

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

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<b>W.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1516</b>
	)	<b>Issued: November 28, 2017</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Antioch, IL, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 3, 2017 appellant filed a timely appeal from an April 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

**ISSUE**

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

**FACTUAL HISTORY**

On August 7, 2009 appellant, then a 50-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that on July 15, 2009 he first became aware of shoulder, neck, and thoracic sprains. He related that the conditions were caused by his employment duties of delivering mail and steering the mail truck. Appellant stopped work on July 22, 2009, returned

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

to part-time restricted work on February 10, 2010, and returned to full-duty work, effective April 27, 2011. By decision dated January 21, 2010, OWCP accepted the claim for neck and thoracic sprains and right shoulder impingement syndrome.

Appellant underwent authorized right shoulder arthroscopic surgery on April 27, 2010. OWCP accepted his August 8, 2011 recurrence claim and placed appellant on the periodic rolls for temporary total disability beginning September 23, 2012. Appellant returned to limited-duty work for four hours per day on October 6, 2015 and retired from the employing establishment, effective October 13, 2015.

Appellant, on October 9, 2015, filed a claim for a schedule award (Form CA-7). By letter dated October 20, 2015, OWCP requested that he submit an impairment evaluation from his attending physician addressing the extent of any employment-related permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup>

In a November 12, 2015 report, Dr. Edward J. Logue, III, a treating Board-certified orthopedic surgeon, determined that appellant had eight percent right upper extremity permanent impairment based on diagnoses of right shoulder superior labral tear from anterior to posterior (SLAP) tear, right shoulder sprain, right shoulder partial rotator cuff tear, and right shoulder impingement syndrome. He indicated that the impairment rating was based on the sixth edition of the A.M.A., *Guides*. Dr. Logue found appellant had reached maximum medical improvement on December 16, 2011, but continued to be symptomatic. He related that appellant had restrictions of lifting up to 50 pounds and repetitive grasping or reaching up to five hours as of December 16, 2011. However, a recent functional capacity evaluation determined appellant's permanent work restrictions to be up to 30 pounds of pushing, pulling, or lifting and up to 25 pounds of overhead lifting.

An OWCP district medical adviser (DMA) reviewed the medical record on September 23, 2016. He found that Dr. Logue had not based his impairment rating on the sixth edition of the A.M.A., *Guides*. The DMA determined that appellant had five percent permanent impairment of the right upper extremity due to his right shoulder arthroscopy and labral repair using Table 15-5 of the A.M.A., *Guides*.<sup>3</sup>

By decision dated April 25, 2017, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The period of the award ran for 15.6 weeks from October 11, 2015 to January 28, 2016.

### **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>4</sup> Section 8107

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>3</sup> *See id.* at 404, Table 15-5.

<sup>4</sup> *See* 20 C.F.R. §§ 1.1-1.4.

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>5</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>6</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.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>7</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>8</sup>

### ANALYSIS

The issue on appeal is whether appellant has more than five percent permanent impairment of the right upper extremity.

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

The Board has found that OWCP 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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>9</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>10</sup> In *T.H.*, the Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians,

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<sup>5</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>6</sup> 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>7</sup> *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).

<sup>8</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>10</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.<sup>11</sup>

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the April 25, 2017 decision. Utilizing 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.<sup>12</sup>

### **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 April 25, 2017 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 28, 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

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<sup>11</sup> *Supra* note 9.

<sup>12</sup> *See* FECA Bulletin No. 17-06 (issued May 8, 2017).