

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Birmingham, AL, Employer**

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**Docket No. 16-0196
Issued: February 15, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 10, 2015 appellant filed a timely appeal from a September 15, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 10 percent permanent impairment of the left upper extremity, for which he previously received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board.² In a decision dated April 4, 2016, the Board denied appellant's claim for leave buyback for the period June 22, 2013 to May 28, 2014

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 15-1508 (issued April 4, 2016).

for intermittent periods of disability as the medical evidence was insufficient to establish that he was unable to work during this period as a result of his left shoulder condition. It also found that the record established that appellant received medical treatment on June 22 and July 9, 2013 and remanded the claim for OWCP to determine whether he was entitled to up to four hours of wage-loss compensation for these medical appointments and travel time. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On June 28, 2013 appellant, then a 59-year-old a postal clerk, filed a recurrence claim alleging that on June 19, 2013 he sustained a recurrence of a January 28, 2003 employment injury. He stopped work on June 22, 2013. OWCP converted appellant's claim to a new occupational disease claim as he attributed his injury to new employment factors. It accepted his claim for left shoulder rotator cuff tear. OWCP paid wage-loss and medical compensation benefits.

Appellant underwent authorized left shoulder surgery for arthrotomy rotator cuff repair, acromioplasty, and distal clavicle resection on August 13, 2014. He continued to receive medical treatment and was paid wage-loss and medical compensation benefits.

On October 25, 2014 appellant returned to full-time limited duty.

Appellant underwent a functional capacity evaluation (FCE) on February 20, 2015. In a March 24, 2015 work capacity evaluation form, Dr. William Garth, a Board-certified orthopedic surgeon, who specializes in orthopedic sports medicine, modified appellant's work duties based on the FCE. He noted that appellant was limited in his left shoulder. Dr. Garth indicated that appellant could work full time with restrictions of reaching, reaching above the shoulder, and pushing for one hour and pulling up to 10 pounds for eight hours.

On June 4, 2015 OWCP offered appellant a modified-job assignment as a mail processing clerk. Appellant accepted the full-time limited-duty position on June 11, 2015.

Appellant filed a Form CA-7 claim for schedule award on August 14, 2015.

By letter dated August 19, 2015, OWCP requested that appellant submit a medical report from his treating physician with a detailed description of the permanent impairment, including any permanent impairment of the same member or function which preexisted the injury, a date of maximum medical improvement, and a discussion of the rationale for calculation of the impairment according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). It included a Form CA-1053 to be completed by appellant's physician.

The Form CA-1053 was completed on September 2, 2015 by Dr. Garth and reflected that appellant had reached maximum medical improvement on June 9, 2015. He related appellant's complaints of left shoulder pain with overhead activities and repetitive reaching. Dr. Garth noted a diagnosis of partial tear of the left rotator cuff and indicated that appellant had undergone left shoulder surgery on August 13, 2014 as a result of his work injury. He reported examination findings of partial tear of the rotator cuff and superior labral. Dr. Garth indicated that according to the A.M.A., *Guides*, appellant had eight percent impairment of the left shoulder due to left

shoulder rotator cuff tear, which translated to five percent left upper extremity impairment and three percent whole body impairment. He also reported that appellant had 18 percent impairment of the left shoulder due to total impingement, which translated to 11 percent left upper extremity impairment and 6 percent whole body impairment. Dr. Garth concluded that appellant had 11 percent left upper extremity impairment and 6 percent whole body impairment.

In a September 8, 2015 report, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon, acting as OWCP's district medical adviser (DMA) reviewed Dr. Garth's September 2, 2015 impairment rating evaluation and agreed that appellant had reached maximum medical improvement on June 9, 2015. He noted, however, that although Dr. Garth recommended 11 percent impairment of the left upper extremity, Dr. Garth did not explain or document his calculations. Dr. Hogshead referred to Table 15-5, page 403, of the A.M.A., *Guides* and assigned class 1 diagnosis, default 10 percent impairment, for acromioclavicular (AC) joint injury, distal clavicle resection. He pointed out that under OWCP File No. xxxxxx137 appellant had received a schedule award for eight percent impairment for the left shoulder for basically the same problem. Accordingly, Dr. Hogshead subtracted the previous 8 percent award from his current 10 percent impairment rating and concluded that appellant should be awarded an additional 2 percent impairment for the left upper extremity.

By decision dated September 15, 2015, OWCP granted a schedule award for two additional percent permanent impairment of the left upper extremity. The award ran for 6.24 weeks from June 9 to July 22, 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 the Office of Workers' Compensation Programs.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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* 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 A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included

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).

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 established that he sustained more than 10 percent permanent impairment of the left upper extremity, for which he previously received schedule awards.

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 diagnosis-based impairment (DBI) or the range of motion 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 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.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

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.

cases involving upper extremity impairment, the Board will set aside the September 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 September 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 15, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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