United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 17-1631**
	)	**Issued: January 3, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 24, 2017 appellant filed a timely appeal from a March 9, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated December 14, 2017, the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1631 (issued December 14, 2017).

FACTUAL HISTORY

On October 29, 2009 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained an injury to his right shoulder as a result of repetitively moving heavy mail containers.[3] OWCP accepted the claim for a right complete rotator cuff rupture, cervicalgia, and degeneration of cervical intervertebral disc. Appellant stopped work on January 26, 2010 and did not return. He received compensation on the supplemental rolls as of January 26, 2010 and on the periodic rolls as of October 24, 2010.

On February 2, 2010 appellant underwent right shoulder arthroscopic rotator cuff repair, right shoulder arthroscopic superior labral anterior-posterior (SLAP) reconstruction repair, right shoulder arthroscopic distal clavicle excision, and right shoulder arthroscopic subacromial decompression. The surgery was authorized by OWCP. On May 17, 2012 appellant underwent surgery for removal of anterior cervical instrumentation at C5-C6, fusion and exploration at C5-C6, anterior cervical discectomy at C4-C5 and C6-C7, anterior cervical interbody fusion at C4-C5 and C6-C7, fresh frozen corticocancellous allograft with mesenchymal stem cell concentrate (Trinity) and anterior cervical instrumentation at C4-C7. This surgery was also authorized by OWCP.

On October 18, 2013 appellant filed a claim for a schedule award (Form CA-7) due to his right shoulder rotator cuff tear.

In a November 7, 2013 medical report, Dr. Thomas Perlewitz, a Board-certified orthopedic surgeon, reported that appellant had reached MMI as of May 20, 2013. In accordance with the A.M.A., *Guides*, he opined that appellant sustained 28 percent whole person permanent impairment.[4]

OWCP referred appellant, a statement of accepted facts (SOAF), and the case file to Dr. Mysore Shivaram, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of appellant's accepted conditions.

In a September 22, 2014 medical report, Dr. Shivaram diagnosed rotator cuff tear, right shoulder with satisfactory recovery following subacromial decompression, and repair of rotator cuff tear. He further diagnosed degenerative arthritis of the cervical spine and status post

[3] Under subsidiary claim OWCP File No. xxxxxx171, appellant filed an occupational disease claim alleging that he injured his left shoulder, neck, and left arm due to repetitive use of a pallet jack on or about August 30, 2005. OWCP accepted the claim for a full-thickness tear involving the anterior supraspinatus tendon, aggravation of cervical disc C5-C6, and aggravation of radiculopathy. It authorized left shoulder arthroscopic repair. On July 22, 2010 OWCP granted appellant a schedule award for 18 percent permanent impairment of the left upper extremity, with a date of maximum medical improvement (MMI) occurring on August 26, 2008. OWCP administratively combined OWCP File No. xxxxxx171 with the present claim, OWCP File No. xxxxxx866, with the latter serving as the master file.

[4] The medical report does not indicate whether this citation is in reference to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (2009) or a prior edition of the A.M.A., *Guides*.

cervical fusion from C4 through C7. Dr. Shivaram opined that MMI had been reached as of February 2, 2011, one year following surgical treatment of the right shoulder.

In a July 15, 2015 report, Dr. William T. Pennington, a Board-certified orthopedic surgeon, reported that appellant sustained 20 percent permanent impairment of his shoulders.

By decision dated September 17, 2015, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish that he sustained permanent impairment of a scheduled member or function of the body. It noted that his condition was accepted for cervicalgia, complete right rotator cuff rupture, and degeneration of cervical intervertebral disc. However, appellant had previously received 18 percent permanent impairment pertaining to loss of use of his left shoulder under OWCP File No. xxxxxx171 and was not entitled to a greater schedule award.

By decision dated January 28, 2016, OWCP vacated its September 17, 2015 decision, explaining that it was issued in error as it failed to properly address permanent impairment of appellant's right upper extremity.

OWCP routed Dr. Perlewitz's November 8, 2013 report, a SOAF, and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP District Medical Adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment of the right upper extremity and date of MMI.

In an October 3, 2016 report, Dr. Katz disagreed with Dr. Perlewitz's 28 percent whole person impairment rating, noting that he neither referenced a specific edition of the A.M.A., *Guides*, nor provided any calculations explaining his impairment rating. He further noted that OWCP did not recognize whole person impairment for the accepted conditions of this claim. Dr. Katz further noted that a diagnosed injury originating in the spine may be considered only to the extent that it resulted in permanent impairment of the extremities. As such, he recommended a second opinion evaluation.

OWCP referred appellant, a SOAF, and the case file to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent and degree of right upper extremity permanent impairment and the date of MMI.

In a December 20, 2016 medical report, Dr. Brecher reported that appellant had reached MMI on December 20, 2016. In accordance with the sixth edition of the A.M.A., *Guides,* he used range of motion (ROM) measurements explaining that Table 15-5 was not applicable due to appellant's limited motion. Using Table 15-34 of the A.M.A., *Guides,* Dr. Brecher noted percentages of impairment as follows: motion flexion 150 degrees of the right shoulder equaled three percent; abduction of 105 degrees equaled three percent; internal rotation of 60 degrees equaled two percent; external rotation of 50 degrees equaled two percent; and abduction of 40 degrees, and extension of 50 degrees equaled zero percent impairment. These totaled 10 percent permanent impairment of the right upper extremity. Dr. Brecher reported that he could not provide a rating for the cervicalgia and cervical disc disease as there was no clear spinal nerve involvement.

OWCP routed Dr. Brecher's December 20, 2016 report, a SOAF, and the case file back to Dr. Katz for review and determination regarding whether appellant sustained permanent impairment of the right upper extremity and date of MMI.

In a January 23, 2017 medical report, Dr. Katz agreed with Dr. Brecher's impairment rating of 10 percent permanent impairment of the right upper extremity. He provided measurements for loss of motion to the right shoulder from Table 15-34.[5] This resulted in a grade modifier of 1 due to range of motion loss from Table 15-35.[6] Dr. Katz reported that Dr. Brecher correctly referenced Table 15-34 for a stand-alone ROM method of calculating the rating as the Shoulder Regional Grid, Table 15-5, directed the examiner to use Table 15-34 for key diagnostic factors consistent with those accepted conditions in instances where normal motion was not present. Dr. Katz noted that FECA does not allow a schedule award for the spine. Therefore, a diagnosed injury originating in the spine may be considered only to the extent that it results in permanent impairment of the extremities, generally manifest as spinal nerve impairment. Dr. Katz noted that Dr. Brecher could not give a rating for cervicalgia and cervical disc disease as there was no clear spinal nerve involvement. As Dr. Brecher correctly applied the procedures set forth by FECA/OWCP and the A.M.A., *Guides,* Dr. Katz opined that his evaluation should be accepted instead of Dr. Perlewitz's 2013 report. He concluded that appellant's permanent impairment of the right upper extremity equaled 10 percent and that appellant reached MMI on December 20, 2016, the date of Dr. Brecher's examination.

By decision dated March 9, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of his right upper extremity. The date of MMI was noted as December 20, 2016. The award covered a period of 31.2 weeks from December 20, 2016 through March 4, 2017. OWCP determined that the weight of the medical evidence rested with Dr. Katz, serving as the DMA, who correctly applied the A.M.A., *Guides* to the examination findings of Dr. Brecher, the second opinion physician. It noted that the "rating was indicated by using the … ROM method for impairment ratings."

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.[7] The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[8] 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.[9] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined.

[5] *Id.* at 475.

[6] *Id.* at 477.

[7] 5 U.S.C. § 8149.

[8] *See* 20 C.F.R. §§ 1.1-1.4.

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

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.[10]

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).[11] 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.[12]

ANALYSIS

OWCP accepted appellant's claim for right rotator cuff rupture, cervicalgia, and degeneration of cervical intervertebral disc. It approved surgery for a February 2, 2010 right shoulder arthroscopy and rotator cuff repair, as well as a May 17, 2012 anterior cervical discectomy and fusion C4-C5, C5-C6, and C6-C7. The issue is whether appellant sustained more than 10 percent permanent impairment of his right upper extremity for which he previously received a schedule award.

The Board finds this case 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.[13] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[14] 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 DMAs use both DBI and ROM

[10] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[12] *Isidoro Rivera*, 12 ECAB 348 (1961).

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

[14] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

methodologies interchangeably without any consistent basis. Furthermore, the Board has 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.[15]

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 March 9, 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.[16]

CONCLUSION

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

[15] *Supra* note 13.

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

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: January 3, 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