was based on the opinion of Dr. Hogshead.[6]

In a July 30, 2014 report, Dr. Tien noted that appellant had reached maximum medical improvement of the right arm in 2006. He indicated that a right arm impairment rating of 46 percent was calculated on June 2, 2006 based on the fifth edition of the A.M.A., *Guides,* which was applicable at that time. This 46 percent impairment of the right arm yielded 28 percent impairment of the whole body and the 21 percent impairment of the left arm yielded 13 percent impairment of the whole body. Dr. Tien indicated that when these figures were combined it yielded 37 percent impairment of the whole body. He noted that appellant underwent an additional surgery on the left side on October 8, 2012 which involved a left wrist proximal carpectomy and radial styloidectomy. Maximum medical improvement of the left arm was reached in 2013 and an impairment rating was determined on December 13, 2013 based on the sixth edition the A.M.A., *Guides,* which was applicable at that time, for 12 percent permanent impairment of the left arm or 7 percent permanent impairment of the whole body.

On August 20, 2014 Dr. Hogshead, serving as an OWCP medical adviser, noted that he had reviewed the July 30, 2014 report of Dr. Tien and that reference should be made to his May 6, 2014 report with respect to his calculation that appellant had 28 percent impairment of her right arm. For appellant's left arm, he indicated that the DBI methodology was recommended and that she had 12 percent left arm permanent impairment. Dr. Hogshead noted that appellant was compensated on July 9, 2014 for her 28 percent right arm permanent impairment and her 12 percent left arm permanent impairment.

In a September 8, 2014 decision, OWCP affirmed its July 9, 2014 schedule award determination which found that appellant had 12 percent permanent impairment of her left arm and 28 percent permanent impairment of her right arm. It found that the new evidence of Dr. Tien did not establish additional schedule award compensation for her left arm because Dr. Tien posited that she had 12 percent permanent impairment of her left arm and she had already been compensated for this level of permanent impairment. The new evidence of Dr. Tien also did not establish that appellant was entitled to additional schedule award compensation for her right arm. OWCP indicated that Dr. Tien's right arm impairment rating of

[6] Appellant was advised that, although the commencement date of a schedule award is normally the date of maximum medical improvement, a schedule award is payable consecutively but not concurrently with an award for wage loss. The starting date of appellant's schedule award was adjusted to June 29, 2014 as she had received compensation for wage loss through June 29, 2014.

46 percent was of limited probative value because it was calculated under the fifth 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 the Office of Workers' Compensation Programs.[7] 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.[8] 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.[9]

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).[10] 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.[11]

ANALYSIS

The issue on appeal is whether appellant met her burden of proof to establish more than 28 percent permanent impairment of her right arm, for which she received 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

[7] *See* 20 C.F.R. §§ 1.1-1.4.

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

[9] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

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.[12] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[13] 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.[14]

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 September 8, 2014 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.

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

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

[14] *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 14, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board