



## **FACTUAL HISTORY**

On January 13, 2015 appellant, then a 43-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he was pulling a bag up the incline in the baggage area when he felt a tear in his left deltoid area. He stopped work on January 14, 2015 and returned to work on July 20, 2015. OWCP accepted appellant's claim for sprain of the left shoulder and upper arm and adhesive capsulitis of the left shoulder. Appellant underwent a left shoulder arthroscopy on April 24, 2015.

In a January 14, 2016 report, Dr. Terry A Vernoy, appellant's treating Board-certified orthopedic surgeon, related that appellant had improved left shoulder pain. He noted that appellant had left shoulder range of motion (ROM) that was full and equal to the right with pain on extremes and especially to the acromioclavicular joint region. Dr. Vernoy noted that appellant had satisfactory status post left shoulder arthroscopy with debridement, decompression, release of coracoacromial ligament and manipulation with return of full ROM, but he also related that appellant now had aggravation of acromioclavicular joint with resultant capsulitis. He concluded that appellant could continue his regular work duties, but that maximum medical improvement (MMI) could not be determined due to his new complaint.

On January 20, 2016 appellant filed a claim for a schedule award (Form CA-7). By letter received by OWCP on February 10, 2016, he requested that OWCP provide an independent specialist to evaluate his left shoulder permanent impairment because his current physician was unable to do so.

On February 25, 2016 OWCP referred appellant to Dr. Neelesh B. Fernandes, a Board-certified physiatrist, for a second opinion evaluation. In an April 5, 2016 report, Dr. Fernandes found 12 percent permanent impairment of appellant's left upper extremity. He utilized the ROM methodology found in Table 15-34 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>2</sup> and noted 130 degrees of flexion equaled 3 percent upper extremity impairment, 50 degrees of extension equaled 0 percent impairment, abduction of 90 degrees equaled 3percent upper extremity impairment, adduction of 60 degrees equaled 0 percent upper extremity impairment, internal rotation of 10 degrees equaled 4 percent upper extremity impairment, and external rotation of 45 degrees equaled 2 percent impairment. Dr. Fernandes then utilized Table 15-7 for a functional history adjustment.<sup>3</sup> He noted a *QuickDASH* score of 46 was equivalent to grade modifier 2. Dr. Fernandes noted that since the functional history grade modifier was the same as ROM grade modifier, there was no change to the total ROM impairment.

On May 31, 2016 OWCP referred appellant's case to an OWCP medical adviser and asked him to review the report of Dr. Fernandes and indicate whether he agreed with his assessment. In a June 2, 2016 response, the medical adviser indicated that he had reviewed the medical evidence. He noted that on April 24, 2015 appellant underwent a left shoulder arthroscopy, debridement, and acromioplasty. The medical adviser noted that appellant had done

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<sup>2</sup> A.M.A., *Guides* 475.

<sup>3</sup> *Id.* at 406.

relatively well following his left shoulder surgery, but had continued subjective complaints of weakness in the left shoulder. He noted that whereas Dr. Fernandes found 12 percent left upper extremity impairment based on the ROM methodology of calculating permanent impairment, his attending physician had previously noted that appellant's ROM was normal. The medical adviser also noted that "more importantly," pursuant to the A.M.A., *Guides*, ROM was used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case where it is not possible to otherwise define impairment.<sup>4</sup> Accordingly, he recommended discarding the impairment rating of Dr. Fernandes and used the diagnosis-based impairment (DBI) methodology to provide an alternate rating of permanent impairment. The medical adviser provided that claimant be awarded the default value for residual impingement syndrome of three percent upper extremity impairment as noted in Table 15-5 of the A.M.A., *Guides*.<sup>5</sup> He noted that there would be no change to this award with use of the net adjustment formula.

In a July 19, 2016 decision, OWCP issued a schedule award for three percent permanent impairment of the left upper extremity.

### **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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.

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<sup>4</sup> *Id.* at 387.

<sup>5</sup> *Id.* at 402.

<sup>6</sup> *See* 20 C.F.R. §§ 1.1-1.4.

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

<sup>8</sup> 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).<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

The issue on appeal is whether appellant has more than three percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

Dr. Fernandes, OWCP's second opinion physician, reported on February 25, 2016 that appellant had 12 percent permanent impairment of the left upper extremity pursuant to the ROM methodology for rating upper extremity permanent impairment. OWCP's medical adviser, in a report dated May 31, 2016, disagreed that appellant's impairment should be rated for his loss of ROM. He concluded that appellant had 3 percent permanent impairment of the left upper extremity due to residual impingement syndrome under the DBI methodology for rating upper extremity permanent impairment.

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.<sup>11</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>12</sup> 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.<sup>13</sup>

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

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<sup>9</sup> 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 2.808.5(a) (February 2013).

<sup>10</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

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

<sup>12</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>13</sup> *Supra* note 11.

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 July 19, 2016 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 this case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 19, 2016 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

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

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