

ISSUE

The issue is whether appellant established that he has more than 12 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On May 11, 2006 appellant, then a 50-year-old welder, injured his right shoulder in the performance of duty. OWCP accepted his traumatic injury claim (Form CA-1) for right rotator cuff sprain/strain, right rotator cuff tendinitis, and right frozen shoulder. On December 20, 2006 appellant underwent OWCP-approved right shoulder arthroscopic surgery. He received wage-loss compensation for temporary total disability, and ultimately resumed his regular welder duties in June 2007.⁴

On August 9, 2007 appellant filed a claim for a schedule award (Form CA-7).

By decision dated July 17, 2008, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The award was based on loss of shoulder range of motion (ROM) under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).⁵ On an appeal request form, dated and postmarked July 30, 2008, appellant requested an oral hearing before an OWCP hearing representative. Following a preliminary review, by decision dated September 29, 2008, OWCP's hearing representative set aside the July 17, 2008 schedule award and remanded the case to OWCP for further medical development.

In a March 19, 2009 decision, OWCP determined that appellant had five percent permanent impairment of the right upper extremity under the A.M.A., *Guides* (5th ed. 2001). This award was also based on right shoulder ROM deficits. Appellant appealed to the Board on April 19, 2009. By order dated February 12, 2010, the Board found that OWCP neglected to fully advise appellant of his appeal rights, including a right to a hearing. Consequently, the Board set aside the March 19, 2009 schedule award and remanded the case to OWCP for issuance of a decision which included all available appeal rights.⁶

On February 25, 2010 OWCP reissued the schedule award for five percent right upper extremity permanent impairment that it had previously calculated under the fifth edition of the A.M.A., *Guides* (2001). By that time, it had already adopted the sixth edition of the A.M.A., *Guides* (2009), which applied to all schedule awards issued on or after May 1, 2009.

On an appeal request form dated September 8, 2010, appellant's then-counsel requested an oral hearing before an OWCP hearing representative. He challenged OWCP's post-May 1, 2009 reliance on the fifth edition of the A.M.A., *Guides* (2001). A hearing was held on

⁴ Appellant retired in March 2014.

⁵ Section 16.4i, Shoulder Motion Impairment, A.M.A., *Guides* 474-79 (5th ed. 2001).

⁶ Docket No. 09-1264 (issued February 12, 2010).

June 24, 2010. By decision dated September 8, 2010, the hearing representative disagreed and affirmed the February 25, 2010 schedule award.

Appellant appealed to the Board on January 10, 2011. On September 28, 2011 the Board issued an Order Remanding Case, finding that OWCP should have applied the sixth edition of the A.M.A., *Guides* (2nd prt. 2009) in determining appellant's entitlement to a schedule award.⁷ Consequently, the Board set aside the hearing representative's September 8, 2010 decision.

On remand, OWCP referred appellant for a second opinion examination to determine the extent and degree of any employment-related impairment. In a report dated December 29, 2011, Dr. Thomas G. Griffith, a Board-certified orthopedic surgeon and OWCP referral physician, determined that appellant had 9 percent right upper extremity permanent impairment due to shoulder ROM deficits under the A.M.A., *Guides* (6th ed., 2nd prt. 2009).⁸ On February 1, 2012 OWCP's district medical adviser (DMA) also found nine percent right upper extremity permanent impairment due to shoulder ROM deficits.

By decision dated February 24, 2012, OWCP granted a schedule award for an additional three percent permanent impairment of the right upper extremity for a total of nine percent permanent impairment of the right upper extremity.⁹

Appellant requested a hearing, which was held on June 22, 2012. In a September 12, 2012 decision, the hearing representative affirmed the February 24, 2012 additional schedule award.

In January 2013, appellant filed a claim (Form CA-7) for an additional schedule award. He later submitted a February 19, 2013 impairment rating from Dr. Michael S. McManus, Board-certified in occupational medicine. Dr. McManus found five percent right upper extremity permanent impairment based on a diagnosis of torn glenoid labrum. He utilized the diagnosis-based impairment (DBI) methodology, citing Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 404 (6th ed., 2nd prt. 2009). In a March 11, 2013 report, the DMA similarly found five percent right upper extremity permanent impairment under Table 15-5.

In an April 24, 2013 decision, OWCP explained that the current right upper extremity impairment rating (five percent) was less than the combined nine percent impairment previously awarded, and therefore, appellant was not entitled to an additional schedule award.

Appellant filed another Form CA-7 on March 3, 2014, but failed to respond to OWCP's request for additional medical evidence of permanent impairment. Consequently, OWCP denied his claim for an additional schedule award by decision dated April 16, 2014.

⁷ Docket No. 11-0584 (issued September 28, 2011).

⁸ Table 15-34, A.M.A., *Guides* 475 (6th ed. 2009).

⁹ OWCP reduced the current nine percent impairment rating by the six percent award appellant received in July 2008.

OWCP subsequently received a May 14, 2014 impairment rating from Dr. John W. Ellis, a Board-certified family practitioner and Board-certified in environmental medicine. Dr. Ellis found 35 percent right upper extremity permanent impairment based on a combination of ROM deficits in the right elbow (12 percent) and right shoulder (26 percent).¹⁰ He also provided an alternative five percent right shoulder upper extremity rating under the DBI methodology (labral tear).¹¹

On July 29, 2014 appellant requested reconsideration of OWCP's April 16, 2014 decision based on Dr. Ellis' recent impairment rating.

In an October 17, 2014 report, the DMA advised that he was unable to affirm Dr. Ellis' May 14, 2014 impairment rating due to multiple issues. His concerns primarily focused on Dr. Ellis' shoulder ROM measurements.

In an October 22, 2014 decision, OWCP denied an additional schedule award, citing the DMA's finding of "multiple errors" with respect to Dr. Ellis' May 14, 2014 impairment rating. However, on October 30, 2014 it vacated its latest decision, and provided Dr. Ellis an opportunity to respond to the DMA's October 17, 2014 report.

In a November 5, 2014 report, Dr. Ellis specifically addressed the DMA's concerns regarding his May 14, 2014 ROM measurements. He also explained that because of appellant's frozen right shoulder, the ROM method provided a more accurate assessment of appellant's impairment in comparison to the preferred DBI methodology.¹² Dr. Ellis found 25 percent impairment of the right upper extremity due to decreased shoulder ROM. He also revised his previous right elbow ROM impairment from 12 percent down to 6 percent, having noted a prior error with respect to impairment attributed to loss of elbow flexion.

OWCP again referred the case to its DMA, and in a report dated December 8, 2014, he continued to express disagreement with Dr. Ellis' findings based on his application of the ROM impairment rating methodology. The DMA also questioned Dr. Ellis' remarks regarding appellant's development of a frozen shoulder following surgery. In contrast, he believed that the DBI rating for labral tear (five percent), as previously noted by Dr. McManus, was the "most accurate" representation of appellant's upper extremity impairment due to shoulder pathology.¹³

OWCP determined that there was a conflict in medical opinion based on the differing impairment ratings provided by Dr. Ellis and the DMA. Accordingly, it referred appellant for an impartial medical evaluation.

¹⁰ Table 15-33 and Table 15-34, A.M.A., *Guides* 474-75 (6th ed., 2nd prt. 2009).

¹¹ Table 15-5, A.M.A., *Guides* 404 (6th ed., 2nd prt. 2009).

¹² Dr. Ellis noted that appellant's right shoulder ROM limitations were mechanical rather than pain related.

¹³ The DMA excluded the six percent rating for right elbow loss of ROM, but did not otherwise explain why he omitted this aspect of Dr. Ellis' overall upper extremity impairment rating.

In a report dated January 15, 2015, Dr. H. Richard Johnson, a Board-certified orthopedic surgeon and impartial medical examiner (IME), found 12 percent right upper extremity impairment based on loss of shoulder ROM.¹⁴ Dr. Johnson noted, among other things, that there was no evidence of suboptimal effort or symptom magnification and that appellant's loss of active ROM was "consistent with a frozen shoulder."

In a February 6, 2015 report, the DMA concurred with Dr. Johnson's 12 percent right upper extremity rating based on loss of shoulder ROM. He recommended that the date of maximum medical improvement (MMI) be based on Dr. Johnson's date of examination; January 15, 2015. The DMA also advised that appellant's previous right upper extremity schedule awards (9 percent) should be deducted from the current 12 percent rating.

By decision dated April 17, 2015, OWCP granted appellant a schedule award for an additional 3 percent permanent impairment of the right upper extremity, for a total of 12 percent. The award was based on the latest reports from Dr. Johnson and the DMA.

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.¹⁵ 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.¹⁶ 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.¹⁷

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.

¹⁴ Table 15-34, A.M.A., *Guides* 475 (6th ed. 2009).

¹⁵ See 20 C.F.R. §§ 1.1-1.4.

¹⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

¹⁷ 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).¹⁸ 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.¹⁹

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish more than 12 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 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.²⁰ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.²¹ 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.²²

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 April 17, 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.

¹⁸ 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).

¹⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

²⁰ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

²¹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

²² *Supra* note 20.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 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: March 29, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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