United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 15-0403**
	)	**Issued: February 13, 2017**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Boise, ID, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2014 appellant filed a timely appeal from a November 18, 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.

ISSUE

The issue is whether appellant has established more than 38 percent permanent impairment of the right upper extremity for which he had received a schedule award.

FACTUAL HISTORY

On September 9, 1996 appellant, then a 48-year-old employee, filed a traumatic injury claim (Form CA-1) alleging that on August 18, 1996 while loading cargo he injured his right rotator cuff. OWCP accepted the claim for a right rotator cuff tear, a sprain of the shoulder and

[1] 5 U.S.C. § 8101 *et seq.*

upper arm at the right supraspinatus, and right biceps tendon degeneration. Appellant underwent authorized right rotator cuff repairs on December 2, 1996 and March 5, 1997. He filed a claim for a schedule award (Form CA-7) on March 2, 1997.

OWCP had previously accepted that appellant sustained a right rotator cuff tear due to a December 28, 1989 employment injury, assigned file number xxxxxx657. On April 17, 1990 appellant had also undergone a right rotator cuff repair under file number xxxxxx657. In a decision dated September 9, 1991, OWCP granted him a schedule award for 10 percent permanent impairment of the right arm. The period of the award ran for 31.20 weeks from July 8, 1991 to February 11, 1992.

By decision dated May 5, 1998, OWCP granted appellant a schedule award for 38 percent permanent impairment of the right arm. The period of the award ran for 118.56 weeks from February 3, 1998 to May 12, 2000.

On November 1, 2012 OWCP accepted a recurrence of a medical condition. On August 6, 2013 Dr. Kirk Lewis, an attending Board-certified orthopedic surgeon, performed an authorized right shoulder arthroscopic debridement of the glenohumeral joint, and a biceps tenotomy.

In an impairment evaluation report dated January 24, 2014, Dr. Lewis related that appellant was medically stationary following his surgery. He noted, "[Appellant] has endstage glenohumeral arthrosis of his right shoulder with a global rotator cuff tear and subsequent biceps tenotomy. [Appellant] is severely limited with function and strength." Dr. Lewis advised that [appellant] had a full-thickness tear of two rotator cuff tendons and a partial tear of a third tendon, for a class 3 impairment. He further found grade IV glenohumeral arthrosis. Dr. Lewis obstensibly utilized the diagnosis-based impairment (DBI) methodology for rating permanent impairment and opined that appellant had 50 percent right upper extremity impairment, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

On February 13, 2014 appellant filed a claim for an increased schedule award.

On August 13, 2014 an OWCP medical adviser advised that Dr. Lewis should provide detailed findings on examination, including measurements for range of motion (ROM), perform a *Quick*DASH (disabilities of the arm, shoulder, and hand) assessment, and explain his use of the A.M.A., *Guides*.

By letter dated August 19, 2014, OWCP requested that Dr. Lewis provide a formal impairment evaluation in accordance with the A.M.A., *Guides* and enclosed the August 13, 2014 report of OWCP's medical adviser for his review.

In a report dated October 16, 2014, Dr. Lewis reviewed appellant's history of four right upper extremity surgeries.[2] He opined that appellant had reached maximum medical

[2] On October 22, 2014 OWCP had referred appellant for a second opinion examination. However, it cancelled the examination after it received the October 16, 2014 report from Dr. Lewis.

improvement on January 24, 2014. Dr. Lewis found symmetrical sensation and less than five millimeters of two-point discrimination in the median, ulnar and radial nerves. He determined that appellant had "severe atrophy of the infraspsinatus and supraspinatus tendons of both shoulders which is symmetric." Appellant also had bilateral positive impingement and a positive Hawkins' test, which Dr. Lewis indicated was "difficult to interpret because of his poor active strength in both the right and left shoulders." Dr. Lewis obtained ROM measurements and determined that, for the right shoulder, 50 degrees abduction yielded six percent impairment, 45 degrees forward flexion yielded nine percent impairment, 20 degrees extension yielded two percent impairment, 20 degrees adduction yielded two percent impairment, 10 degrees internal rotation yielded four percent impairment, and negative 10 degrees external rotation yielded two percent impairment. He also provided passive ROM findings and ROM measurements for the left side. Dr. Lewis further found that appellant had crepitus of the right glenohumeral and acrominal humeral joints. Without citation to any rating methodology in the A.M.A., *Guides* he combined the ROM impairments to find 25 percent right upper extremity permanent impairment. Dr. Lewis determined that appellant had a *Quick*DASH score of 52, for a grade modifier of 2. He further found grade modifiers of two for physical examination and functional history, for a net adjustment of zero and a total right upper extremity impairment of 25 percent.

On November 5, 2014 an OWCP medical adviser reviewed the October 16, 2014 report of Dr. Lewis. He concurred with Dr. Lewis' use of ROM methodology for evaluation of appellant's shoulder impairment. The medical adviser noted that the A.M.A., *Guides* provided that measurements for ROM should be "rounded off to the nearest 10 degrees."[3] He concurred with Dr. Lewis' impairment findings for ROM with the exception of adduction, finding that 20 percent adduction yielded 1 percent rather than 2 percent impairment.[4] Combining the ROM findings yielded 24 percent right upper extremity impairment. The medical adviser further determined that appellant's *Quick*DASH score was 70 rather than 52, which yielded a grade modifier for functional history of 3 rather than 2.[5] He found that this increased the total right upper extremity permanent impairment to 25 percent.

By decision dated November 18, 2014, OWCP denied appellant's claim for an increased schedule award. It found that he had already received a schedule award for 38 percent right upper extremity impairment. As appellant had failed to submit an impairment rating establishing a higher percentage of impairment, he thus failed to meet his burden to obtain an additional award.

On appeal, appellant argues that Dr. Lewis found that he had 50 percent permanent impairment due to his weakness and difficulty performing activities of daily living. He asserts that following his 1998 schedule award he had additional arthritis, a torn rotator cuff, and a frayed tendon. Appellant also notes that he had surgery in August 2013, rather than March 2013 as found by the medical adviser. He argues that tests are insufficient to demonstrate his pain and loss of strength with movement.

[3] A.M.A., *Guides* 461.

[4] *Id*. at 475, Table 15-34.

[5] *Id*. at 306, 477, Tables 15-7, 15-36.

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 A.M.A., *Guides* 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., *Guides* issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides*." 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 is entitled to an increased schedule award of the right upper extremity.

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 has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[11]

[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] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010);

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

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

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 November 18, 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] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 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 13, 2017
Washington, DC

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

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

Alec J. Koromilas, Alternate 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.