

ISSUE

The issue is whether appellant has more than two percent permanent impairment of his right arm.

FACTUAL HISTORY

On May 13, 2010 appellant, then a 62-year-old tractor/trailer operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained a neck injury while backing into the loading dock on May 7, 2010. He reported a pop in his neck when he turned his head. Appellant stopped work on May 7, 2010 and was to return on May 15, 2010. On July 15, 2010 he filed a claim for occupational disease (Form CA-2), noting that on May 7, 2010 he felt a pop in his neck while backing into a dock. Appellant also alleged that his physician had reported degenerative disc disease as a result of 25 years of federal employment. The claims have been combined under OWCP File No. xxxxxx773.

On August 3, 2010 OWCP accepted neck sprain and right shoulder impingement as a result of the May 7, 2010 incident. Appellant submitted a claim for a schedule award (Form CA-7) on September 12, 2013.

In a report dated November 14, 2013, Dr. Bennett Machanic, a neurologist, provided a history of a work injury on May 7, 2010 when appellant struck a loading dock while operating a tractor-trailer. He utilized the range of motion (ROM) method to find 12 percent permanent impairment of the right shoulder under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition). Dr. Bennett also reported that appellant had an ulnar nerve problem and found an additional right arm permanent impairment of four percent based on sensory and motor deficit.

OWCP referred the case to OWCP medical adviser Dr. Morley Slutsky, Board-certified in occupational medicine. In a report dated April 15, 2014, Dr. Slutsky recommended that appellant be referred for a second opinion examination.

Appellant was referred to Dr. John Douthit, a Board-certified orthopedic surgeon for a second opinion. In a report dated May 19, 2014, Dr. Douthit provided a history and results on examination. With respect to the right shoulder, using the ROM method, he reported 20 degrees external rotation, 70 degrees internal rotation, 160 degrees flexion and abduction, 20 degrees adduction, and 50 degrees extension. Dr. Douthit indicated that three measurements were taken in accord with the A.M.A., *Guides*. He opined that appellant had a right shoulder permanent impairment of 12 percent due to loss of range of motion under the A.M.A., *Guides* at Table 15-34.

Dr. Douthit's report was referred to Dr. Slutsky for review. In a report dated May 29, 2014, he opined that, under the preferred diagnosis-based impairment (DBI) method, appellant had two percent right arm permanent impairment. Dr. Douthit applied Table 15-5 for the diagnosis of shoulder tendinitis, and a class 1, grade B impairment. He also found no diagnostic studies provided support for the significant loss of shoulder motion which Dr. Douthit had found.

On May 29, 2014 OWCP advised appellant that the accepted conditions had been updated and now included: neck sprain, right shoulder impingement, cervical intervertebral disc degeneration, and right shoulder calcifying tendinitis.

OWCP requested an additional report from Dr. Douthit based on the preferred DBI method.

In a report dated June 5, 2014, Dr. Douthit noted that the A.M.A., *Guides* provides that some diagnosis-based grids refer to the ROM section, and indicate that this section is to be used as a stand-alone rating when other grids refer to the ROM section or when no other diagnosis-based sections are applicable. He opined that this was confusing. Using the DBI method, under Table 15-5, Dr. Douthit opined that appellant had five percent right arm permanent impairment.

OWCP's medical adviser, Dr. Slutsky, reviewed Dr. Douthit's updated report and, by report dated June 13, 2014, found two percent permanent impairment of the right arm under Table 15-5.

By decision dated July 8, 2014, OWCP issued a schedule award for two percent right arm permanent impairment. The period of the award was 6.24 weeks commencing from May 19, 2014.

On July 23, 2014 appellant requested a hearing before an OWCP hearing representative, which was held on February 11, 2015. By decision dated April 8, 2015, the hearing representative affirmed the July 8, 2014 decision, finding that the weight of the medical evidence was represented by OWCP's medical adviser.

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.³ 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.⁴ 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.⁵

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the American Medical Association issued a 52-page document entitled

³ See 20 C.F.R. §§ 1.1-1.4.

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

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

“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).⁶ 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.⁷

ANALYSIS

The issue on appeal is whether appellant has more than two 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 ROM methodology when assessing the extent of permanent impairment for schedule award purposes.⁸ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.⁹ 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.¹⁰

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 April 8, 2015 decision.

⁶ 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).

⁷ *Isidoro Rivera*, 12 ECAB 348 (1961).

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

⁹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁰ *Supra* note 8.

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 April 8, 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 10, 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