

**United States Department of Labor  
Employees' Compensation Appeals Board**

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<b>A.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-0827</b>
	)	<b>Issued: April 10, 2018</b>
<b>DEPARTMENT OF STATE, CHICAGO</b>	)	
<b>PASSPORT AGENCY, Chicago, IL, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 5, 2017 appellant filed a timely appeal from a February 28, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

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

**FACTUAL HISTORY**

On February 4, 2010 appellant, then a 51-year-old operations officer, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2010 he sustained left shoulder, neck, and back conditions due to being assaulted by a security guard who was a contract employee of the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

employing establishment. He stopped work on January 27, 2010 and returned to work on January 28, 2010.

OWCP initially accepted appellant's claim for contusion of his left shoulder and upper arm.<sup>2</sup>

On October 18, 2010 Dr. Guido Marra, an attending Board-certified orthopedic surgeon, performed OWCP-approved left shoulder surgery, including arthroscopic subacromial decompression and arthroscopic rotator cuff repair. In his report of the surgery, Dr. Marra noted that he removed approximately seven to eight millimeters of appellant's left distal clavicle to create a one millimeter space between the end of his collar bone and the medial aspect of his left acromion.

On November 23, 2010 OWCP expanded the accepted conditions to include left shoulder impingement syndrome.

Appellant received periodic treatment for his left shoulder condition from Dr. Marra. The findings of a July 26, 2013 magnetic resonance imaging (MRI) scan of his left shoulder showed mild supraspinatus tendinosis and lesser infraspinatus tendinosis without evidence of new rotator cuff tear or re-tear of prior rotator cuff tear. In January 2015, appellant began to be seen by Dr. Joseph Centano, a Board-certified orthopedic surgeon, to whom he complained of continuing left shoulder pain.

On April 30, 2015 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted employment conditions.

In a letter dated May 4, 2015, OWCP requested that appellant submit additional factual and medical evidence in support of his schedule award claim, including a medical report containing a permanent impairment rating derived in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

Due to the absence of a permanent impairment rating in the case record, OWCP referred appellant for a second opinion examination to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon. It requested that Dr. Swartz examine appellant and provide an opinion regarding whether he had permanent impairment of a scheduled member under the standards of the sixth edition of the A.M.A., *Guides*.

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<sup>2</sup> Appellant periodically attended medical appointments related to his accepted employment-related medical condition and, beginning April 22, 2010, he received intermittent disability compensation on the daily rolls for work hours he lost due to these appointments.

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009). In the July 30, 2015 statement of accepted facts (SOAF) provided to Dr. Swartz, OWCP advised that appellant filed a separate claim in November 2013 (OWCP File No. xxxxxx674) which was accepted for right carpal tunnel syndrome. The SOAF also indicated that appellant underwent right carpal tunnel release and median nerve block surgery on July 17, 2014. The Board notes that the present appeal only pertains to appellant's claim for left upper extremity permanent impairment.

In an August 14, 2015 report, Dr. Swartz discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date, including the findings for left shoulder range of motion (ROM) testing. He opined that appellant's date of maximum medical improvement (MMI) with respect to his left shoulder was October 18, 2011, one year after his left shoulder surgery. Dr. Swartz conducted a permanent impairment rating for appellant's left shoulder under the sixth edition of the A.M.A., *Guides*. He indicated that, based on appellant's lack of cooperation with the physical examination and his voluntary restriction, he could not use the ROM method for evaluating permanent impairment. Dr. Swartz then applied the diagnosis-based impairment (DBI) method of rating left shoulder permanent impairment by using Table 15-5 (Shoulder Regional Grid) on page 402. He determined that appellant's most impairing left shoulder diagnosis was impingement syndrome, a class 1 condition which qualified him for a one percent default value for left shoulder permanent impairment. Dr. Swartz determined that appellant had a functional history grade modifier of 1 and a physical examination grade modifier of 1, and he indicated that application of the net adjustment formula on page 411 did not result in any movement from the default value of one percent for left shoulder permanent impairment. Therefore, he concluded that appellant had one percent permanent impairment of his left shoulder under the sixth edition of the A.M.A., *Guides*.

OWCP requested that Dr. Ellen Pichey, a Board-certified family practitioner and occupational medicine physician serving as an OWCP medical adviser, review the medical evidence of record including Dr. Swartz' August 14, 2015 report. It asked Dr. Pichey to provide an impairment rating for the permanent impairment of appellant's left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*.

In a September 29, 2015 report, Dr. Pichey disagreed with Dr. Swartz' assessment of the permanent impairment of appellant's left upper extremity. She also applied the DBI method for evaluating permanent impairment but found that appellant's most impairing left shoulder condition was his acromioclavicular joint injury with distal clavicle resection. Dr. Pichey indicated that, under Table 15-5 on page 403, this was a class 1 condition which qualified him for 10 percent default value for left shoulder permanent impairment. She determined that appellant had a functional history grade modifier of 1 and a physical examination grade modifier of 1, and she indicated that application of the net adjustment formula did not result in any movement from the default value of 10 percent for left shoulder permanent impairment. Dr. Pichey concluded that appellant had 10 percent permanent impairment of his left upper extremity under the sixth edition of the A.M.A., *Guides*.<sup>4</sup>

OWCP requested that Dr. Swartz review Dr. Pichey's September 29, 2015 report and comment on the discrepancy between his permanent impairment rating and that of Dr. Pichey.

In an October 26, 2015 report, Dr. Swartz advised that he agreed with Dr. Pichey's use of the distal clavicle resection to apply the DBI method of assessing of appellant's left upper

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<sup>4</sup> Dr. Pichey opined that appellant reached MMI on August 14, 2015, the date of Dr. Swartz' evaluation.

extremity permanent impairment.<sup>5</sup> He indicated that he agreed with Dr. Pichey's conclusion that appellant had 10 percent permanent impairment of his left upper extremity under the sixth edition of the A.M.A., *Guides*.

In a November 4, 2015 decision, OWCP granted appellant a schedule award for 10 percent permanent impairment of his left upper extremity. The award ran for 31.2 weeks from August 14, 2015 to March 19, 2016 and was based on the permanent impairment rating of Dr. Pichey.

Appellant requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review regarding the November 4, 2015 decision.

During the hearing held on July 11, 2016, appellant described his continuing medical symptoms and asserted that he had 50 percent permanent impairment of his left upper extremity.

By September 2, 2016 decision, OWCP's hearing representative affirmed OWCP's November 4, 2015 decision. The hearing representative found the opinion of the Dr. Pichey, OWCP's medical adviser, showed that appellant had 10 percent permanent impairment of his left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*.

On February 15, 2017 appellant requested reconsideration of the September 2, 2016 decision. In a statement accompanying his reconsideration request, he discussed his left upper extremity symptoms/limitations and argued that he had more than 10 percent permanent impairment of this extremity.<sup>6</sup> Appellant submitted a November 23, 2016 report from Dr. Centeno, who reported physical examination findings and discussed the treatment plan for his upper extremity problems.

In a February 28, 2017 decision, OWCP denied modification of the September 2, 2016 decision. It again noted that the opinion of Dr. Pichey showed that appellant had 10 percent permanent impairment of his left upper extremity.

### **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 Director of OWCP.<sup>7</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>8</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To

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<sup>5</sup> Dr. Swartz noted that the report of the October 18, 2010 surgery showed that Dr. Marra removed approximately seven to eight millimeters of appellant's left distal clavicle to create a one millimeter space between the end of his collar bone and the medial aspect of his left acromion.

<sup>6</sup> Appellant also submitted a September 30, 2016 affidavit in which his mother discussed her observations about his left upper extremity symptoms/limitations.

<sup>7</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>8</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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>9</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>10</sup> 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.<sup>11</sup>

### ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish more than 10 percent permanent impairment of his left 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 had 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>12</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>13</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 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

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<sup>9</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>10</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).

<sup>11</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>13</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.<sup>14</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 February 28, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities to be 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>15</sup>

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2017 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 10, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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

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<sup>14</sup> *Supra* note 12.

<sup>15</sup> *See* FECA Bulletin No. 17-06 (issued May 8, 2017).