

causing her to lose her balance. She grabbed a metal beam with her right arm and hand to prevent her fall. Appellant sought treatment with Dr. Rajiv D. Pandya, a Board-certified orthopedic surgeon.

By decision dated January 11, 2013, OWCP accepted the claim for left tenosynovitis of the foot and ankle, as well as sprain of the right shoulder and upper arm rotator cuff.

On May 21, 2013 appellant underwent right shoulder arthroscopy with arthroscopic rotator cuff repair, subacromial bursectomy, and decompression and debridement of labral tear. She stopped work on May 21, 2013 and returned to modified duty on August 29, 2013.

A statement of accepted facts (SOAF) dated October 23, 2013 relates that the accepted conditions are sprain of the right shoulder and upper arm, rotator cuff, and tenosynovitis of left foot and ankle.

On November 14, 2013 OWCP referred appellant, the case file, a series of questions, and a SOAF to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her disability and residual injury status. In his November 19, 2013 report, Dr. Doman opined that her tenosynovitis of left foot and ankle, as well as sprain of right shoulder and upper arm rotator cuff had resolved with no further need for medical treatment. He reported that appellant did not require work limitations and could perform the physical demands of a factory manager.

On February 9, 2016 appellant filed a claim for a schedule award (Form CA-7).

By letter dated February 12, 2016, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (6th ed. 2009).² Appellant was afforded 30 days to submit the requested impairment evaluation.

In a February 24, 2016 medical report, Dr. Pandya related that appellant's tenosynovitis of the foot and ankle had reached maximum medical improvement (MMI) on January 29, 2013. He reported that these conditions did not result in permanent impairment.

In a February 29, 2016 report, Dr. Pandya reported that appellant's right shoulder conditions had reached MMI on April 22, 2014. He noted a diagnosis of full-thickness rotator cuff tear for which she had undergone surgery on May 21, 2013. Dr. Pandya noted objective findings of muscle weakness and arthroscopic incision scars and subjective complaints of weakness and occasional pain. Using the diagnosis-based impairment (DBI) method and the sixth edition of the A.M.A., *Guides*, he opined that appellant had a seven percent permanent impairment of the right upper extremity. According to Table 15-5 Shoulder Regional Grid, section for rotator cuff injury full thickness tear, Dr. Pandya identified the diagnosis as class 1

² A.M.A., *Guides* (2009).

with a net adjustment of 2 for grade E, yielding seven percent permanent impairment of the right shoulder.³

OWCP properly routed Dr. Pandya's report and the case file to Dr. Herbert White Jr., an OWCP medical adviser Board-certified in occupational medicine, for review and a determination on whether appellant sustained a permanent partial impairment to a member or function of the body and for the proper date of MMI.

In a March 9, 2016 report, Dr. White summarized appellant's medical records and reported that her left ankle/foot injury had reached MMI on January 21, 2013. He reported that her symptoms had been stable since that date and there had been no more recent evaluation of the foot. Using Table 16-2 of the A.M.A., *Guides*, Foot and Ankle Regional Grid, Dr. White determined that appellant's sprain of the left ankle revealed no significant abnormalities resulting in zero percent permanent impairment of the left lower extremity.⁴

With respect to the right shoulder, Dr. White determined, also using the DBI method, that the date of MMI was April 22, 2014 as determined by examination of appellant's treating physician. He noted that a SOAF was not available. Dr. White concurred that, according to Table 15-5, the diagnosis was identified as rotator cuff injury full-thickness tear.⁵ He assigned class 2 due to slightly decreased range of motion (ROM). Functional history was assigned grade 1 due to occasional pain/permanent lifting restrictions,⁶ clinical studies were assigned grade 3 due to the severe problem and diagnosis,⁷ and physical evaluation was excluded from the net adjustment formula as it was used to determine the class. Dr. White applied the net adjustment formula which moved the rating to grade E with an adjusted impairment rating of seven percent for the right upper extremity.⁸ He concluded that he agreed with Dr. Pandya's findings that appellant was entitled to zero percent permanent impairment of the left lower extremity and seven percent permanent impairment of the right upper extremity.

By decision dated March 29, 2016, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish permanent impairment to a scheduled member or function of the body.

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

³ *Id.* at 403, Table 15-5.

⁴ *Id.* at 501.

⁵ Right rotator cuff tear is not an accepted condition. The SOAF dated October 23, 2013 relates that the accepted conditions are sprain of the right shoulder and upper arm, rotator cuff, and tenosynovitis of left foot and ankle.

⁶ A.M.A., *Guides* 406, Table 15-7

⁷ *Id.* at 410, Table 15-9

⁸ *Id.* at 411.

vested the authority to implement the FECA program with the Director of OWCP.⁹ 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.¹⁰ 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.¹¹

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).¹² 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.¹³

ANALYSIS

OWCP accepted appellant’s claim for left tenosynovitis of foot and ankle and sprain of right shoulder and upper arm rotator cuff. The issue is whether appellant sustained permanent impairment of the left lower extremity and right upper extremity entitling her to a schedule award.

Both Dr. White and Dr. Pandya concurred that appellant’s tenosynovitis of the left ankle and foot had resolved with no permanent impairment.¹⁴ No other physician has provided a medical opinion finding a permanent impairment of her lower extremity. Thus, the Board finds

⁹ See 20 C.F.R. §§ 1.1-1.4.

¹⁰ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

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

¹² 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 2.808.5(a) (February 2013).

¹³ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁴ *E.D.*, Docket No. 10-0967 (issued January 7, 2011).

that appellant has not established permanent impairment of the left lower extremity warranting a schedule award.¹⁵

Regarding permanent impairment of the right upper extremity, the Board finds that the 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.¹⁶ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁷ 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.¹⁸

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 July 12, 2016 decision as it relates to upper extremity permanent impairment. 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.

¹⁵ Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue on appeal until after the Board relinquishes jurisdiction. See 20 C.F.R. § 501.2(c)(3). The Board notes that, following the March 29, 2016 decision, appellant also requested reconsideration before OWCP. During the pendency of this appeal before the Board, by decision dated August 30, 2016, OWCP vacated the March 29, 2016 decision and awarded appellant a schedule award for seven percent impairment of the right arm with an April 22, 2014 date of MMI. It further found that appellant was entitled to zero percent impairment of the left leg. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in the same case at the same time. *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Douglas E. Billings*, 41 ECAB 880 (1990). Thus, OWCP's August 30, 2016 decision is declared null and void. *S.O.*, Docket No. 13-1083 (issued April 15, 2014).

¹⁶ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁷ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁸ *Supra* note 16.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: May 2, 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