

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

L.T., Appellant)	
)	
and)	Docket No. 16-0585
)	Issued: March 27, 2017
DEPARTMENT OF VETERANS AFFAIRS,)	
AMERICAN LAKE MEDICAL CENTER,)	
Tacoma, WA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 8, 2016 appellant filed a timely appeal from a December 15, 2015 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 met her burden of proof to establish an additional schedule award.

FACTUAL HISTORY

On January 5, 2015 appellant, then a 67-year-old social worker, filed an occupational disease claim (Form CA-2) alleging an employment injury in the performance of duty. She referred to attachments to her claim form which did not accompany her claim form. Appellant

¹ 5 U.S.C. § 8101 *et seq.*

first became aware of her condition on April 14, 2013 and she first became aware that the condition was related to her federal employment on March 28, 2006.² OWCP accepted the claim for bilateral shoulder adhesive capsulitis, bilateral shoulder impingement, and aggravation bilateral shoulder arthritis.

On January 5, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a December 30, 2014 report, Dr. Daniel A. Brzusek, a treating Board-certified physiatrist, provided a history of injury and physical examination findings. He diagnosed bilateral shoulder adhesive capsulitis, bilateral shoulder impingement, and aggravation of bilateral shoulder arthritis, which he opined had been caused or aggravated by appellant's employment. Dr. Brzusek used the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He found 35 percent right upper extremity permanent impairment and 12 percent left upper permanent extremity impairment. Dr. Brzusek based his impairment rating on the range of motion (ROM) methodology. Using Table 15-34, page 475 and Figures 15-28, page 476, 15-29, page 475; and 15-30, page 476, he assigned 9 percent impairment for flexion, 0 percent impairment for extension, 6 percent impairment for abduction, 2 percent impairment for adduction, 8 percent impairment for internal³ rotation, and 9 percent impairment for external rotation, resulting in a total right upper extremity permanent impairment of 35 percent.

Next, Dr. Brzusek calculated appellant's left upper extremity permanent impairment. Using Table 15-34, page 475 and Figures 15-28, page 475, 15-29, page 476; and 15-30, page 476, he determined 3 percent impairment for flexion and abduction, 0 percent impairment for adduction and extension, 4 percent impairment for internal rotation, and 2 percent impairment for external rotation, resulting in a total left upper extremity permanent impairment of 12 percent under the ROM methodology. Lastly, Dr. Brzusek observed appellant's rating had changed little since his last impairment rating of July 12, 2012.

On March 5, 2015 an OWCP medical adviser reviewed Dr. Brzusek's impairment rating. He indicated that the A.M.A., *Guides* generally prefer the use of the DBI method, as found on page 461, but does allow for ratings based on the ROM method if that method better reflects the degree of impairment. The medical adviser related that his ratings currently were different from Dr. Brzusek's as he had erred in reading Table 15-34 regarding extension, adduction, internal rotation, and external rotation on the right. On the left side he noted that Dr. Brzusek had misread the impairment value for extension. Using the correct values, the medical adviser related that appellant had a right upper extremity permanent impairment of 25 percent, and 13 percent left upper extremity permanent impairment due to shoulder pathology.

By letter dated April 20, 2015, OWCP referred appellant for a second opinion evaluation with Dr. Josef K. Eichinger, a Board-certified orthopedic surgeon, to determine the extent of appellant's bilateral upper extremity impairment.

In a June 15, 2015 report, Dr. Eichinger, based on a review of the statement of accepted facts (SOAF), review of the medical evidence and physical examination, noted the accepted

² Appellant retired from the employing establishment effective June 28, 2014.

³ The doctor mistakenly wrote external twice.

conditions were bilateral shoulder impingement, bilateral shoulder arthritis aggravation, and bilateral shoulder adhesive capsulitis. Utilizing the A.M.A., *Guides* (6th ed.), he determined, using the ROM method of establishing permanent impairment, that appellant had 14 percent right upper extremity permanent impairment and 16 percent left upper extremity.

In a letter dated August 12, 2015, OWCP referred appellant to Dr. Lance Brigham, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence as to the extent of permanent impairment.

In a September 2, 2015 report, Dr. Brigham, based upon a review of medical evidence, the SOAF, and a physical examination, diagnosed bilateral shoulder impingement, adhesive capsulitis, and aggravation of arthritis. Utilizing the sixth edition of the A.M.A., *Guides*, and also using the ROM method of establishing permanent impairment, Dr. Brigham calculated 11 percent permanent impairment of each upper extremity.

On November 15, 2015 an OWCP medical adviser reviewed and concurred with Dr. Brigham's impairment determination.

By decision dated December 15, 2015, OWCP denied appellant's claim for an additional schedule award. The denial was based on the finding that appellant had previously received a schedule award under OWCP File No. xxxxxx178 and was not entitled to an additional schedule award for her bilateral upper extremities under the current claim number, OWCP File No. xxxxxx012.

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.⁴ 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.⁵ 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.⁶

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

⁴ See 20 C.F.R. §§ 1.1-1.4.

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

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

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).⁷ 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.⁸

ANALYSIS

The issue on appeal is whether appellant met her burden of proof to establish an additional 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.⁹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁰ 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.¹¹

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 December 15, 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

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁰ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹¹ *Supra* note 9.

deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.¹²

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 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 27, 2017
Washington, DC

Christopher J. Godfrey, 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

¹² In its December 15, 2015 decision, OWCP determined that appellant was not entitled to an additional schedule in its December 15, 2015 decision since it found she had previously received a schedule award under OWCP File No. xxxxxx178 for 34 percent right arm permanent impairment and 12 percent left arm permanent impairment. On remand, it should combine the present case record, OWCP File No. xxxxxx012, with OWCP File No. xxxxxx178.