



In a May 7, 2014 report, Dr. James Mazo, a Board-certified physiatrist, indicated that a magnetic resonance imaging scan showed a full-thickness left rotator cuff tear. OWCP accepted the claim for a partial tear of the left rotator cuff and left rotator cuff sprain.<sup>2</sup> Appellant underwent left shoulder arthroscopic surgery on July 10, 2014. He received wage-loss compensation on the supplemental rolls from June 12 to August 23, 2014, and on the periodic rolls from August 24 to October 18, 2014. Appellant returned to full-time, light-duty work on November 3, 2014, and received intermittent compensation on the supplemental rolls from October 19, 2014 until December 20, 2015.

Appellant submitted a July 21, 2015 report from Dr. John Mara, a Board-certified orthopedic surgeon, who reported results on examination and indicated that appellant had reached maximum medical improvement. Dr. Mara reported full range of motion (ROM) of the left shoulder, noting it was difficult to use the right shoulder as a control because appellant had right shoulder arthritis that limited his ROM.<sup>3</sup> He opined that appellant had 12 percent left upper extremity permanent impairment. In a note dated January 7, 2016, Dr. Mara indicated that the 12 percent permanent impairment rating was based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup>

OWCP referred appellant and medical records for a second opinion examination by Dr. Balazs Somogyi, a Board-certified orthopedic surgeon. In a report dated May 7, 2016, Dr. Somogyi provided a history and results on examination. Utilizing the ROM method, he evaluated impairment. Dr. Somogyi found for the left shoulder: 90 degrees flexion, 32 degrees extension, 80 degrees abduction, 15 degrees adduction, 52 degrees internal rotation and 54 degrees external rotation. He opined that appellant had 15 percent left upper extremity permanent impairment under the A.M.A., *Guides*.

The case was referred to an OWCP medical adviser, Dr. David Garelick, a Board-certified orthopedic surgeon. In a report dated May 25, 2016, Dr. Garelick opined that appellant's permanent impairment should be determined using a diagnosis-based impairment (DBI) method, instead of a ROM method. He opined that appellant had seven percent left upper extremity permanent impairment, based on a diagnosis of full-thickness rotator cuff tear.

By letter dated June 2, 2016, OWCP requested that Dr. Somogyi review the report from Dr. Garelick and provide a supplemental report. In a report dated July 29, 2016, Dr. Somogyi indicated that he disagreed with Dr. Garelick. He opined that the ROM method was more appropriate in this case, and his opinion remained that appellant had 15 percent left upper extremity permanent impairment.

The case was again referred to Dr. Garelick for an opinion as to permanent impairment. In a report dated July 21, 2016, Dr. Garelick reiterated his opinion that the DBI method should

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<sup>2</sup> While the acceptance letter noted a partial tear had been accepted, this was an error. Appellant's claim is accepted for a complete tear of the rotator cuff tendon.

<sup>3</sup> Dr. Mara did not provide specific ROM results for the left shoulder.

<sup>4</sup> 6<sup>th</sup> ed. 2009.

be used, and the permanent impairment rating for appellant's left upper extremity was seven percent.

OWCP then requested that an OWCP medical adviser review the reports from the attending physician, Dr. Mara. In a report dated January 4, 2017, an OWCP medical adviser, Dr. Michael Katz, a Board-certified orthopedic surgeon, opined that the evidence from Dr. Mara was of little probative value as he had not explained how the permanent impairment was calculated.

By decision dated January 24, 2017, OWCP issued a schedule award for seven percent left upper extremity permanent impairment. The period of the award was 21.84 weeks from July 21, 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.<sup>5</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>6</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>7</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>8</sup> The Board has approved the use by OWCP of the A.M.A.,

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<sup>5</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>6</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>7</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>8</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 2.808.5a (February 2013).

*Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>9</sup>

### **ANALYSIS**

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

The second opinion physician, Dr. Somogyi, found that appellant's left upper extremity permanent impairment should be determined using the ROM method. An OWCP medical adviser, Dr. Garelick, determined that the DBI method was appropriate.

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 had 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>10</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>11</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, 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 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 found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.<sup>12</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 January 24, 2017 OWCP decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after 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>13</sup>

### **CONCLUSION**

The Board finds the case is not in posture for decision with respect to appellant's left upper extremity permanent impairment.

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<sup>9</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>10</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>11</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *See* FECA Bulletin No. 17-06 (issued May 8, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 24, 2017 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: October 23, 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