United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
and	)	**Docket No. 17-0763**
	)	**Issued: September 14, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Compton, CA Employer	)	

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 February 21, 2017 appellant filed a timely appeal from a December 14, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish more than 46 percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances of the prior Board decision are incorporated herein by reference. The relevant facts are as follows. Appellant, a 62-year-old former carrier technician, has an accepted occupational disease claim (Form CA-2) for arthralgia of the left thumb metacarpophalangeal (MCP) joint, left shoulder strain, and left shoulder impingement syndrome, which arose on or about September 3, 1996. That claim was assigned OWCP File No. xxxxxx760. Appellant also has an accepted occupational disease claim for right thumb degenerative arthritis and right shoulder impingement syndrome, which arose on or about July 20, 1994 under OWCP File No. xxxxxx400.[3] The two upper extremity occupational disease claims have been combined under Master File No. xxxxxx760.

On July 14, 1998 OWCP granted appellant a schedule award for 20 percent permanent impairment of his left upper extremity. On March 9, 2000 it awarded an additional 21 percent impairment, for a total of 41 percent permanent impairment of appellant's left upper extremity. Appellant appealed to the Board. By decision dated April 20, 2001, the Board affirmed OWCP's March 9, 2000 decision, finding that appellant had no more than 41 percent permanent impairment of his left upper extremity.[4]

Appellant stopped work on September 20, 2007. Effective September 21, 2007, he received a disability retirement annuity from the Office of Personnel Management (OPM).

On August 6, 2013 appellant underwent OWCP-approved left shoulder arthroscopic surgery. Following surgery, he opted to receive FECA wage-loss compensation benefits in lieu of OPM benefits.

On December 7, 2015 appellant filed a claim for an additional schedule award (Form CA-7).

In an April 3, 2015 report, Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, indicated that appellant had reached maximum medical improvement (MMI) on April 1, 2015. Appellant's left shoulder diagnoses included internal derangement, rotator cuff syndrome, impingement syndrome, and status post arthroscopic surgery for treatment of left shoulder impingement syndrome. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*), Dr. Bishai found 24 percent left upper extremity permanent impairment based on loss of shoulder range of motion

[2] Docket No. 00-2026 (issued April 20, 2001).

[3] Appellant also received several schedule awards totaling 46 percent permanent impairment of his right upper extremity.

[4] *See supra* note 2.

(ROM) under Table 15-34.[5] He noted that he utilized the stand alone ROM method to calculate permanent impairment because loss of motion represented the most disabling aspect of appellant's injuries, and it affected him the most with respect to both work and activities of daily living.

In a May 1, 2016 report, OWCP's district medical adviser (DMA), Dr. Morley Slutsky, Board-certified in occupational medicine, reviewed the medical record, including Dr. Bishai's report. He noted that Dr. Bishai used the "less preferred" ROM methodology, and his reported measurements were not in accordance with the procedures proscribed in section 15.7a, A.M.A., *Guides* 464 (6th ed. 2009). The DMA further indicated that the diagnosis-based impairment (DBI) method was the "preferred rating methodology" under the A.M.A., *Guides* (6th ed. 2009), and that appellant's most impairing diagnosis was labral injury in the left shoulder. He noted that, under Table 15-5, pages 401-405, shoulder regional grid, for this diagnosis, appellant had class 1 impairment with a default value of three percent. The DMA found a modifier of 1 for functional history, Table 15-7, page 406, modifier of 1 for physical examination, Table 15-8, page 408, and modifier of 1 for clinical studies, Table 15-9, page 410. After applying the net adjustment formula, Dr. Slutsky concluded that appellant had three percent left upper extremity permanent impairment.

On June 23, 2016 OWCP requested that Dr. Slutsky clarify his May 1, 2016 impairment report. In July 7 and August 12, 2016 addendum reports, the DMA stated that the 3 percent permanent impairment for the left shoulder was a decrease of 11 percent from the 14 percent left upper extremity previously accepted for the same shoulder joint. He noted that loss of thumb ROM and grip strength were independent of the left shoulder impairment. Thus, the medical adviser concluded that the 41 percent permanent impairment previously accepted in this case was not affected by the 3 percent left upper extremity permanent impairment assigned for the shoulder.

By decision dated August 19, 2016, OWCP awarded appellant an additional 3 percent for left upper extremity permanent impairment, independent from the previously awarded 41 percent. The latest award covered a period of 9.36 weeks from December 13, 2015 to February 16, 2016.

On October 31, 2016 appellant requested reconsideration.

In a September 22, 2016 report, Dr. Bishai again advised that appellant had reached MMI on April 1, 2015. He indicated that appellant's injury to his left shoulder joint left him with a markedly reduced ROM of the left shoulder joint. Dr. Bishai explained that the use of the DBI methodology was not recommended for injuries that caused patient's to suffer loss of ROM as the primary problem and that the DBI methodology did not take into consideration the diminished ROM of a joint. He requested that OWCP approve his April 3, 2015 24 percent left

[5] A.M.A., *Guides* 475 (6th ed. 2009). Dr. Bishai indicated that flexion of 70 degrees equaled 9 percent upper extremity impairment, extension of 10 degrees equaled 2 percent impairment, abduction of 70 degrees equaled 6 percent impairment, adduction of 10 degrees equaled 1 percent impairment, internal rotation of 15 degrees equaled 4 percent impairment, and external rotation of 45 degrees equaled 2 percent impairment. He added the ROM impairments (9 + 2 + 6 + 1 + 4 + 2), which totaled 24 percent left upper extremity permanent impairment.

upper extremity permanent impairment rating. Dr. Bishai stated that the ROM examination was conducted exactly as the A.M.A., *Guides* indicated as appellant did warm up movements of the joint and the joint was examined three different times to get the average of the three. In each case, the same ROM was found for the three times it was done.

On December 6, 2016 Dr. Slutsky again reviewed the medical record, including Dr. Bishai's reports of April 3, 2015 and September 22, 2016. He indicated that Dr. Bishai had noted that he had performed three measurements per joint motion, which were exactly the same. The medical adviser applied the ROM measurements using both the shoulder ROM methodology and the shoulder DBI rating and provided his impairment calculations. He agreed with Dr. Bishai that there was 24 percent left upper extremity permanent impairment under the ROM methodology, but now found 4 percent left upper extremity permanent impairment under the DBI methodology. The medical adviser reported that since the shoulder ROM methodology was the greater of the two, it would be used for final impairment calculations.

The medical adviser found that per his calculation using the DBI methodology, the final left upper extremity impairment was 46 percent, which exceeded the previous award of 44 percent by 2 percent upper extremity impairment. He also found that under the ROM methodology, the final left upper extremity impairment was 58 percent, which exceeded the previous award of 44 percent by 14 percent upper extremity permanent impairment.

The medical adviser again indicated that Dr. Bishai had used the "less preferred" ROM methodology with invalid ROM measurements as it was subjective. Under Chapter 15 of the A.M.A., *Guides,* which dealt with upper extremity impairments, he noted that the DBI methodology was to be used in most upper extremity ratings and was the "preferred method." The medical adviser noted that Chapter 15 indicated that ROM may be used in special circumstances as the primary impairment method when no other methods are available. He also noted that Chapter 15 also provides that ROM is to be used primarily as an adjustment factor, not the primary rating method. The medical adviser indicated that this specific advice, as found in the Upper Extremity Chapter of the A.M.A., *Guides* was specific to upper extremity impairment calculations as opposed to the nonspecific advice found in Table 2-1, No. 12 page 20, which indicated that the method producing the higher rating should be used. He also noted that the A.M.A., *Guides* page 481 No. 12 indicated that "Only if no other approach is available to rating, calculate impairment based on ROM, as explained in section 15.7."

By decision dated December 14, 2016, OWCP vacated its August 19, 2016 decision. It found that its medical adviser determined that appellant sustained left upper extremity impairment beyond that which was awarded in the August 19, 2016 decision.

By decision also dated December 14, 2016, OWCP granted appellant an additional schedule award of 2 percent left upper extremity. This was above the previously paid 44 percent left upper extremity award, for a total left upper extremity permanent impairment of 46 percent. The award ran for a total of 6.24 weeks of compensation from February 17 to March 31, 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.[6] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* 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 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 is whether appellant met his burden of proof to establish more than 46 percent left upper extremity permanent impairment, 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. As of the December 14, 2016 decision, no consistent interpretation had been followed regarding the

[6] 5 U.S.C. § 8149.

[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).

[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).

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 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.[14] 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.[15]

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 December 14, 2016 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.

CONCLUSION

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

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

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

[14] *Supra* note 12.

[15] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: September 14, 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