

ISSUE

The issue is whether appellant has established more than seven percent permanent impairment of the right upper extremity and seven percent permanent impairment of the left upper extremity for which he previously received schedule awards.

FACTUAL HISTORY

On February 7, 2013 appellant, then a 60-year-old-old sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that on February 6, 2013 he sustained a right shoulder injury when moving a horizontal stabilizer, causing sharp pain in his right shoulder. OWCP accepted the claim for right rotator cuff tendinitis, disorder of bursae and tendons in right shoulder region, rotator cuff sprain of left shoulder and upper arm, and bilateral rotator cuff tear. Appellant stopped work intermittently and received wage-loss compensation. Following an accepted September 26, 2013 left shoulder surgery, he stopped work. Appellant received compensation benefits on the supplemental rolls through January 11, 2014. He began receiving social security disability benefits as of December 2013.

On June 22, 2016 appellant filed a claim for a schedule award (Form CA-7).

By letter dated June 28, 2016, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).³ It provided him 30 days to submit the requested impairment evaluation.

In support of his claim, appellant submitted an April 5, 2016 report from Dr. John W. Ellis, Board-certified in family medicine. Dr. Ellis detailed appellant's history of injury. He noted review of appellant's medical history, discussed diagnostic testing, and provided findings on physical examination. Dr. Ellis provided diagnoses of right rotator cuff syndrome, left sprain of rotator cuff, and bilateral partial rotator cuff tear which he opined were caused by appellant's employment duties. He noted that maximum medical improvement (MMI) was reached on April 5, 2016 and opined that appellant was temporarily totally disabled as a result of each shoulder surgery. Using the diagnosis-based impairment (DBI) method for the right upper extremity, Dr. Ellis found seven percent impairment for irreparable rotator cuff⁴ and five percent impairment for biceps tendon tear.⁵ As the A.M.A., *Guides* provide that rotator cuff and biceps tendon should not be combined in the same impairment, Dr. Ellis determined that the DBI impairment rating was seven percent. He then utilized the range of motion (ROM) method to calculate impairment of the right upper extremity. Due to right shoulder decreased ROM Dr. Ellis opined that appellant sustained 21 percent permanent impairment of the right upper extremity. He noted that in accordance with the A.M.A., *Guides*, if more than one method to rate a particular impairment or condition exists, the method producing the higher rating must be

³ A.M.A., *Guides* (2009).

⁴ *Id.* at 403, Table 15-5.

⁵ *Id.* at 404.

used.⁶ As such, Dr. Ellis determined that appellant sustained 21 percent permanent impairment of the right upper extremity based on the ROM method. Using the DBI method for the left upper extremity, he also found seven percent impairment for irreparable rotator cuff and five percent impairment for biceps tendon tear. However, when utilizing the ROM method, Dr. Ellis determined that appellant sustained 18 percent permanent impairment of the left upper extremity due to decreased ROM. As the ROM method provided the higher rating, he concluded that appellant sustained 18 percent permanent impairment of the left upper extremity.

On July 5, 2016 OWCP routed Dr. Ellis' report, a statement of accepted facts (SOAF), and the case file to Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained a permanent impairment of the bilateral upper extremities and date of MMI.

In a July 7, 2016 report, Dr. Garelick opined that Dr. Ellis' recommendation for 21 percent permanent impairment of the right upper extremity and 18 percent permanent impairment of the left upper extremity based on ROM loss in the shoulder should be disregarded. He explained that the A.M.A., *Guides* provide that ROM is used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment.⁷ Dr. Garelick noted that both the right and left shoulders should be rated as five percent permanent impairment for the default value of full-thickness rotator cuff tear with residual findings.⁸ He explained that given appellant's residual weakness, diminished ROM, and *QuickDASH* score of 70, the award should be allowed 2 grade modifiers resulting in a final total of seven percent permanent impairment for each left and right upper extremity. He concluded that the date of MMI was April 5, 2016, the date of Dr. Ellis' examination.

By letter dated October 21, 2015, OWCP provided Dr. Ellis a copy of Dr. Garelick's July 7, 2016 report for review and requested that he respond to the concerns presented by the DMA within 30 days.

In a July 18, 2016 supplemental report, Dr. Ellis disagreed with Dr. Garelick regarding use of the ROM method. He argued that the DBI method for the rotator cuff tear would warrant Grade E seven percent permanent impairment of each left and right upper extremity. However, Dr. Ellis again cited to Table 2-1 of the A.M.A., *Guides* which provided that the method producing the higher rating must be used.⁹ He reiterated that appellant sustained 21 percent permanent impairment of the right shoulder and 18 percent permanent impairment of the left shoulder in accordance with the ROM method as it provided the higher rating.

On July 29, 2016 OWCP routed Dr. Ellis' July 18, 2016 supplemental report to Dr. Garelick for review and comment.

⁶ *Id.* at 20, Table 2-1.

⁷ *Id.* at 387.

⁸ *Supra* note 5.

⁹ *Supra* note 7.

In an August 2, 2016 report, Dr. Garelick disagreed with Dr. Ellis' assessment that the higher impairment rating should be used. He explained that while this may be true if appellant had two separate diagnoses, OWCP did not accept ROM and DBI as two separate methods to award permanent impairment. He again referenced the A.M.A., *Guides* which provide that ROM is used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment.¹⁰ Dr. Garelick explained that given the existence of a DBI for full-thickness rotator cuff tear, it was clear that this method was the appropriate manner in which to award permanent impairment. He concluded that appellant was only entitled to seven percent permanent impairment of the right upper extremity and seven percent permanent impairment of the left upper extremity.

By decision dated November 2, 2016, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity and seven percent permanent impairment of the left upper extremity. The date of MMI was noted as April 5, 2016. The award covered a period of 43.68 weeks from April 5, 2016 through February 7, 2017. OWCP noted that the weight of the medical evidence rested with Dr. Garelick, serving as an OWCP DMA, who correctly applied the A.M.A., *Guides* to the examination findings.

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.¹¹ 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.¹² 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.¹³

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.

¹⁰ *Supra* note 8.

¹¹ See 20 C.F.R. §§ 1.1-1.4.

¹² For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

¹³ 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).¹⁴ 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.¹⁵

ANALYSIS

OWCP accepted appellant's claim right rotator cuff tendinitis, disorder of bursae and tendons in right shoulder region, rotator cuff sprain of left shoulder and upper arm, and bilateral rotator cuff tear. The issue is whether appellant sustained more than seven percent permanent impairment of the right upper extremity and seven percent permanent impairment of the left upper extremity for which he received schedule awards. The Board finds this case is not in posture for decision.

In support of his claim, appellant submitted an April 5 and July 18, 2016 impairment evaluation from Dr. Ellis who opined that he sustained 21 percent permanent impairment of the right upper extremity and 18 percent permanent impairment of the left upper extremity. Dr. Ellis argued that appellant's impairment rating was based on the ROM method which provided the greater impairment.

In medical reports dated July 11 and August 2, 2016, Dr. Garelick, serving as an OWCP DMA, disagreed with Dr. Ellis' impairment rating, finding that appellant only sustained seven percent permanent impairment of the right upper extremity and seven percent permanent impairment of the left upper extremity based on the DBI for rotator cuff tear. Dr. Garelick argued that Dr. Ellis incorrectly used the ROM method which should primarily be used as a physical examination adjustment factor because an appropriate DBI method exists to define impairment, that of full thickness rotator cuff tear.

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.¹⁶ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁷ In *T.H.*, the Board concluded that OWCP physicians were 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

¹⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁵ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁶ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁷ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹⁸

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the November 2, 2016 decision. Utilizing 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 that this case is not in posture for a decision.

ORDER

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

Issued: June 27, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ *Supra* note 16.