



## **FACTUAL HISTORY**

On August 18, 2013 appellant, a 60-year-old health technician, sustained a traumatic injury in the performance of duty while defending himself from a patient. OWCP accepted his claim for a right rotator cuff sprain.

On September 25, 2013 appellant underwent a right shoulder arthroscopy, full-thickness rotator cuff repair, and subacromial decompression. Dr. Daryl L. O'Connor, the Board-certified orthopedic surgeon, who performed the operation, saw appellant on January 17, 2014. He released appellant to return to work without restrictions but noted the following: "I would expect gradual improvement in his overhead strength and [range of motion] ROM. Date of maximum medical improvement remains estimated at six months postoperative. I will see him again as needed."

Appellant filed a claim for a schedule award. Dr. Anatoly Rozman, a Board-certified physiatrist and attending physician, evaluated impairment on February 7, 2014. It was his understanding that appellant had reached maximum medical improvement as per Dr. O'Connor's January 17, 2014 note. Dr. Rozman rated impairment using the ROM method, citing to Table 15-34, page 475, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed.) (shoulder ROM). He explained that he was not able to use Table 15-5, page 403 (shoulder regional grid), because the diagnosis-based impairment method required normal motion, which appellant did not have.

Flexion was 80 degrees. Extension was zero percent impairment. Abduction was 70 degrees. Adduction was preserved at zero percent impairment. Internal rotation was a four percent impairment of the upper extremity. External rotation was 60 degrees, or no impairment. Using the Combined Values Chart on page 604, Dr. Rozman calculated 17 percent permanent impairment of appellant's right upper extremity due to loss of motion.

An OWCP medical adviser reviewed Dr. Rozman's evaluation and noted, quoting the A.M.A., *Guides*: "ROM is used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment; this is a significant change from prior editions." The medical adviser concluded, therefore, that Dr. Rozman's rating based on ROM should be disregarded.

Instead, the medical adviser used the diagnosis-based impairment method on Table 15-5, page 403, of the A.M.A., *Guides*. He noted that a five percent rating was awarded for a diagnosis of full-thickness rotator cuff tear with residual findings. The medical adviser added that, based on the physical examination findings of Dr. O'Connor, there would be no change due to the net adjustment formula. He concluded that appellant had five percent permanent impairment of his right upper extremity based on the diagnosis of full-thickness rotator cuff tear. The medical adviser indicated the date of maximum medical improvement was January 17, 2014, the date Dr. O'Connor last saw appellant.

On June 26, 2014 OWCP issued a schedule award for five percent permanent impairment of appellant's right upper extremity. After a request for a review of the written record, an OWCP hearing representative on January 13, 2015 affirmed the June 26, 2014 schedule award.

On appeal, appellant argues that the ROM method of evaluating impairment is permissible in his case.

### **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>2</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>3</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>4</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.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>5</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>6</sup>

### **ANALYSIS**

The issue on appeal is whether appellant has more than five percent permanent impairment of his right upper extremity.

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

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<sup>2</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>3</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>4</sup> 20 C.F.R. § 10.404. See also, *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>5</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>6</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

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 diagnosis-based impairment or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>7</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>8</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 diagnosis-based impairment 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 diagnosis-based impairment 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>9</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 13, 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.

### CONCLUSION

The Board finds this case not in posture for decision.

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<sup>7</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>8</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>9</sup> *Supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 13, 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 8, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board