

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

_____)	
E.P., Appellant)	
)	
and)	Docket No. 17-1218
)	Issued: December 10, 2018
U.S. POSTAL SERVICE, POST OFFICE, Stone Mountain, GA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2017 appellant filed a timely appeal from a February 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 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.

FACTUAL HISTORY

On October 18, 2011 appellant, then a 41-year-old letter carrier, injured his right shoulder while lifting trays and carrying mail. OWCP accepted his claim for sprain of the shoulder and

¹ 5 U.S.C. § 8101 *et seq.*

upper arm other specified sites on the right, rotator cuff syndrome of the shoulder and allied disorders on the right, and brachial neuritis or radiculitis.

Appellant reached maximum medical improvement (MMI) on September 10, 2013.

OWCP paid appellant wage-loss compensation for temporary total disability through September 10, 2013. On January 24, 2014 OWCP granted appellant a schedule award for 10 percent permanent impairment of the right arm. The award covered a period of 31.2 weeks from September 11, 2013 to April 17, 2014, with a date of MMI of September 10, 2013. Appellant returned to work on December 8, 2015 full-time, full duty. However, he had a limitation under another claim and was working with limitations.²

On February 5, 2016 appellant filed a claim for an increased schedule award (Form CA-7). In support of his claim, he submitted a February 2, 2016 impairment rating from Dr. John Foster, III, a Board-certified orthopedic surgeon. In the February 2, 2016 report, Dr. Foster noted his examination of appellant, provided findings, and utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.³ He provided findings for range of motion which included 100 degrees abduction, 130 degrees flexion, 60 degrees external rotation, and 30 degrees internal rotation. Dr. Foster determined that there was no instability and motor and sensory examinations were normal. He diagnosed status post revision right shoulder arthroscopy, arthroscopic subacromial decompression, scope Mumford, and excision of scar tissue with mild arthrofibrosis of the right shoulder. Dr. Foster found 13 percent right upper extremity permanent impairment. He explained that this meant, as he had a previous rating of 10 percent, appellant was due an additional 3 percent for permanent impairment to the right upper extremity. Dr. Foster advised that, if the prior rating had not been paid, then his payment should be based upon his 13 percent right upper extremity rating. He indicated that appellant was at full duty and should continue his current medication.

Dr. Jovito B. Estaris, a physician specializing in occupational medicine and preventive occupational medicine and serving as an OWCP district medical adviser (DMA), reviewed the report of Dr. Foster and utilized the sixth edition of the A.M.A., *Guides*. He explained that his impairment calculation was based on the diagnosis of tendinitis as there was no rotator cuff tear or impingement. Dr. Estaris referenced Table 15-5,⁴ the Shoulder Regional Grid and determined that appellant had three percent upper extremity impairment of the right arm. He explained that he was unable to find the diagnosis that Dr. Foster used for the impairment rating as there was no rotator cuff tear, no impingement syndrome, no acromioclavicular joint injury or disease, no shoulder instability, no labral lesions, or biceps tendon dislocation/subluxation. Dr. Estaris advised that tendinitis was therefore the most appropriate diagnosis.

² The record reflects that, under OWCP File No. xxxxxx42, appellant received a schedule award of 11 percent due to permanent impairment to the left upper extremity. That case was previously on appeal before the Board. Docket No. 11-0614 (issued November 2, 2011). The Board found that appellant had not met his burden of proof to establish more than 11 percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at 402.

On July 5, 2016 OWCP requested clarification from Dr. Estaris. It noted that appellant had previously received a schedule award for 10 percent permanent impairment to the right shoulder. OWCP requested that Dr. Estaris clarify his opinion with regard to whether his rating for tendinitis was in addition to the prior award.

In a July 8, 2016 response, Dr. Estaris explained that appellant was previously awarded compensation for 10 percent permanent impairment of the right upper extremity and there was no additional impairment under the A.M.A., *Guides*. He also noted that MMI had been reached on February 2, 2016, the date of Dr. Foster's report.

By letter dated September 9, 2016, OWCP advised appellant of the DMA's findings. It explained that he had previously received a schedule award for 10 percent permanent impairment of the right arm and Dr. Estaris had found that there was no additional impairment. OWCP advised appellant that a copy of the DMA's report should be provided to his physician and he would be afforded 30 days for the physician to respond.

In response, Dr. Foster completed an attachment to the schedule award development letter. He provided range of motion findings, noted referencing the A.M.A., *Guides*, and opined that appellant had 11 percent permanent impairment of the right shoulder.

On October 23, 2016 Dr. Estaris reviewed the supplemental report of Dr. Foster. He explained that the impairment rating was based on the reports using the A.M.A., *Guides* to the evaluation of permanent impairment. Dr. Estaris explained that the diagnosis was rotator cuff tendinitis and referenced the shoulder regional grid at Table 15-5 for upper extremity impairment, page 402. He advised that this grid was the basis for his initial rating. Dr. Estaris explained that Dr. Foster was now using the range of motion (ROM) method for evaluating permanent impairment which is located at page 475. He determined that appellant had abduction of 100 degrees or 3 percent upper extremity impairment, flexion of 130 degrees or 3 percent upper extremity impairment, external rotation of 60 degrees or 0 percent upper extremity impairment, and internal rotation of 30 degrees, and 4 percent upper extremity impairment, for a total of 10 percent right upper extremity impairment. Dr. Estaris referenced Table 15-35 for range of motion grade modifiers at page 477, and found less than 12 percent total range of motion impairments, which qualified for a grade modifier of one. He referenced Table 15-36, page 477 for functional history grade adjustment and range of motion. Dr. Estaris determined that appellant had a grade modifier of one due to shoulder discomfort. He referenced Table 15-7 for functional history adjustment of the upper extremity at page 406. Dr. Estaris explained that, since the modifiers were both one, they were equal and there was no change. He noted that, since there was a previous award of 10 percent to the right upper extremity, no additional impairment had been incurred.

By decision dated February 15, 2017, OWCP denied appellant's claim for a schedule award based on the opinion of the DMA, Dr. Estaris.

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.⁵ 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.⁶ 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.⁷

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).⁸ 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.⁹

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish 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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁰ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹¹ In *T.H.*, the Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment,

⁵ See 20 C.F.R. §§ 1.1-1.4.

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

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

⁸ 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).

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

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

¹¹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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 Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹²

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 15, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly¹³ 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 that the case is not in posture for decision.

¹² *Supra* note 9.

¹³ *See* FECA Bulletin No. 17-06 (issued May 8, 2017).

ORDER

IT IS HEREBY ORDERED THAT the February 15, 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: December 10, 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