

FACTUAL HISTORY

On May 24, 2013 appellant, then a 63-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that on April 10, 2006 he first became aware that his right shoulder condition was due to his employment duties, including sorting, and delivering mail. The record indicates that he stopped work on May 11, 2013 and retired.

Following development of the medical evidence regarding the cause of appellant's diagnosed conditions, on October 8, 2014, OWCP accepted the claim for right shoulder bursae and tendons disorder. The record does not reflect that he received wage-loss compensation for the accepted injury.

On January 26, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated February 2, 2015, OWCP informed appellant that the evidence of record was insufficient to support his claim for a schedule award. It advised him of the medical evidence required and afforded him 30 days to provide this information.

By decision dated April 8, 2015, OWCP denied appellant's claim for a schedule award as there was no medical evidence establishing a permanent impairment.

By letter dated April 14, 2015, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on October 22, 2015.

Subsequent to the hearing appellant submitted a March 20, 2015 impairment rating from Dr. Martin Fritzhand, an examining physician. Dr. Fritzhand related appellant's medical treatment and employment injury history. He then utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (6th ed. 2009) to rate appellant's permanent impairment of the right shoulder. Under history of injury, Dr. Fritzhand reported that appellant's employment injury occurred on April 10, 2006 when appellant assisted a woman on his route with changing a tire. He noted that appellant was a rural mail carrier and that, while he attempted to work after the injury, he retired because he was unable to use his right arm. An examination of the right shoulder revealed tenderness on palpation, intact sensory modalities, and diminished muscle strength. Range of motion (ROM) findings included 70 degrees elevation, 45 degrees external rotation with appellant arm at the side with 5 degrees external rotation lag, and 80 degrees external rotation with his arm in abduction. Dr. Fritzhand attributed appellant's loss of ROM to the diagnosed employment injury. He reviewed a December 2007 x-ray interpretation, which showed mild acromioclavicular joint degenerative changes. A review of an October 2011 magnetic resonance imaging scan revealed severe erosive arthritis, focal avascular humerus head necrosis, and complete supraspinatus, infraspinatus, and biceps long head tendon rupture and retraction. Dr. Fritzhand diagnosed right shoulder disorder of the bursae and tendons and determined that maximum medical improvement (MMI) had been reached on December 22, 2014.

Dr. Fritzhand explained that he used Table 15-5 post-traumatic degenerative joint disease with documented asymmetric arthritic changes to assess impairment.³ In support of this

³ A.M.A., *Guides* 405 (6th ed. 2009).

conclusion, he noted that appellant's decreased ROM was a more accurate reflection of his impairment and provided a higher percentage of impairment. Dr. Fritzhand explained that if motion loss was present the impairment could be assessed under Table 15-7, the ROM impairment method. He noted that ROM stands alone as an impairment method and is not combined with diagnosis-based impairment (DBI).⁴ Dr. Fritzhand utilized the *QuickDash* and determined that appellant had a score of 66. He referred to Table 15-34.⁵ Dr. Fritzhand determined that appellant had a right upper extremity impairment due to flexion of three percent, extension of one percent, abduction of six percent, internal rotation of four percent, and adduction and external rotation of zero percent. He opined that appellant sustained a right upper extremity permanent impairment of 14 percent.

By decision dated January 11, 2016, the hearing representative affirmed the denial of appellant's claim for a schedule award. He found Dr. Fritzhand's opinion was insufficient to establishment entitlement to a schedule award as it was based on an inaccurate history of the employment injury and failed to provide a date of MMI.

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.⁶ 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.⁷ 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.⁸

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.

⁴ *Id.* at 407.

⁵ *Id.* at 475.

⁶ *See* 20 C.F.R. §§ 1.1-1.4.

⁷ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁸ 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).⁹ 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.¹⁰

ANALYSIS

The issue on appeal is whether appellant has established permanent impairment of his right upper extremity, warranting 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.¹¹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹² 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.¹³

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 January 11, 2016. 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.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹² *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹³ *Supra* note 11.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 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: March 6, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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