

ISSUE

The issue is whether appellant has established more than 13 percent permanent impairment of the right upper extremity for which she previously received a schedule award.

FACTUAL HISTORY

On July 23, 2010 appellant, then a 58-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 2010 she tripped and fell fracturing her right arm in the performance of duty. OWCP accepted the claim for a fracture of the right humerus and lumbar sprain. Appellant stopped work on July 22, 2010. OWCP paid her compensation for total disability from September 6 to October 15, 2010.

Appellant underwent an open reduction and internal fixation of the right proximal humerus fracture on August 3, 2010.⁴

Appellant filed a claim for schedule award (Form CA-7).

By decision dated February 23, 2012, OWCP granted appellant a schedule award for 13 percent permanent impairment of the right upper extremity. The period of the award ran for 40.56 weeks from January 3 to October 13, 2011.

Appellant, on June 17, 2012, filed a claim for an increased schedule award (Form CA-7).

In an impairment evaluation received on June 22, 2012, Dr. Frank A. Burke, a Board-certified orthopedic surgeon, diagnosed a comminuted displaced right proximal humerus fracture requiring an open reduction and internal fixation and a back sprain. Applying Table 15-34 on page 475 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found 26 percent permanent impairment using the range of motion (ROM) method. Dr. Burke opined that appellant had reached maximum medical improvement (MMI).

Dr. Nabil F. Angley, a Board-certified orthopedic surgeon and OWCP medical adviser, concurred with Dr. Burke's finding of 26 percent permanent right upper extremity impairment due to loss of motion. He indicated that the date of MMI was October 18, 2010, the date appellant resumed limited-duty work.

On October 7, 2013 appellant, through counsel, questioned why OWCP had not processed her schedule award claim. On November 15, 2013 OWCP referred the case record to an OWCP medical adviser for review, noting that it was unclear why Dr. Angley used October 18, 2010 as the date of MMI.

⁴ By decision dated December 13, 2011, OWCP reduced appellant's compensation to zero after finding that her actual earnings as a gastroenterology staff nurse effective August 29, 2011 fairly and reasonably represented her wage-earning capacity.

Dr. Morley Slutsky, an OWCP medical adviser and Board-certified occupational medicine specialist, reviewed the evidence on December 14, 2013. He noted that the diagnosis-based impairment (DBI) estimate method was preferred over the ROM method for rating impairments of the upper extremities. Dr. Slutsky identified the diagnosis as a humerus fracture and found, using Table 15-5 on page 405, that appellant had three percent permanent impairment of the right upper extremity. He advised that she had reached MMI on June 1, 2011.

In an addendum dated March 28, 2014, Dr. Burke reviewed Dr. Slutsky's report at the request of OWCP. He asserted that it was appropriate to use the ROM method to rate appellant's impairment using motion loss as it was pronounced. Dr. Burke noted that such a rating was allowed under the A.M.A., *Guides*.

Dr. Slutsky, on April 13, 2014, again advised that appellant had three percent permanent impairment of the right upper extremity using the DBI method.

On July 29, 2014 OWCP referred appellant to Dr. Alan Kohlhaas, a Board-certified orthopedic surgeon, for an impartial medical examination. In an August 25, 2014 impairment evaluation, Dr. Kohlhaas diagnosed a comminuted proximal fracture of the humerus with surgical repair August 3, 2010. Using the ROM method he found that appellant had eight percent permanent impairment due to reduced motion under Table 15-34 on page 475 of the A.M.A., *Guides*. Dr. Kohlhaas opined that appellant reached MMI on June 1, 2011.

Dr. Daniel Zimmerman, a Board-certified internist and OWCP medical adviser, determined that appellant had three percent permanent impairment of the right arm using a DBI estimate.

By decision dated October 17, 2014, OWCP denied appellant's claim for an increased schedule award.

Appellant, through counsel, on November 13, 2014 requested an oral hearing before an OWCP hearing representative. Following a preliminary review, by decision dated April 27, 2015, an OWCP hearing representative vacated the October 17, 2014 decision. Counsel found that an OWCP medical adviser could not resolve a conflict in medical opinion and instructed OWCP to refer the case to the impartial medical examiner to review the medical adviser's report.

Dr. Kohlhaas, in a supplemental report dated May 13, 2015, reviewed Dr. Zimmerman's report and noted that he used a diagnosis of fracture set forth at Table 15-5 on page 405 in rating appellant's impairment. He again found eight percent permanent impairment of the right upper extremity using the ROM method.

In a decision dated May 29, 2015, OWCP denied appellant's claim for an increased schedule award.

Appellant, on June 3, 2015, requested a telephone hearing, which was held on February 16, 2016. In a March 9, 2016 statement, counsel contended that OWCP erred by procedurally referring the case to a second OWCP medical adviser after Dr. Angley had concurred with Dr. Burke's May 23, 2012 impairment rating. He asserted that Dr. Angley should have addressed any questions regarding the date of MMI and questioned why Dr. Slutsky

provided a new finding regarding the percentage of impairment. Counsel argued that everything after Dr. Angley's report was based on a procedural error and should not be considered. He asserted that OWCP procedures provide that if the OWCP medical adviser and attending physician agree the award should be processed.

By decision dated May 2, 2016, OWCP's hearing representative affirmed the May 29, 2015 decision. She found that OWCP properly obtained an additional opinion from another medical adviser as Dr. Angley had not provided a detailed evaluation of Dr. Burke's findings and had not explained the date he chose for MMI. The hearing representative determined that the opinion of Dr. Kohlhaas as the impartial medical examiner represented the special weight of the medical evidence and established that appellant had no more than 13 percent permanent impairment.

On appeal counsel contends that OWCP committed a procedural error in referring the case to a new OWCP medical adviser after obtaining an opinion from Dr. Angley agreeing with the extent of permanent impairment found by Dr. Burke. He asserts that she is entitled to a schedule award for an additional 13 percent permanent impairment plus interest and reimbursement of attorney's fees.

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.⁵ 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.⁶ 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.⁷

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.

⁵ See 20 C.F.R. §§ 1.1-1.4.

⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁸ 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.⁹

ANALYSIS

The issue on appeal is whether appellant has more than the previously awarded 13 percent permanent impairment of the right upper extremity.

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.¹⁰ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹¹ 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.¹²

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 May 2, 2016 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.

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹¹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹² *Supra* note 10.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 2, 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