

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

S.B., Appellant

and

**U.S. POSTAL SERVICE, SAPPINGTON
BRANCH, St. Louis, MO, Employer**

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**Docket No. 16-0562
Issued: May 1, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 4, 2016 appellant, through counsel, filed a timely appeal from a November 24, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The record also contains a January 27, 2015 decision reducing appellant's compensation to zero as his actual earnings as a modified city carrier, effective October 6, 2014, fairly and reasonably represented his wage-earning capacity. He has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c)

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has more than three percent permanent impairment of the right arm, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On November 23, 2009 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date in the performance of duty he experienced pain in his right shoulder radiating into his arm. OWCP accepted the claim for right shoulder strain, an aggravation of acromioclavicular (AC) degenerative hypertrophy with inflammation of the right shoulder, other disorders of the bursae and tendons of the right shoulder, and a benign neoplasm of the scapula and long bones of the right upper limb.

Following his injury, appellant performed modified employment until February 2, 2010, when he underwent a reconstruction of the right acromioclavicular joint.⁵ On April 20, 2010 he underwent a release of the right coracoacromial ligament and on August 13, 2010 he underwent a distal clavicle resection, acromioplasty, and debridement of the rotator cuff and subacromial space. Appellant returned to limited-duty employment on January 18, 2011. He underwent an open resection of the superior medial angle of the scapula on August 27, 2013. Appellant resumed limited-duty employment on October 6, 2014.

On January 14, 2015 appellant filed a claim for a schedule award (Form CA-7). By letter dated January 23, 2015, OWCP requested that he submit an impairment evaluation from his attending physician providing the extent of any permanent impairment using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In a report dated June 15, 2015, Dr. Corey G. Solman, Jr., a Board-certified orthopedic surgeon, noted that appellant's condition was not represented in the sixth edition of the A.M.A., *Guides*. He opined that appellant had 20 percent permanent impairment of the right shoulder.

⁴ Docket No. 12-1920 (issued September 3, 2013).

⁵ On August 2, 2011 OWCP denied appellant's claim for leave without pay on May 6, 2011 as the evidence was not sufficient to show that he was disabled from work on that date. In an August 11, 2011 decision, it denied his claim for leave without pay for various dates in May and June 2011. On September 30, 2011 OWCP denied appellant's request for surgical authorization for a right shoulder arthroscopy. In a decision dated August 21, 2012, it found that he had not established a recurrence of disability from June 19 to 21, 2010. However, the Board set aside the August 21, 2012 decision on September 3, 2013 finding that a conflict existed with regard to whether appellant was disabled from work on June 20 and 21, 2012 due to his work injury. The Board remanded the case for OWCP to refer appellant for an impartial medical examination. *Supra* note 4. On October 18, 2013 OWCP paid appellant compensation for disability from work on June 20 and 21, 2012.

⁶ A.M.A., *Guides* (6th ed. 2009).

An OWCP medical adviser, on August 7, 2015, found that Dr. Solman's impairment rating was insufficient to determine the extent of any permanent impairment and suggested a second opinion. By letter dated August 19, 2015, OWCP referred appellant to Dr. Richard R. Katz, a Board-certified physiatrist, for a second opinion evaluation.

Dr. Katz, in a September 8, 2015 impairment evaluation, discussed appellant's history of injury and diagnosed a right shoulder strain, an aggravation of degenerative joint disease of the AC joint, snapping scapular syndrome, and scapulothoracic bursitis. He measured range of motion (ROM) of the shoulder three times and, using the ROM method and Table 15-34 on page 475 of the A.M.A., *Guides*, found six percent permanent impairment of the arm due to reduced shoulder motion.

On September 17, 2015 an OWCP medical adviser found that Dr. Katz failed to measure ROM three times as required on page 464 of the A.M.A., *Guides*. Using the diagnosis-based impairment (DBI) method and the shoulder regional grid set forth on page 403, he identified the diagnosis as AC degenerative joint disease and, after applying grade modifiers, found that appellant had three percent permanent impairment of the right arm. The medical adviser opined that appellant had reached maximum medical improvement on September 8, 2015.

By decision dated November 24, 2015, OWCP granted three percent permanent impairment of the right arm. The period of the award ran for 9.36 weeks from September 8 to November 12, 2015.

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.⁷ 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.⁸ 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.⁹

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

⁷ See 20 C.F.R. §§ 1.1-1.4.

⁸ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁹ 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).¹⁰ 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.¹¹

ANALYSIS

The issue on appeal is whether appellant has more than three 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.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ 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.¹⁴

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 November 24, 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

¹⁰ 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).

¹¹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *Supra* note 12.

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 November 24, 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: May 1, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board