

FACTUAL HISTORY

On February 14, 2013 appellant, then a 60-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her right shoulder and right knee on January 29, 2013. She alleged that she was attempting to lower her chair while trying to sit on it, the chair rolled backwards and she fell. OWCP accepted the claim on April 14, 2013 for right shoulder and upper arm sprain, and right knee and leg sprain. According to the employing establishment, appellant worked intermittently through April 19, 2013, and then stopped work. Appellant filed claims for compensation CA-7 forms for disability commencing from March 19, 2013.

By decision dated September 11, 2013, OWCP denied a claim for a recurrence of disability commencing March 19, 2013. It found that the evidence of record was insufficient to establish the claim.

Appellant, through counsel, requested a hearing on October 9, 2013. A hearing was held on April 15, 2013. By decision dated June 27, 2014, the hearing representative affirmed the September 11, 2013 decision. He found that the evidence of record did not establish that appellant was totally disabled as of March 19, 2013 causally related to the January 29, 2013 employment injury.

On November 3, 2014 appellant filed a claim for a schedule award (Form CA-7). She submitted an October 8, 2014 note from Dr. Kamal Khalafi, a Board-certified internist. Dr. Khalafi wrote that appellant had reached maximum medical improvement.

By decision dated February 23, 2015, OWCP found that appellant was not entitled to a schedule award as the medical evidence of record did not establish permanent impairment of a scheduled member under 5 U.S.C. § 8107.

On March 31, 2015 appellant submitted a March 12, 2015 report from Dr. Catherine Campbell, Board-certified in occupational medicine.³ Dr. Campbell provided a history and results on examination, including right shoulder range of motion (ROM) measurements. With respect to the right knee, she indicated that appellant had degenerative joint disease that required use of a walker. Based on loss of flexion and adduction in the right shoulder, Dr. Campbell opined that appellant had four percent right upper extremity permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁴ She found there was no employment-related lower extremity permanent impairment. Dr. Campbell wrote that there was insufficient historical data or objective evidence of a permanent impairment beyond the preexisting degenerative condition.

The case was referred to an OWCP medical adviser, Dr. Morley Slutsky. In a report dated April 10, 2015, Dr. Slutsky concurred that there was no lower extremity permanent impairment. With respect to the upper extremity, he opined that the diagnosis-based impairment (DBI) method was the preferred method of evaluating permanent impairments under the A.M.A.,

³ The date of the evaluation was reported as November 18, 2014. The date on the front page of the report was March 12, 2014, which appears to have been a typographical error. The intended date was March 12, 2015.

⁴ A.M.A., *Guides* (6th ed. 2009).

Guides. Dr. Slutsky opined that appellant had no ratable impairment under Table 15-5, the shoulder regional grid. He reported the only diagnosis was nonspecific shoulder pain, and after a grade modifier adjustment there was zero percent permanent impairment under Table 15-5.

By decision dated April 14, 2015, OWCP again found that appellant was not entitled to a schedule award as the weight of the evidence was represented by Dr. Slutsky.

Appellant, through counsel, requested a hearing on April 20, 2015. A hearing was held on September 16, 2015. Counsel argued that Dr. Slutsky improperly applied the A.M.A., *Guides* and the weight of the evidence rested with Dr. Campbell.

By decision dated December 9, 2015, the hearing representative affirmed the April 14, 2015 decision, finding that Dr. Campbell did not provide a reasoned medical opinion with respect to an employment-related permanent impairment.

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.⁵ 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.⁶ 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.⁷

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).⁸ The Board has approved the use by OWCP of the A.M.A.,

⁵ See 20 C.F.R. §§ 1.1-1.4.

⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

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

⁸ 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 2.808.6a (February 2013).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁹

ANALYSIS

In the present case, OWCP accepted appellant sustained right shoulder and upper arm sprain, and right knee and leg sprain in the performance of duty on January 29, 2013. As to a permanent impairment in the right lower extremity, both attending physician Dr. Campbell and OWCP medical adviser Dr. Slutsky concurred there was no ratable employment-related permanent impairment. Dr. Campbell wrote in her November 18, 2014 report that there was insufficient historical data or objective evidence of a permanent impairment beyond the preexisting degenerative condition. There was no probative medical evidence of record establishing a right lower extremity permanent impairment in this case. The Board finds that OWCP properly determined that appellant had not established an employment-related permanent impairment to the right lower extremity.

As to the upper extremity, Dr. Campbell found four percent right upper extremity impairment based on loss of ROM in the shoulder. Dr. Slutsky opined that the DBI was the preferred method of rating upper extremity impairment under the A.M.A., *Guides*, and under the DBI method, there was no ratable permanent impairment.¹⁰

The Board finds that this case is not in posture for decision as to right upper extremity permanent impairment.

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's 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

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ The hearing representative incorrectly wrote that an impairment rating based on pain is not acceptable. Table 15-5 specifically provides "nonspecific shoulder pain" as a diagnosis, with a default impairment of one percent to the upper extremity. Dr. Slutsky found zero percent permanent impairment after applying a net adjustment formula. See A.M.A., *Guides* 401-11.

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

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

¹³ *Supra* note 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 9, 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.

CONCLUSION

The Board finds that appellant has not established right lower extremity permanent impairment. The Board further finds that the case is not in posture for decision as to right upper extremity permanent impairment, and the case is remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2015 is affirmed with respect to lower extremity permanent impairment. The December 9, 2015 decision is set aside with respect to right upper extremity permanent impairment and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: March 16, 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