



## **FACTUAL HISTORY**

In August 2008 OWCP accepted that appellant, then a 52-year-old mail handler, sustained bilateral rotator cuff syndrome due to performing his repetitive work duties over time. It later expanded the accepted conditions to include right shoulder impingement.

On April 17, 2009 Dr. John Riester, an attending Board-certified orthopedic surgeon, performed subacromial decompression surgery on appellant's right shoulder and, on August 21, 2009, he performed the same procedure on his left shoulder. He noted that the shoulders had normal joint surfaces, glenoid surfaces, capsules, and labra. These procedures were authorized by OWCP.

OWCP had previously accepted, under OWCP File No. xxxxxx655, that appellant sustained bilateral strains on August 25, 2004 due to lifting a heavy trailer door. The file for this injury was administratively combined with the file for the present case.

On December 21, 2011 appellant filed a claim for a schedule award (Form CA-7) due to his accepted work injuries.

In a December 2, 2011 report, Dr. William N. Grant, an attending Board-certified internist, determined that appellant had 17 percent permanent impairment of his right arm. He provided range of motion findings for appellant's right shoulder. Dr. Grant indicated that, under Table 15-5 (Shoulder Regional Grid) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009), appellant had five percent permanent impairment for rotator cuff syndrome. Under Table 15-23, he had 13 percent permanent impairment due to right shoulder peripheral nerve impairment. Dr. Grant stated that appellant had a combined impairment value of 17 percent for his right arm. The date of maximum medical improvement for his right arm was December 2, 2011.

In May 3, 2012 report, Dr. Nabil F. Angley, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, noted that Dr. Grant based his impairment rating on loss of range of motion. He noted that Table 15-5 of the sixth edition of the A.M.A., *Guides* was not applicable for such an evaluation, but rather that range of motion rating fell under Table 15-34. As Dr. Grant had not properly used the A.M.A., *Guides*, Dr. Angley recommended that appellant undergo a second opinion medical examination.

OWCP referred appellant to Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, for a second opinion medical examination and opinion on his arm impairment. In a report dated May 3, 2013, Dr. Ghanma noted findings for right shoulder motion: forward flexion of 160 degrees, extension of 70 degrees, abduction of 175 degrees, adduction of 40 degrees, external rotation of 90 degrees, and internal rotation of 90 degrees. For appellant's left shoulder, he reported forward flexion of 170 degrees, extension of 80 degrees, abduction of 180 degrees, adduction of 40 degrees, external rotation of 90 degrees, and internal rotation of 90 degrees. Dr. Ghanma noted no evidence of shoulder instability or impingement. He stated that Table 15-5 of the sixth edition of the A.M.A., *Guides*, using the diagnosis-based impairment (DBI) method, was not applicable as appellant had shoulder range of motion loss. Dr. Ghanma found that

appellant had three percent impairment of each arm under Table 15-34 for loss of range of shoulder motion. Appellant's date of maximum medical improvement was November 6, 2009.

OWCP referred the file to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, for a calculation of permanent impairment of appellant's arms. It provided the surgical records to Dr. Slutsky. In a July 19, 2013 report, Dr. Slutsky determined that appellant had one percent permanent impairment of his left arm based on his left shoulder strain. Using Table 15-5 of the sixth edition of the A.M.A., *Guides*, he determined a class 1 impairment with modifiers of zero for functional history, one for physical examination, and zero for clinical studies. The net adjustment was minus one for a final class 1 (grade B) or one percent impairment. Dr. Slutsky explained that shoulder strain was the most impairing diagnosis for appellant's left arm and noted that the DBI impairment rating method covered by Table 15-5 was preferred to the range of motion method. He stated that without review of the right shoulder surgery report, he could not provide a right upper extremity rating. Dr. Slutsky found that appellant's date of maximum medical improvement was May 3, 2013, the date of Dr. Ghanma's report.

In an updated report dated July 26, 2013, Dr. Slutsky stated that the 2009 right shoulder surgery report showed no evidence of rotator cuff tear, tendinitis, impingement, labrum, or glenohumeral disease. He noted that right shoulder sprain/strain was the most impairing diagnosis. Using Table 15-5 of the sixth edition of the A.M.A., *Guides*, he determined a class 1 impairment with grade modifiers of zero for both physical examination and functional history, with a minus two net adjustment. With a final class A value, appellant had a zero percent impairment of his right arm. Dr. Slutsky repeated his earlier assessment of one percent impairment for appellant's left arm and noted that, for both arms, his opinion was based on application of Dr. Ghanma's findings to Table 15-5.

On October 21, 2013 OWCP issued a schedule award for one percent permanent impairment of his left arm and a zero percent permanent impairment of his right arm. The award ran for 3.12 weeks from May 3 to 24, 2013 and was based on the opinion of Dr. Slutsky.

Appellant requested a hearing with an OWCP hearing representative. During the hearing held on April 11, 2014, he submitted an October 1, 2014 report of Dr. Jessica Volsky, an attending osteopath. In this report, Dr. Volsky found that appellant had 6 percent left arm impairment and 10 percent right arm impairment based on range of motion loss under Table 15-34 of the sixth edition of the A.M.A., *Guides*.

By decision dated May 7, 2014, an OWCP hearing representative set aside OWCP's October 21, 2013 decision and remanded the case for additional development to be followed by an appropriate decision. He directed OWCP to have an OWCP medical adviser review Dr. Volsky's report and provide an impairment rating for appellant's arm impairment.

In a May 10, 2014 report, Dr. Slutsky noted that he had reviewed Dr. Volsky's opinion. He repeated his prior opinion that appellant had one percent permanent impairment of his left arm and zero percent permanent impairment of his right arm based on the diagnosis-based impairment rating method found in Table 15-5 of the sixth edition of the A.M.A., *Guides*.

Dr. Slutsky posited that the DBI rating method was preferred under the A.M.A., *Guides* to the range of motion method used by Dr. Volsky.

In a May 13, 2014 decision, OWCP found that it had been properly determined that appellant had failed to establish more than one percent permanent impairment of his left arm and zero percent permanent impairment of his right arm.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the December 1, 2014 hearing, counsel argued that Dr. Slutsky was biased with regard to schedule award claims because it was felt that he determined lower impairment ratings compared with other medical evaluators. He asserted that Dr. Slutsky ignored Table 2.1 of the A.M.A., *Guides*, which required the evaluator to use the rating method that provided the highest impairment rating.

In a January 21, 2015 decision, the hearing representative affirmed OWCP's May 13, 2014 decision. He found that Dr. Slutsky had properly determined, by using a DBI rating method, that appellant has a one percent permanent impairment of his left arm and a zero percent permanent impairment of his right arm.

### **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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.

---

<sup>3</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>4</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>5</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>6</sup> 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.<sup>7</sup>

### ANALYSIS

The issue on appeal is whether OWCP properly determined that appellant has one percent permanent impairment of his left arm and zero percent permanent impairment of his right arm.

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 range of motion methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>8</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>9</sup> 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.<sup>10</sup>

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 January 21, 2015 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.

---

<sup>6</sup> 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).

<sup>7</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>8</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>9</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>10</sup> *Supra* note 8.

**CONCLUSION**

The Board finds this case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 21, 2015 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 16, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board