# United States Department of Labor
# Employees' Compensation Appeals Board

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| **D.G., Appellant** | ) | |
| **and** | ) | **Docket No. 15-0206** |
| | ) | **Issued: February 9, 2017** |
| **U.S. POSTAL SERVICE, POST OFFICE, Beachwood, OH, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 7, 2014 appellant, through counsel, filed a timely appeal from a September 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 established more than one percent right upper extremity permanent impairment, for which he received a schedule award.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel argues the decision is contrary to law and fact.

## ***FACTUAL HISTORY***

This case has previously been before the Board. On December 23, 2004 appellant, then a 34-year-old city letter carrier, filed a traumatic injury claim alleging that, on that date, he injured his right elbow and shoulder when he slipped and fell while stepping off a curb. On June 15, 2010 OWCP accepted sprains of the neck, back (thoracic), and shoulder and upper arm rotator cuff).[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

In a January 27, 2012 report, Dr. William N. Grant, an examining Board-certified internist, concluded, using the diagnosis-based impairment (DBI) method, that appellant had a 17 percent right upper extremity impairment using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4] He opined that appellant had 2 percent impairment due to the right arm and shoulder sprain, 5 percent impairment due to the right shoulder rotator cuff tear and 10 percent impairment due to his cervical sprain, which resulted in a total left upper extremity impairment of 17 percent.

Using Table 15-5, page 401, Dr. Grant determined appellant had a class 1 diagnosis of arm/shoulder sprain. He found a grade modifier of 2 based for Functional History (GMFH) under Table 15-7, page 406, and a grade modifier of 3 for Physical Examination (GMPE) using Table 15-8, page 408. Dr. Grant found a net adjustment of 2 or 2 percent right upper extremity impairment for right upper arm and shoulder sprain.

Dr. Grant determined that appellant had a class 1 diagnosis of right rotator cuff sprain according to Table 15-5, page 402. Using Table 15-7, page 406 he found a grade modifier of 2 for functional history and a grade modifier of 3 using Table 15-8, page 408 for physical examination, which resulted in a net adjustment of two or five percent right upper extremity impairment. He determined appellant had a class 1 diagnosis for his neck sprain. Using Tables 15-7, page 406 Dr. Grant found a grade modifier of 2 for functional history and a grade modifier of 2 using 15-8, page 408 for physical examination, resulting in a net adjustment of 2. He concluded appellant had a 1 percent mild sensory deficit and a 10 percent mild motor deficit of the C5-8 nerves, resulting in 10 percent right upper extremity impairment. Dr. Grant combined the impairment ratings using the Combined Values Chart to conclude that appellant had a total right upper extremity impairment of 17 percent.[5]

[3] Docket No. 12-1067 (issued January 8, 2013). In a decision dated January 8, 2013, the Board affirmed a February 17, 2012 OWCP decision concerning the denial of a recurrence claim. The Board found appellant failed to submit sufficient medical evidence supporting his claim that he sustained a recurrence of disability on and after June 5, 2010 causally related to his accepted December 23, 2004 employment injury.

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

[5] In his original report of August 25, 2010, Dr. Grant, after applying the 6th edition of the A.M.A., *Guides*, concluded that appellant sustained 21 percent left upper extremity impairment and 25 percent right lower extremity impairment.

On October 24, 2012 appellant filed a claim for a schedule award.

In an August 8, 2013 report, Dr. John L. Dunne, an examining Board-certified osteopath specializing in preventive and occupational medicines, reported the findings of his physical examination of appellant. He noted that range of motion of appellant's right shoulder was assessed *via* goniometer. Flexion was measured at 150 degrees, extension at 50 degrees, abduction at 120 degrees, adduction at 45 degrees, external rotation at 50 degrees and internal rotation at 65 degrees. Dr. Dunne noted rotator cuff strength tests as grade 5 and positive Neer's and Hawkins impingement maneuvers. He noted that shoulder regional grid at Table 15-5 failed to properly account for rotator cuff injuries with residual motion loss so that a stand-alone range of motion (ROM) method was the best method under Chapter 15 to determine appellant right shoulder impairment. Using Table 15-34 Dr. Dunne found a 10 percent range of motion impairment of the right shoulder due to the objective findings. Next, using Table 15-35 he assigned a grade modifier of 1 for a 12 percent right upper extremity range of motion impairment. Dr. Dunne assigned no grade modifier for functional history per Table 15-7. He found a ??? 10 percent whole person impairment of the right upper extremity. Dr. Dunne found no impairment for the neck and thoracic sprains as there was no evidence of spinal root involvement.

On October 7, 2013 OWCP's medical adviser reviewed the evidence of record. He was asked to specifically comment on Dr. Dunne's impairment rating. Based on Dr. Dunne's report, the medical adviser concluded that appellant had one percent right upper extremity impairment. He noted that DBI ratings were preferred under the sixth edition of the A.M.A., *Guides*, but that the ROM method of rating impairment could be used in some circumstances. The medical adviser provided a one percent impairment using the DBI method for appellant's right shoulder. He found that Dr. Dunne only documented the average range of motion for each joint movement, which was not consistent with the validity criteria in section 15.7 of the A.M.A., *Guides* for measuring range of motion. Under Table 15-5 on pages 401-405, appellant had a diagnosis of right shoulder sprain which fell under class 1 with a default value of 1. The medical adviser noted that he had a grade modifier 2 for functional history using Table 15-7, page 406, a grade modifier 1 for physical examination using Table 15-8, page 408, and that no modifiers were applicable for clinical studies. He applied the Net Adjustment Formula to find that there was no adjustment from the default value of 1 percent impairment of appellant's right shoulder.

By decision dated December 6, 2013, OWCP granted appellant a schedule award for one percent right upper extremity impairment. The period of the award ran from August 8 to 29, 2013.

On December 12, 2013 counsel requested a telephone hearing before an OWCP hearing representative, which was held on June 17, 2014.

By decision dated September 5, 2014 the hearing representative affirmed the December 6, 2013 schedule award decision.

## ***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.[6] 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.[7] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[8]

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).[9] 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.[10]

## ***ANALYSIS***

The issue on appeal is whether appellant established more than one percent right upper extremity permanent impairment, for which he received a schedule award.

The Board finds this case 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

[6] *See* 20 C.F.R. §§ 1.1-1.4.

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

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[9] *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 & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

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

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 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 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.[13]

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 5, 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.

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

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

[13] *Supra* note11.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 5, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.[14]

Issued: February 9, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[14] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.