

ISSUES

The issues are: (1) whether OWCP properly found an overpayment in the amount of \$6,121.53 as his permanent impairment was no more than six percent of his left upper extremity; and (2) whether appellant's overpayment is subject to waiver.

FACTUAL HISTORY

On December 4, 2001 appellant, then a 44-year-old telecommunications specialist, filed a traumatic injury claim (Form CA-1) alleging that he developed bruising and soreness in his middle back, and extreme internal pain in his left shoulder. He alleged that the injury occurred while carrying a 45-pound battery in a backpack and a 30-pound repeater with his left arm for approximately two miles, up 500 to 750 feet of elevation, and over loose rocks on November 27, 2001.

A left shoulder magnetic resonance imaging (MRI) scan on January 18, 2003 showed a full thickness tear of the supraspinatus tendon on the rotator cuff.

OWCP accepted appellant's claim on March 7, 2003 for left rotator cuff tear. On April 7, 2003 appellant underwent a diagnostic arthroscopy of the left shoulder with anterior Neer acromioplasty, distal clavicle Mumford excision, and open complex rotator cuff repair. OWCP placed appellant on the periodic rolls on April 28, 2003 effective April 7, 2003. Appellant returned to light-duty work on June 3, 2003.

Appellant underwent a left shoulder MRI scan on October 25, 2003 which demonstrated tendinosis of the supraspinatus and infraspinatus tendons with no full-thickness tear, but a possible small partial thickness tear of the supraspinatus.

The employing establishment terminated appellant's employment on January 25, 2004. OWCP placed appellant on the periodic rolls effective January 25, 2004.

OWCP referred appellant for vocational rehabilitation on January 30, 2004. Appellant returned to work at the employing establishment on March 5, 2005 as a purchasing agent with a loss of wage-earning capacity. By decision dated May 11, 2005, OWCP found that the position of purchasing fairly and reasonably represented appellant's wage-earning capacity and reduced his compensation benefits based on his actual earnings.³ Appellant returned to his date-of-injury position with modifications on April 15, 2007. OWCP proposed to modify the formal loss of wage-earning capacity decision dated May 11, 2005 on June 21, 2007 based on appellant's increased earnings. By decision dated June 23, 2007, OWCP reduced appellant's wage-loss compensation benefits to zero based on his actual earnings.

On September 17, 2012 appellant underwent an additional left shoulder MRI scan which demonstrated postoperative changes, a defect in the supraspinatus tendon, intrasubstance

³ Appellant alleged that he sustained a back injury at the time of his initial injury on November 27, 2001. OWCP denied his requests for diagnostic back treatments by decisions dated January 12, 2006 and January 19, 2006. Appellant requested reconsideration of the January 19, 2006 decision. OWCP denied modification of the January 19, 2006 decision on January 10, 2007.

delamination involving the infraspinatus tendon, and mild thickening of the biceps tendon with no definitive full-thickness rotator cuff tear.

Appellant filed a claim for a schedule award (Form CA-7) on March 4, 2013. Dr. Lionel Edwards Weeks, a Board-certified orthopedic surgeon, examined appellant on December 18, 2012 and found that he had reached maximum medical improvement (MMI) in regard to his left shoulder. Dr. Weeks diagnosed full-thickness rotator cuff tears of subscapularis and supraspinatus tendons. He recommended surgery, but appellant declined. Dr. Weeks calculated appellant's left shoulder permanent impairment using the range of motion (ROM) method of impairment rating under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ He found that appellant had 24 percent permanent impairment of his left upper extremity due to loss of ROM.⁵

Appellant filed an additional claim for a schedule award on May 24, 2013 which also noted that he had a service connected low back condition.

OWCP referred appellant's schedule award claim to Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, on November 14, 2013. Dr. Slutsky determined that appellant had nine percent permanent impairment of his left upper extremity using the diagnosis-based impairment (DBI) of the A.M.A., *Guides*.⁶ He diagnosed acromioclavicular joint disease status post distal clavicle resection and determined that the DBI method was the appropriate method for determining appellant's percentage of permanent impairment.

By decision dated November 25, 2013, OWCP granted a schedule award for nine percent permanent impairment of his left arm. On December 3, 2013 counsel requested an oral hearing from OWCP's Branch of Hearings and Review.

Appellant had previously filed a traumatic injury claim on October 16, 2007 alleging that on October 12, 2007 he injured his neck and middle back with tingling and numbness in both arms. He attributed his condition to transporting solar radio equipment using a wheelbarrow and dollies over 60 degree inclines, hills, and gullies with loose rocks, sand, and small brush. On June 6, 2014 the employing establishment requested authorization for medical treatment for appellant's diagnosed conditions of cervical disc degeneration, cervical spinal stenosis, cervicalgia, and radiculitis.

On June 4, 2014 Dr. Weeks asserted that under the A.M.A., *Guides* the ROM approach was most appropriate to evaluate appellant's permanent impairment for schedule award purposes. Counsel appeared at the oral hearing on June 17, 2014. He argued that OWCP's medical adviser was biased.

⁴ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁵ A.M.A., *Guides* 475, Table 15-34; 477, Table 15-35, Table 15-36.

⁶ *Id.* at 403, Table 15-5.

Appellant underwent C5-6 and C6-7 anterior cervical decompression and fusion with interbody implants on June 12, 2014.

On September 11, 2014 OWCP's hearing representative vacated the November 25, 2014 schedule award decision, found a conflict between Dr. Weeks and Dr. Slutsky and remanded appellant's referral to an impartial medical examiner to determine the extent of his left shoulder condition for schedule award purposes.

In a letter dated February 18, 2015, counsel requested that OWCP accept the additional conditions of aggravation of preexisting degenerative process and cervical disc herniation.

By decision dated March 9, 2015, OWCP denied appellant's claim for an increased schedule award as the evidence was insufficient to establish additional permanent impairment due to his accepted work injury. It found that appellant had not yet reached MMI. Counsel requested an oral hearing on March 16, 2015.

In a decision dated March 25, 2015, OWCP accepted appellant's claim for degeneration of cervical intervertebral disc.⁷

Dr. Weeks examined appellant on May 13, 2015 and reviewed the September 17, 2012 MRI scan finding. He indicated that appellant had reached MMI on December 18, 2012. Dr. Weeks noted that appellant did not wish any further treatment for his left shoulder, but that it was possible in the future appellant might need a new MRI scan and surgery.

On October 5, 2015 appellant testified at the oral hearing regarding the March 9, 2015 schedule award denial. He stated that he had returned to full-time work and was not receiving wage-loss compensation from OWCP. Appellant noted his current medical treatment and advised that he had declined further left shoulder surgery.

By decision dated December 18, 2015, OWCP's hearing representative vacated the March 9, 2015 schedule award decision of OWCP and remanded the case for referral to an impartial medical examiner.

On February 25, 2016 OWCP referred appellant to Dr. Richard Knoebel, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Weeks and OWCP's medical adviser regarding the extent of appellant's permanent impairment for schedule award purposes.

Dr. Knoebel completed a report on April 5, 2016 and reported his findings of permanent impairment. He examined both upper extremities and found that appellant had 12 percent loss of ROM of his unaffected right arm and 13 percent loss of ROM of his left arm. Dr. Knoebel noted that appellant had only an additional one percent loss of ROM of the left upper extremity⁸ and concluded that appellant's impairment was better addressed using the shoulder regional grid

⁷ In a July 21, 2015 letter, OWCP noted that the cervical spine surgery of June 12, 2014 was authorized.

⁸ A.M.A., *Guides* 386 (if the opposite extremity is uninvolved and not previously injured, it should be used to define normal for that individual).

model and found that appellant had six percent permanent impairment of his left upper extremity due to the DBI of rotator cuff injury, full thickness tear.⁹

OWCP's medical adviser, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, reviewed Dr. Knoebel's report on April 18, 2016. He opined that Dr. Knoebel properly applied the A.M.A., *Guides* and concurred with Dr. Knoebel that appellant had no more than six percent permanent impairment of his left upper extremity warranting a schedule award.

In a June 14, 2016 decision, OWCP found that appellant had not established an increased impairment of his left arm. It noted that he had previously received a schedule award for nine percent permanent impairment of his left arm and that the medical evidence currently established no more than six percent left arm impairment. By decision dated June 15, 2016, OWCP issued appellant a schedule award for six percent permanent impairment of his left arm, noting that there was no further entitlement to compensation.

On June 15, 2016 OWCP made a preliminary finding that appellant received a \$6,121.53 overpayment because new medical evidence established that he was overpaid schedule award benefits. It found that he was without fault in the creation of the overpayment. OWCP noted that appellant had received compensation for a nine percent schedule award or \$25,506.09, but was entitled to only six percent impairment or \$19,384.56. It afforded him 30 days to request a prerecoupment hearing and requested that he complete an overpayment recovery questionnaire (OWCP-20) in order to consider the issue of waiver of recovery or to determine a reasonable method for collection.

Counsel requested an oral hearing. He submitted a report dated November 17, 2016 from Dr. Steven Rouzer, a family practitioner. Dr. Rouzer provided his findings on physical examination and diagnosed spondylosis an spondylolisthesis of L4-5 and S1 causing sciatica in appellant's right leg.

Appellant testified at the oral hearing on November 30, 2016. OWCP's hearing representative noted that the issues were both the percentage of impairment of the left upper extremity and overpayment. Appellant noted that he had retired.

In a January 23, 2017 decision, OWCP's hearing representative found that the weight of the medical evidence established that appellant had no more than six percent permanent impairment of his left upper extremity based on the DBI rather than the ROM figures provided by appellant's physician.¹⁰ He further found that appellant had received an overpayment of compensation in the amount of \$6,121.53 for which he was without fault. The hearing representative concluded that, as appellant failed to submit the requested financial information, there was no basis for the waiver of the overpayment.

⁹ *Id.* at 403, Table 15-5.

¹⁰ On June 27, 2016 appellant filed a claim for compensation (Form CA-7) requesting leave without pay compensation from March 3 through 30, 2016. OWCP issued a decision on January 19, 2017 denying appellant's claimed period of disability from March 3 through 30, 2016. Counsel did not appeal this decision to the Board, and therefore the Board will not address this issue in this appeal. 20 C.F.R. § 501.3(c).

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 the FECA program with the Director of OWCP.¹¹ 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.¹² 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.¹³

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).¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 1

The issue on appeal is whether OWCP properly found an overpayment in the amount of \$6,121.53 as his permanent impairment was no more than six percent of his left upper extremity.

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 DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁶

¹¹ See 20 C.F.R. §§ 1.1-1.4.

¹² For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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

¹⁴ 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).

¹⁵ *Isidoro Rivera*, 12 ECAB 348 (1961).

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

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 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.¹⁸

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 23, 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.

CONCLUSION

The Board finds this case not in posture for decision. In view of the Board's decision, the issues of whether there is an overpayment and eligibility for waiver are premature.

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

¹⁸ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further actions consistent with this decision.

Issued: September 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