

ISSUE

The issue is whether appellant has established more than 10 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On October 4, 2010 appellant, then a 49-year-old mechanic, filed a traumatic injury claim (Form CA-1) alleging that his right shoulder popped while he was tightening a bolt with a ratchet while in the performance of his federal employment duties. He stopped work on October 7, 2010. OWCP accepted the claim for rotator cuff syndrome of right shoulder and allied disorders, right rotator cuff tear, and aggravation of right shoulder osteoarthritis of the acromioclavicular (AC) joint. Appellant underwent OWCP-approved right shoulder surgery on January 7, 2011. On May 20, 2011 Dr. Brian Battersby, a Board-certified orthopedic surgeon and appellant's treating physician, released him to work full duty.

On November 14, 2011 appellant filed a claim for a schedule award (Form CA-7). In an August 15, 2011 permanent impairment worksheet for the right upper extremity, Dr. Battersby noted that appellant had reached maximum medical improvement (MMI) on June 21, 2011. He found that appellant had nine percent permanent impairment of the right upper extremity based on the diagnosis-based impairment (DBI) methodology for a full rotator cuff tear and AC joint injury under Table 15-5, Shoulder Regional Grid, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

OWCP's district medical adviser (DMA) reviewed the claim on November 15, 2011, and found that appellant had 10 percent right upper extremity permanent impairment rating under the A.M.A., *Guides*.⁴ He reported that Dr. Battersby's nine percent permanent impairment rating did not use the most favorable DBI method. The DMA's 10 percent permanent impairment rating was based on residuals of status post distal/clavicle resection under Table 15-5, Shoulder Regional Grid, of the A.M.A., *Guides*.

By decision dated November 21, 2011, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity. The award covered a period of 31.2 weeks, from August 15, 2011 to March 20, 2012 (fraction of a day). OWCP based the award on the DMA's November 15, 2011 impairment rating, noting that the DMA "correctly applied the [A.M.A., *Guides*] to the examination findings."

On May 4, 2016 appellant filed a claim for an increased schedule award (Form CA-7).⁵ In a November 26, 2015 report, Dr. Samy F. Bishai, an orthopedic surgeon, diagnosed internal derangement of the right shoulder joint, right shoulder impingement syndrome, status postoperative surgical repair of rotator cuff tear right shoulder and degenerative arthritis of AC

³ A.M.A., *Guides* (6th ed. 2009).

⁴ The DMA's signature is illegible.

⁵ Appellant underwent left shoulder rotator cuff tear repair on April 30, 2013.

joint right shoulder. He opined that MMI had been achieved on November 24, 2015. Dr. Bishai used the range of motion (ROM) impairment methodology and found that appellant had 24 percent permanent impairment of the right upper extremity.

OWCP's DMA, Dr. David H. Garelick, a Board-certified orthopedic surgeon, reviewed the claim on May 18, 2016, and found there was no objective basis to award any additional right upper extremity impairment or to change the date of MMI under the A.M.A., *Guides*. He took issue with Dr. Bishai's right shoulder ROM impairment rating noting that the A.M.A., *Guides* had not been appropriately utilized.⁶

By decision dated July 21, 2016, OWCP denied appellant's claim for an additional schedule award. It relied on the DMA's opinion which found the medical evidence did not support an increase in the impairment already compensated.

On September 12, 2016 appellant's representative requested reconsideration and presented arguments.⁷

In a June 21, 2016 report, Dr. Bishai indicated that he used the stand-alone ROM method to calculate the impairment rating as appellant's disability was related to a markedly restricted ROM of the right shoulder joint. He opined that use of the DBI rating method would be erroneous and unfair in this case as appellant had a markedly restricted ROM joint that affected his daily activities of living and activities at work. A duplicative copy of Dr. Bishai's November 26, 2015 impairment rating report was provided.

In an August 4, 2016 report, Dr. Bishai indicated that the A.M.A., *Guides* recognized the use of the stand-alone ROM method. He also indicated that Line 12 at Table 2-1, page 20 of the A.M.A., *Guides*, explained why the use of the stand-alone ROM method was used in this case.⁸

OWCP's DMA, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, reviewed the case file. He was unable to determine whether there had been any change in the prior 10 percent right upper extremity permanent impairment rating as clarification of the medical evidence was indicated. Dr. Harris indicated that there was confusion in the records as to whether appellant had any surgery on the right shoulder as the record contained an April 30, 2013 operative report for the left shoulder.

By decision dated December 5, 2016, OWCP denied modification of its July 21, 2016 decision.

⁶ Dr. Garelick quoted language from section 15.2, page 387 regarding ROM usage. However, the quoted passage is not entirely consistent with the language contained in the latest version of the A.M.A., *Guides* (6th ed., 2nd prtg. 2009).

⁷ The representative argued that the A.M.A., *Guides* indicated that, if there was more than one method to rate a particular impairment or condition, the method producing the higher rating must be used. She further argued that nowhere in the A.M.A., *Guides* does it say that the DBI rating method should always be used.

⁸ Line 12, Table 2-1 indicates that, "[i]f the *Guides* provides more than one method to rate a particular impairment or condition, the method producing the higher rating must be used."

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.⁹ 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.¹⁰ 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.¹¹

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).¹² 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.¹³

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish that he has greater than 10 percent permanent impairment of the right upper extremity, 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. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁴ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the

⁹ See 20 C.F.R. §§ 1.1-1.4.

¹⁰ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

¹¹ 20 C.F.R. § 10.404; *see also*, Ronald R. Kraynak, 53 ECAB 130 (2001).

¹² 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).

¹³ *Isidoro Rivera*, 12 ECAB 348 (1961).

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

law to all claimants.¹⁵ 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 cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology.¹⁶ Because OWCP's own physicians have been 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.

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 5, 2016 decision with respect to the right upper extremity. Utilizing a consistent method for calculating permanent impairment¹⁷ 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.¹⁸

¹⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁶ *See supra* note 14.

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

¹⁸ In light of the Board's disposition of this case, the representative's arguments will not be addressed on appeal.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 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: April 16, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board