



## **FACTUAL HISTORY**

OWCP accepted that, on January 15, 2013, appellant, then a 24-year-old border patrol agent, was ejected from an airboat after it collided with the riverbank in an employment-related accident. He noted on his traumatic injury claim (Form CA-1) that he sustained a fractured left femur and possible fractured nose. OWCP accepted his traumatic injury claim for femur fracture, left; leg sprain, left; deviated septum; and face and scalp contusions, except for the eyes. It also accepted joint replacement, knee; sprain of the elbow and forearm, bilateral; and sprain of back, lumbar region.

On June 24, 2014 appellant filed a claim for a schedule award (Form CA-7). In support of his claim, he submitted a May 30, 2014 report from Dr. Humberto Varela, a Board-certified family practitioner. Dr. Varela noted that he examined appellant for purposes of determining maximum medical improvement (MMI) and an impairment rating. He indicated that appellant returned to light-duty employment on May 7, 2013 and progressed to regular duty on January 14, 2014. Dr. Varela utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> and provided conclusory findings noting that appellant had a diagnosis-based impairment (DBI) rating of 22 percent of the lower extremities.

On July 8, 2014 OWCP forwarded Dr. Varela's report and a statement of accepted facts (SOAF) to a district medical adviser (DMA). It requested that he assess the date of MMI and functional loss of use and percentage of impairment in accordance with the A.M.A., *Guides*.

In a July 8, 2014 response, Dr. Michael M. Katz, a DMA Board-certified in orthopedic surgery, explained that Dr. Varela's impairment determination could not be accepted as probative for the purpose of recommending a schedule award under FECA. He noted that Dr. Varela did not provide diagnostic indicators in his report or on the worksheet. Dr. Katz requested a second opinion examination be scheduled with a medical specialist who is familiar with the sixth edition and OWCP procedures for schedule awards.

By letter dated March 20, 2015, OWCP notified appellant that a second opinion examination was necessary. In an April 14, 2015 letter, it notified appellant of the time and place of the examination with Dr. Salvador Baylan, Board-certified in physical medicine and rehabilitation.

In an April 24, 2015 report, Dr. Baylan noted appellant's history of injury, the accepted conditions, and treatment history. He provided physical examination findings and utilized the sixth edition of the A.M.A., *Guides*. Dr. Baylan found that January 7, 2014 was the appropriate date of MMI. He explained that the accepted conditions did not result in permanent impairment except for the bilateral elbows due to loss of flexion. Dr. Baylan determined that the range of motion (ROM) methodology was appropriate for rating permanent impairment. He referenced Table 15-33, Table 15-35, Table 15-36, and Table 15-7.<sup>4</sup> Dr. Baylan noted elbow flexion of 130

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> *Id.* at 474, 477, 406.

degrees bilaterally which equaled three percent impairment pursuant to Table 15-33. He provided the functional history adjustments and grade modifiers and determined that the total impairment was three percent on the right and on the left, for a six percent combined permanent impairment of the upper extremities.

The report of Dr. Baylan was provided to the DMA. On June 1, 2015 Dr. Katz noted his agreement with Dr. Baylan's upper extremity impairment ratings, but requested clarification regarding a rating for the left lower extremity.

By letter dated October 16, 2015, OWCP referred appellant for a second opinion examination with Dr. Baylan regarding the lower extremities.

In a November 6, 2015 addendum, Dr. Baylan repeated his findings with regard to the upper extremities. Regarding the lower extremities, he examined appellant and noted complaints of residual pain on the left lower extremity from the hip down to the knee and pain on the left lumbar areas, but no radiating pain. Dr. Baylan noted essentially normal physical findings. He explained that the femur fracture had healed without angular deformity and noted that there was an intramedullary nail with screws at the metaphysis, but the fracture did not cause numbness or muscle weakness. Furthermore, Dr. Baylan explained that the range of motion of the knee and hips were within the normal range, and the gait remained normal. He concluded that there was no permanent impairment from the fracture. On January 21, 2016 OWCP requested that the DMA review the left lower extremity impairment rating report of Dr. Baylan. After no response was received, on April 14, 2016 OWCP again requested review by the DMA.

In a May 25, 2016 report, Dr. Arthur S. Harris, a DMA Board-certified in orthopedic surgery, reviewed the claim including the reports of Dr. Baylan. He also advised that he had reviewed the memorandum of April 14, 2016 from OWCP, which advised that appellant had previously received an award of 10 percent permanent impairment of the left lower extremity under File No. xxxxxx210. Dr. Harris advised that, regarding the lower extremity, the left hip and knee demonstrated satisfactory range of motion without instability. He noted that examination of the elbows demonstrated range of motion, right/left: flexion 130/130 degrees; extension 0/0 degrees; pronation 85/85 degrees; and supination 85/85 degrees, without instability. Dr. Harris opined that there was no evidence of a neurologic deficit in either the upper or lower extremities. He concluded that appellant had three percent right upper extremity, three percent left upper extremity impairment, and zero percent left lower extremity impairment. Dr. Harris explained that there was no increase in appellant's left lower extremity impairment under the A.M.A., *Guides*. He indicated that the date of MMI was November 6, 2015, when appellant had been examined by Dr. Baylan.

By decision dated October 28, 2016, OWCP granted appellant a schedule award for three percent right upper extremity permanent impairment, three percent left upper extremity permanent impairment, and no additional left lower extremity permanent impairment. The award covered a period of 18.72 weeks, from November 6, 2015 to March 16, 2016. OWCP based the award on Dr. Baylan's November 6, 2015 findings, along with the DMA's May 25, 2016 impairment rating.

## 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.<sup>5</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>6</sup> 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.<sup>7</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>8</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>9</sup>

## ANALYSIS

The Board finds that this case is not in posture for decision regarding the extent of appellant’s bilateral upper extremity impairment. The Board further finds that appellant has not met his burden of proof to establish that he is entitled to more than 10 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

With regard to the left lower extremity, the record reflects that appellant previously received a schedule award of 10 percent. In his November 20, 2015 report, Dr. Baylan examined appellant and noted essentially normal physical findings and explained that the femur fracture had healed without an angular deformity. He noted that there was an intramedullary nail with screws at the metaphysis, but the fracture did not cause numbness or muscle weakness. Dr. Baylan also explained that the range of motion of the knee and hips were within the normal range, and that his

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<sup>5</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>6</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

<sup>7</sup> 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>8</sup> 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>9</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

gait remained normal. He concluded that there was no permanent impairment from the fracture. In a May 25, 2016 report, Dr. Harris concurred with Dr. Baylan regarding the nature and extent of appellant's left lower extremity permanent impairment.

The Board finds that Dr. Baylan and Dr. Harris, serving as a DMA, correctly utilized the sixth edition of the A.M.A., *Guides* and determined that no additional impairment was warranted to the lower extremity. Appellant has not submitted other medical evidence conforming with the sixth edition of the A.M.A., *Guides* establishing that he has a greater lower extremity impairment entitling him to a greater schedule award. The Board therefore finds that appellant has not met his burden of proof to establish that he is entitled to more than 10 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

On appeal appellant argues that Dr. Baylan's assessment was "completely arbitrary and improper." He asserts that Dr. Baylan did not perform an accurate examination, as he had to visit him on several occasions. Appellant also argues that the decision took over two years and did not reflect the severity of his injury, which included major surgery to his femur and a titanium rod with four screws to hold it together. The Board notes that appellant has previously received an impairment rating of 10 percent to the left lower extremity and the present medical evidence does not support a higher rating. However, appellant may request a schedule award or increased schedule award, at any time, based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

With respect to the nature and extent of permanent impairment of appellant's bilateral upper extremities, 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.<sup>10</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>11</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 a 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 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.<sup>12</sup>

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<sup>10</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>11</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>12</sup> *Supra* note 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 in part the October 28, 2016 decision as it relates to the upper extremities. 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 with regard to appellant's claim for an upper extremity schedule award.<sup>13</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish more than 10 percent left lower extremity permanent impairment, for which he previously received a schedule award. The Board further finds that the case is not in posture for decision with respect to appellant's upper extremity permanent impairment, and the case is therefore remanded for further development consistent with this decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to left lower extremity impairment, and set aside in part. The case is remanded for further action consistent with this decision with respect to appellant's upper extremity permanent impairment.

Issued: December 12, 2018  
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

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<sup>13</sup> See FECA Bulletin No. 17-06 (May 8, 2017).