

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

O.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Spokane, WA, Employer**

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**Docket No. 15-1837
Issued: February 23, 2017**

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 September 8, 2015 appellant filed a timely appeal from a July 15, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 sustained more than seven percent permanent impairment to her right upper extremity, for which she previously received a schedule award.

¹ The record also contains an August 4, 2015 loss of wage-earning capacity decision which appellant has not contested on appeal. Accordingly, that issue is not currently before the Board.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 19, 2012 appellant, then a 50-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2012 she felt pain in her lower middle back while transferring trays of mail from one general purpose mail container (GPC) to another, and stacking trays of mail on GPC's for carriers. OWCP accepted that she sustained a lumbar sprain. Appellant stopped work on August 1, 2012. That same date she underwent authorized left shoulder arthroscopic subacromial decompression and mini-open rotator cuff repair. Appellant had been working full-time modified duty since approximately April 23, 2012. On November 15, 2012 OWCP expanded the accepted condition to include sprain of left shoulder and upper arm rotator cuff.³ Appellant returned to work full-time, limited duty on December 4, 2012.

On May 30, 2013 appellant filed a schedule award claim (Form CA-7). By decision dated August 5, 2013, OWCP issued a schedule award for 24 percent permanent impairment of the left upper extremity. The award ran for 74.88 weeks for the period July 3, 2013 to December 9, 2014. On January 15, 2014 OWCP expanded the accepted conditions to include displaced lumbar disc and lumbar radiculopathy of the lower extremities.

Appellant requested a schedule award (Form CA-7) for her right upper extremity. In a March 9, 2015 report, Dr. Harold Graeme French, a Board-certified orthopedic surgeon, noted the history of the August 10, 2005 work injury of the right shoulder, which had remained somewhat symptomatic, but became worse after the March 17, 2012 injury. A magnetic resonance imaging (MRI) scan of the right shoulder on May 28, 2013 showed a 10 millimeter full-thickness tear of the rotator cuff involving the suprapinatus and moderate tendinosis of the infraspinatus and subscapularis, but no other internal derangement. Treatment included physical therapy and appellant was noted to have declined injections and additional surgery. A March 9, 2015 x-ray was read as normal. Dr. French provided examination findings, reviewed the medical record, and diagnosed chronic right shoulder rotator cuff tear. He concluded that appellant was at maximum medical improvement (MMI). Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (hereinafter A.M.A., *Guides*), Dr. French opined that she had 18 percent permanent impairment of the right upper extremity and provided his calculations.⁵

OWCP subsequently expanded the accepted conditions to include trochanteric bursitis of the right hip and bilateral sprain of the shoulder and upper arm rotator cuff.

On June 19, 2015 an OWCP medical adviser reviewed Dr. French's report and the medical record. He found that appellant had reached MMI on March 9, 2015, the date of Dr. French's impairment examination. The medical adviser noted that Dr. French had referenced the sixth edition of the A.M.A., *Guides* and used the diagnosis-based impairment (DBI)

³ Under file number xxxxxx267, OWCP had previously accepted a right shoulder strain and bilateral knee contusions for an August 10, 2005 trip and fall.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ Effective May 28, 2015 appellant began work as a clerk for 40 hours per week. *Supra* note 1.

methodology, but had erred in his impairment calculation of 18 percent as he had combined the DBI for multiple conditions within the same joint on the shoulder grid. He noted that three of those conditions (labral tear, biceps subluxation, and suprascapular nerve injury) were questionable since no labral tear or biceps abnormality were noted on the MRI scan and the evidence of a suprascapular nerve injury was based on the finding of supraspinatus atrophy only. The medical adviser explained that such atrophy could be explained on the basis of the rotator cuff tear, which was noted on MRI scan to involve the supraspinatus. He further explained that page 387 of the A.M.A., *Guides* indicated that the examiner should use the diagnosis with the highest causally-related impairment rating for the calculation. The medical adviser noted calculations using the range of motion (ROM) methodology under Table 15-34, page 475 yielded six percent upper extremity impairment, while calculations using the DBI method yielded seven percent upper extremity impairment. He chose to use the DBI method as it yielded a higher impairment rating. Under Table 15-5, page 403, the medical adviser noted a full thickness rotator cuff tear was class 1 impairment with a default of grade C of five percent impairment. Under Table 15-7, page 406, grade modifier Functional History (GMFH) was 2 based on symptoms with normal activity with retained ability to perform self-care. Under Table 15-8, page 408, grade modifier Physical Examination (GMPE) was 2 based on mild loss of motion and weakness with no instability. Under Table 15-9, page 410, grade modifier Clinical Studies (GMCS) was 2 based on imaging studies confirming the diagnosis. Applying the net adjustment formula, the medical adviser found (GMFH - Class of Diagnosis (CDX)) (2-1) + (GMPE - CDX) (2-1) + (GMCS - CDX) (2-1) = 3. However, as a grade modifier may not be used to change the class (page 387) and the current class may only be moved two places to the right in the shoulder grid, the medical adviser changed the default value of C to E, which changed the rating from five percent to seven percent permanent impairment of the right upper extremity.

By decision dated July 15, 2015, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The award covered a period of 21.84 weeks from March 9 to August 8, 2015.

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 OWCP.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

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).

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. 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 sustained more than seven percent permanent impairment to her right upper extremity, for which she previously 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 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 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

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 2.808.6a (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).

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

¹³ *Supra* note 11.

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 July 15, 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.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 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 23, 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