

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

_____)	
T.W., Appellant)	
)	
and)	Docket No. 17-0394
)	Issued: June 1, 2017
U.S. POSTAL SERVICE, POST OFFICE, Cheyenne, WY, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 12, 2016 appellant filed a timely appeal from a November 16, 2016 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has established more than 23 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On January 20, 2016 appellant, then a 62-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 19, 2016 he strained his right shoulder when he lifted his arm to service a box. OWCP accepted the claim for right shoulder rotator cuff tear and authorized right arthroscopic surgery, which occurred on February 23, 2016. Appellant received compensation benefits on the supplemental rolls from March 5 to June 10, 2016.

¹ 5 U.S.C. § 8101 *et seq.*

In an August 2, 2016 report, Dr. James E. Rafferty, a treating physician Board-certified in preventive medicine/occupational-environmental medicine, noted that appellant was employed as a city mail carrier and that arthroscopic surgery was performed on February 23, 2016 for right shoulder rotator cuff repair. He provided examination findings and his review of the medical record. Dr. Rafferty provided a permanent impairment rating based upon the accepted right rotator cuff tear and opined that appellant had reached maximum medical improvement on June 9, 2016. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (hereinafter A.M.A., *Guides*), and citing to tables and figures, Dr. Rafferty calculated four percent permanent impairment of the right upper extremity.

On August 26, 2016 appellant filed a claim for a schedule award (Form CA-7).

On October 31, 2016 OWCP's district medical adviser reviewed Dr. Rafferty's report and the medical records. He noted that appellant had previously received a schedule award for 23 percent permanent impairment of the right upper extremity.³ The district medical adviser found that the date of maximum medical improvement was August 2, 2016, the date of Dr. Rafferty's report. He used the diagnosis-based impairment (DBI) rating method of the A.M.A., *Guides* and found a grade modifier of 1 for functional history⁴ as appellant's right shoulder was still symptomatic, and a grade modifier of 4 for clinical studies based on surgery and a magnetic resonance imaging scan.⁵ No grade modifier was assigned for physical examination as the district medical adviser found Dr. Rafferty's ROM measurements were invalid for an impairment calculation.⁶ He then determined that appellant had grade E, five percent permanent impairment of his right upper extremity due to right shoulder partial thickness rotator cuff tear.⁷

In a November 8, 2016 addendum, the district medical adviser noted that appellant had previously been granted a schedule award for 12 percent permanent impairment of the right shoulder, but he did not know why the remaining 11 percent right upper extremity permanent impairment award had been granted. He also noted that DBI was the preferred rating method.

By decision dated November 16, 2016, OWCP noted that appellant had previously been granted a schedule award for 23 percent permanent impairment of the right upper extremity. It found the medical evidence did not warrant an additional schedule award.

² A.M.A., *Guides* (6th ed. 2009).

³ The record contains a May 2, 2005 impairment rating by Dr. Pete Kuhn, a Board-certified orthopedic surgeon, under OWCP File No. xxxxxx252. Using the fifth edition of the A.M.A., *Guides*, he provided a permanent impairment rating using range of motion (ROM) findings to find that appellant had 12 percent permanent impairment of the right upper extremity.

⁴ A.M.A., *Guides* 406, Table 15-7.

⁵ *Id.* at 408, Table 15-8.

⁶ *Id.* at 408, Table 15-9.

⁷ *Id.* at 402, Table 15-5.

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.⁸ 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.⁹ 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.¹⁰

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).¹¹ 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.¹²

ANALYSIS

The issue on appeal is whether appellant established more than 23 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

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

The Board notes that the record on appeal is incomplete as it does not contain OWCP’s previous decision granting appellant 23 percent permanent impairment for the right upper extremity referenced by the district medical adviser or all of the medical evidence used to calculate this permanent impairment rating. The only evidence pertaining to the prior schedule award is a May 2, 2005 report by Dr. Kuhn. OWCP procedures provide that cases should be

⁸ See 20 C.F.R. §§ 1.1-1.4.

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

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

¹¹ 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 2.808.5(a) (February 2013).

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

doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further indicates that the cases should be doubled as soon as the need to do so becomes apparent.¹³ The Board is therefore unable to determine the basis of the previous schedule award, and whether appellant has established entitlement to an additional award. On remand, OWCP should combine the present case record, OWCP File No. xxxxxx516, with OWCP File Nos. xxxxxx252.

The Board will set aside the November 16, 2016 decision. Following consolidation of the records, 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 decision of the November 16, 2016 Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 1, 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

¹³ *Supra* note 11 at Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8(c)(1) (February 2000); *See T.M.*, Docket Nos. 09-1090 & 09-2226 (issued March 8, 2010).