



## **FACTUAL HISTORY**

On January 9, 2014 appellant, then a 52-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his right shoulder while unloading mail from a trailer on December 24, 2013. In February 2014 OWCP accepted right shoulder rotator cuff syndrome and allied disorders, and other joint derangement of the right shoulder. It additionally accepted nontraumatic compartment syndrome of right arm, enthesopathy of right elbow, and contracture of joint, right shoulder region.

Appellant received continuation of pay from December 26, 2013 to February 14, 2014, and thereafter filed a claim for compensation (Form CA-7). He received appropriate compensation and was placed on the periodic compensation roll.

On March 11, 2014 Dr. Kevin A. Williams, an orthopedic surgeon, performed an authorized right shoulder diagnostic arthroscopy with subacromial decompression, acromioplasty, debridement of labral tear, open rotator cuff repair, and microtenotomy of rotator cuff.

Appellant returned to full-time restricted duty on June 30, 2014. On October 21, 2014 Dr. Williams performed a second right shoulder procedure for impingement syndrome, torn labrum, and partial rotator cuff tear. OWCP authorized the procedure and appellant received wage-loss compensation beginning on October 21, 2014. On July 22, 2015 Dr. Daniel J. Aldrich, a Board-certified orthopedic surgeon, performed a third right authorized shoulder arthroscopic procedure including debridement of a partial subscapular tear, decompression, and distal clavicle resection. Appellant returned to full-time limited-duty work on November 16, 2015. On December 2, 2014 Dr. Aldrich released appellant to full duty.

On April 6, 2014 appellant filed a schedule award claim (Form CA-7). In an undated report, Dr. Mike Shah, a Board-certified physiatrist, noted his review of medical evidence, described appellant's medical and surgical history, his complaint of right shoulder and elbow pain, and the employment injury. He described physical examination findings and advised that maximum medical improvement was reached on March 18, 2016. Dr. Shah advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>2</sup> under Table 15-5, Shoulder Regional Grid, appellant had a class 1 impairment for a diagnosis of acromioclavicular (ACL) joint injury with a default value of 10 percent impairment. He found grade modifiers of 2 for physical examination and clinical studies, and a modifier of 1 for functional history. After applying the net adjustment formula, Dr. Shah advised that appellant had 12 percent permanent impairment of the right upper extremity for ACL injury. He also rated appellant's right elbow in accordance with Table 15-4, Elbow Regional Grid. Dr. Shah found class 1 impairment for a diagnosis of medial epicondylitis which had a default value of one percent. He indicated that appellant had a grade modifier of 2 for functional history, a grade modifier of 1 for physical examination, and a zero modifier for clinical studies. After applying the net adjustment formula, Dr. Shah concluded that appellant had one percent permanent impairment of the right upper extremity due

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

to elbow impairment. He then added the two impairments and concluded that appellant had a total of 13 percent right upper extremity impairment.

On September 28, 2016 OWCP forwarded the medical record to its medical adviser for review. The documentation and statement of accepted facts accompanying the record noted that under File No. xxxxxx396, appellant had an accepted right wrist sprain and indicated that he had previously been awarded a schedule award for eight percent permanent impairment of the right upper extremity.<sup>3</sup>

In a September 30, 2016 report, Dr. Arthur S. Harris, an OWCP medical adviser and Board-certified orthopedic surgeon, noted his review of the medical record, including Dr. Shah's report. He concurred with Dr. Shah's analysis that, in accordance with Table 15-5 of the sixth edition of the A.M.A., *Guides*, appellant had 12 percent permanent impairment of the right shoulder and, under Table 15-4, 1 percent impairment of the right elbow. The medical adviser agreed that maximum medical improvement had been reached on March 18, 2016.

On March 3, 2017 OWCP asked Dr. Harris for clarification, noting that appellant had previously been awarded a schedule award for eight percent permanent impairment of the right upper extremity. It asked him if this prior award should be included in appellant's total right arm impairment. In a March 8, 2017 report, Dr. Harris indicated that appellant had a total of 13 percent right upper extremity impairment, which after subtracting the previous 8 percent award, yielded a current increase of 5 percent. He did not address how the prior eight percent schedule award duplicated same function of the arm at issue in the most recent impairment evaluation.

By decision dated March 20, 2017, OWCP granted, appellant a schedule award for an additional five percent permanent impairment of the right upper extremity, to run for 15.60 weeks, from March 18 to July 5, 2016.

### **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>4</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>5</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

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<sup>3</sup> The instant case was adjudicated by OWCP under File No. xxxxxx029. A copy of an October 10, 2006 OWCP medical adviser's report under File No. xxxxxx396 is found in File No. xxxxxx029. However, a copy of the 2006 schedule award is not contained in the record of File No. xxxxxx029.

<sup>4</sup> See 20 C.F.R. §§ 1.1-1.4.

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

regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>6</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>7</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>8</sup>

### ANALYSIS

The issue on appeal is whether appellant has more than 13 percent permanent impairment of the right upper extremity, for which he previously received schedule awards.

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 diagnosis-based impairment (DBI) or range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>9</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>10</sup> In *T.H.*, the Board concluded that OWCP physicians are 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 had 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>6</sup> 20 C.F.R. § 10.404; *see also* *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>7</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>8</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>10</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>11</sup>

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 20, 2017 decision. Utilizing a consistent method for calculating permanent impairment 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. OWCP should also obtain a copy of the schedule award issued under File No. xxxxxx396 and incorporate it into this case, File No. xxxxxx029.<sup>12</sup>

On appeal appellant asserts that he is entitled to a greater award because his current award for his right shoulder and right elbow should be combined with his previous award for his right hand. OWCP regulations provide that benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) OWCP finds that the later impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.<sup>13</sup> In its March 20, 2017 decision, OWCP did not clearly explain how the prior schedule award,<sup>14</sup> would duplicate impairment attributable to the right elbow and right shoulder. As OWCP nor its medical adviser did not adequately explain why appellant's current impairment rating duplicated his previous compensation, upon remand OWCP shall obtain clarification from an OWCP medical adviser regarding whether the latest rating would in whole or in part duplicate the prior schedule award.<sup>15</sup> In doing so, OWCP shall supplement the record with any pertinent documents from File No. xxxxxx396, including the actual schedule award decision in that claim.<sup>16</sup> Following any necessary further development, OWCP shall issue a *de novo* decision.

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<sup>11</sup> *Supra* note 9.

<sup>12</sup> OWCP procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further indicates that the cases should be doubled as soon as the need to do so becomes apparent. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8(c)(1) (February 2000); *D.C.*, Docket No. 17-0538 (issued June 27, 2017).

<sup>13</sup> 20 C.F.R. § 10.404(d).

<sup>14</sup> The actual schedule award decision is not in the record before the Board. *See supra* note 3. An OWCP medical adviser's October 10, 2006 report attributes eight percent permanent impairment to the wrist, elbow, and thumb.

<sup>15</sup> *See T.S.*, Docket No. 09-1308 (issued December 22, 2009) (the Board remanded the case to OWCP to obtain clarification from its medical adviser regarding whether the latest rating would in whole or in part duplicate the prior schedule award); *see also P.B.*, Docket No. 14-899 (issued July 28, 2014) (it is not enough simply to compare the final impairment ratings of the two schedule awards; OWCP must examine the basis of the impairment ratings and determine whether appellant has previously received compensation for the impairments found; the A.M.A., *Guides*, contemplate that there may be impairments in different regions of the same extremity).

<sup>16</sup> *See supra* note 3.

**CONCLUSION**

The Board finds this case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 20, 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: January 12, 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