

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

J.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 16-0523
Issued: February 15, 2017**

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
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 January 27, 2016 appellant, through counsel, filed a timely appeal from an October 29, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish more than five percent permanent impairment of his right upper extremity and three percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on August 7, 2007 appellant, then a 47-year-old clerk, sustained a right shoulder sprain and a right rotator cuff tear due to moving a heavy mail container. It also accepted the condition of temporary aggravation of left shoulder tendinitis, resolved, which was sustained as a consequence of his accepted right shoulder conditions.³ On March 17, 2008 appellant underwent OWCP-authorized surgery of his right shoulder, which included repair of his right rotator cuff tear.

In an October 27, 2009 report, Dr. David Weiss, an attending osteopath, concluded that appellant had five percent permanent impairment of his right upper extremity and five percent permanent impairment of his left upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed., 2009).

In August 2010, OWCP referred appellant for examination to Dr. Stuart L. Gordon, a Board-certified orthopedic surgeon.⁴ In September 9 and December 10, 2010 reports, Dr. Gordon reported findings of his physical examination of appellant. His reports formed the basis for OWCP's acceptance of appellant's claim for temporary aggravation of left shoulder tendinitis, resolved.

On July 2, 2012 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, provided an opinion on the extent of permanent impairment of appellant's upper extremities. He reviewed the medical evidence of record, including the examination findings of Dr. Weiss and Dr. Gordon, and concluded that appellant had five percent permanent impairment of his right arm and three percent permanent impairment of his left arm under the sixth edition of the A.M.A., *Guides*.

In a January 4, 2013 decision, OWCP granted appellant a schedule award for five percent permanent impairment of his right upper extremity and three percent permanent impairment of his left upper extremity. The award ran for 24.96 weeks and was based on the impairment rating of Dr. Berman. Appellant claimed additional permanent impairment. In an October 18, 2013 decision, OWCP found that he did not meet his burden of proof to establish additional impairment.

³ Appellant previously underwent left shoulder surgery in 1995.

⁴ Dr. Gordon performed his examination as an impartial medical specialist who was asked to resolve a conflict in the medical opinion evidence regarding whether appellant had developed a left shoulder condition consequential to his August 7, 2007 right shoulder injury. See 5 U.S.C. § 8123(a).

By decision dated October 2, 2014,⁵ the Board set aside OWCP's October 18, 2013 decision and remanded the case to OWCP for further development. The Board found that there was a conflict in the medical opinion evidence regarding the extent of appellant's upper extremity permanent impairment between Dr. Berman and Dr. Weiss. The Board remanded the case to OWCP for referral of appellant to an impartial medical specialist for examination and an opinion on this matter, to be followed by the issuance of a *de novo* decision.

On remand, OWCP referred appellant for an impartial medical examination to Dr. Zohar Stark, a Board-certified orthopedic surgeon. In a March 19, 2015 report, Dr. Stark opined that the five percent impairment rating that appellant received for his right upper extremity was appropriate. Regarding the left upper extremity, Dr. Stark noted that, under Table 15-5 on page 402 of the sixth edition the A.M.A., *Guides*, appellant's diagnosis-based impairment (DBI) of tendinitis (residual loss, functional with normal motion) fell under class 1, grade C and equaled three percent impairment of the left upper extremity. Dr. Stark noted that appellant's functional history grade modifier was 1, his physical examination grade modifier was 1, and his clinical studies grade modifier was 1. He noted that appellant had a net adjustment of zero and indicated that therefore his permanent impairment remained at the default value of three percent for the left upper extremity.

By decision dated March 31, 2015, OWCP found that appellant failed to establish more than five percent permanent impairment of the right upper extremity and three percent for the left upper extremity. Appellant requested a review of the written record with an OWCP hearing representative and, in a decision dated August 18, 2015, the hearing representative affirmed OWCP's March 31, 2015 decision.

Appellant submitted an August 4, 2015 report of Dr. Michael E. Cohen, an attending osteopath and Board-certified orthopedic surgeon. Dr. Cohen discussed appellant's factual and medical history and reported findings of his physical examination on August 4, 2015. He noted that appellant's claim was accepted for several conditions including rotator cuff tear of the right shoulder and temporary aggravation of left shoulder tendinitis. Dr. Cohen listed findings for range of bilateral shoulder motion upon flexion, extension, abduction, adduction, internal rotation, and external rotation. He applied the range of motion (ROM) method of impairment rating under Table 15-34 (Shoulder Range of Motion) on page 475 of the sixth edition of the A.M.A., *Guides*, noting that the ROM findings established six percent permanent impairment of each upper extremity.⁶

OWCP referred the case record to Dr. Berman, in his role as an OWCP medical adviser, for evaluation of Dr. Cohen's impairment rating report. In a report dated October 12, 2015, Dr. Berman discussed Dr. Stark's March 19, 2015 impairment rating, noting that he used the

⁵ Docket No. 14-1113 (issued October 2, 2014).

⁶ Dr. Cohen indicated that application of Table 15-35 (Range of Motion Grade Modifiers) and Table 15-36 (Functional History Grade Adjustments: Range of Motion) on page 477 did not change appellant's final permanent impairment from six percent permanent impairment of each upper extremity.

DBI rating method, and Dr. Cohen's August 4, 2015 impairment rating, noting that he used the ROM rating method. Dr. Berman noted:

“According to the [A.M.A., *Guides*], the calculation for [s]chedule [a]ward should be based upon diagnostic[-]related groupings wherever possible and not based upon [ROM] calculation. [ROM] calculation should only be utilized if and when the diagnostic[-]related groupings cannot be utilized or are otherwise inappropriate. Therefore, the calculation of the [s]chedule [a]ward as submitted by Dr. Cohen is incorrect and should not be accepted.

“Dr. Stark was in agreement with the previously submitted [s]chedule [a]ward that I recommended in my letter of July 2, 2012 of [five percent] impairment right upper extremity and [three percent] for left upper extremity and therefore there is no change from my previously submitted recommendation.

“In summary, this claimant has a [five percent] impairment right upper extremity and [three percent] impairment left upper extremity....”

In a decision dated October 29, 2015, OWCP determined that appellant failed to meet his burden of proof to establish more than five percent permanent impairment of his right upper extremity and three percent permanent impairment of his left upper extremity, for which he previously received a schedule award. It found that the weight of the medical evidence with respect to his upper extremity impairment rested with the October 12, 2015 opinion of Dr. Berman. OWCP noted that Dr. Berman found that it was inappropriate for Dr. Cohen to use the ROM method for rating permanent impairment.

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.⁷ 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.⁸ 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.⁹

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,

⁷ See 20 C.F.R. §§ 1.1-1.4.

⁸ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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

[s]ixth [e]dition, *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).¹⁰ 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.¹¹

ANALYSIS

The issue on appeal is whether appellant met his burden of proof to establish more than five percent permanent impairment of his right upper extremity and three percent permanent impairment of his left upper extremity, for which he 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.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ 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.¹⁴

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

¹⁰ 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).

¹¹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *Supra* note 12.

cases involving upper extremity impairment, the Board will set aside the October 29, 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 October 29, 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