

FACTUAL HISTORY

On October 2, 2001 appellant, then a 44-year-old laborer, filed a traumatic injury claim (Form CA-1) alleging that on September 24, 2001 he sustained cervical strain and carpal tunnel syndrome in the performance of duty. OWCP accepted the claim for cervical strain, right shoulder strain, and right carpal tunnel syndrome. Appellant stopped work on July 27, 2002 and did not return. On August 22, 2002 he underwent a right anterior acromioplasty, lateral resection, and decompression of impingement syndrome of the right shoulder.

In an impairment evaluation form dated November 30, 2015, Dr. Rida N. Azer, a Board-certified orthopedic surgeon, found on examination objective evidence of right carpal tunnel syndrome, no impingement, and tenderness at the “right levator, scapula and trapezius, over C5, C6 and C7.” He opined that appellant had 45 percent permanent impairment of the right upper extremity.

Appellant, on April 19, 2016, filed a schedule award claim (Form CA-7). By letter dated August 19, 2016, OWCP requested that he submit an impairment evaluation from his attending physician addressing the extent of any permanent employment-related impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

OWCP, on November 18, 2016, referred appellant to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated December 15, 2016, Dr. Haskins discussed appellant’s continued symptoms of pain in his neck, shoulder, and right hand. On examination, he found a negative Tinel’s sign of the right wrist with no atrophy and intact sensation. Dr. Haskins diagnosed carpal tunnel syndrome, resolved, nonemployment-related cervical disc disease with radiculopathy, status post-surgery for a torn rotator cuff, and resolved cervical sprain. He opined that appellant had reached maximum medical improvement. Dr. Haskins identified the ratable diagnosis as a class 1 full-thickness rotator cuff tear using Table 15-5 on page 403 of the A.M.A., *Guides*, which yielded a default value of five percent. He applied a grade modifier of two for functional history due to pain with activities and a grade modifier of two for physical examination findings of a moderate decrease in range of motion to find an adjusted impairment rating of seven percent. Dr. Haskins opined that appellant had no ratable impairment due to carpal tunnel syndrome.

An OWCP medical adviser reviewed the evidence on February 9, 2017 and concurred with Dr. Haskins’ impairment rating.

By decision dated April 21, 2017, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The period of the award ran for 21.84 weeks from April 2 to September 1, 2017.

In a letter dated May 13, 2017 and postmarked June 1, 2017, appellant requested a review of the written record. By decision dated June 6, 2017, OWCP denied his request for a review of the written record as it was untimely. It considered the request within its discretion and found that the matter could be equally well addressed by appellant requesting reconsideration and submitting evidence showing more than seven percent permanent impairment.

On appeal appellant describes his injury and the medical treatment he received. He asserts that he continues to have pain with certain movements and at night. Appellant maintains that he should be awarded the 45 percent permanent impairment found by Dr. Azer in his November 30, 2015 report. He contends that he injured his right knee participating in a 2015 functional capacity evaluation.

LEGAL PRECEDENT -- ISSUE 1

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 FECA program with the Director of the Office of Workers' Compensation Programs.² 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.³ 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.⁴

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A., *Guides* 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).⁵ 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.⁶

ANALYSIS -- ISSUE 1

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

² See 20 C.F.R. §§ 1.1-1.4.

³ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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

⁵ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁶ *Isidoro Rivera*, 12 ECAB 348 (1961).

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 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.⁷ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.⁸ 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.⁹

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 21, 2017 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.¹⁰

On appeal appellant asserts that he injured his right knee undergoing a functional capacity evaluation.¹¹ The Board's jurisdiction is limited to reviewing final decisions of OWCP.¹² OWCP has not issued a final decision on this issue and thus it is not before the Board at this time.

CONCLUSION

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

⁷ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

⁸ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁹ *Supra* note 7.

¹⁰ *See* FECA Bulletin No. 17-06 (issued May 8, 2017).

¹¹ In view of the Board's disposition of the merits, it is premature to address the issue of whether OWCP properly denied appellant's request for an oral hearing as untimely.

¹² 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the June 6 and April 21, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 26, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board