

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

F.O., Appellant	)	
	)	
and	)	Docket No. 17-0207
	)	Issued: July 2, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
Palatine, IL, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On November 8, 2016 appellant, through counsel, filed a timely appeal from a September 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment of his right upper extremity, warranting a schedule award.

## FACTUAL HISTORY

OWCP accepted that appellant, a 54-year-old rural carrier, sustained a right knee contusion, a right lower leg contusion, and a right shoulder contusion on April 11, 2009 as a result of a motor vehicle accident. Appellant received a schedule award for 28 percent permanent impairment of the right lower extremity for the period June 6, 2010 to December 22, 2011 for a total of 80.64 weeks. He returned to full-duty work without restrictions in July 2009.

On March 13, 2014 appellant, through counsel, filed a claim for a schedule award (Form CA-7).

In a December 23, 2013 report, Dr. Neil Allen, a Board-certified neurologist, opined that appellant had 11 percent permanent impairment of the right upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup> He indicated that the range of motion (ROM) method of assigning impairment reflected a more accurate impairment rating for appellant's diagnosis of right shoulder contusion than the diagnosis-based impairment (DBI) method. Utilizing Table 15-34, page 475, of the A.M.A., *Guides*, Dr. Allen found 10 percent right upper extremity permanent impairment based on appellant's range of motion. He assigned a grade modifier of 2 for functional history (GMFH) based on appellant's pain with less than normal activity, ability to perform self-care activities with modification but unassisted, and *QuickDASH* score of 30. Dr. Allen concluded that appellant had 11 percent permanent impairment of the right upper extremity.

In a March 27, 2014 development letter, OWCP notified appellant of the deficiencies of his claim and requested a medical report from a physician assessing his permanent impairment based on the sixth edition of the A.M.A., *Guides* and establishing that he had reached maximum medical improvement (MMI). It noted that the medical examination report from Dr. Allen did not explain how appellant sustained 11 percent permanent impairment of the right upper extremity for a contusion sustained in 2009, a condition which usually would resolve within four to eight weeks from the date of injury.

In a May 10, 2014 addendum report, Dr. Allen indicated that according to Table 15-5, page 401, of the A.M.A., *Guides*, if the patient has residual symptoms and consistent objective findings when at MMI, a shoulder contusion is in fact ratable. He indicated that despite conservative management appellant continued to suffer pain and function limitations in his right shoulder and, therefore, his condition was ratable under the sixth edition of the A.M.A., *Guides*. Dr. Allen reiterated his opinion that appellant had 11 percent permanent impairment of the right upper extremity.

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

On December 8, 2014 Dr. David Garelick, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence of record and found that appellant's right shoulder contusion was treated conservatively and had resolved long ago. He determined that the date of MMI was July 11, 2009, which was approximately three months following the date of injury. Dr. Garelick found no medical evidence supporting any ongoing right shoulder conditions and noted that a December 28, 2011 independent medical examination from Dr. Mark Breslow, a Board-certified orthopedic surgeon, revealed symmetric range of motion of the bilateral shoulders with forward elevation, internal rotation, and external rotation.<sup>4</sup>

By decision dated November 6, 2015, OWCP denied appellant's schedule award claim finding that the medical evidence of record did not establish permanent impairment of his right upper extremity.

On November 12, 2015 counsel requested an oral hearing before the Branch of Hearings and Review and submitted a June 17, 2016 magnetic resonance imaging (MRI) report of the right shoulder demonstrating moderate-to-high grade combined bursal and articular surface tearing and moderate grade undersurface tearing.

A telephonic hearing was held before an OWCP hearing representative on June 29, 2016.

By decision dated September 7, 2016, OWCP's hearing representative affirmed the November 6, 2015 schedule award decision, finding that Dr. Garelick's opinion that the accepted right shoulder contusion would have long since resolved was the only opinion based on a complete and accurate history of appellant's work injury.

### **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>

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<sup>4</sup> Dr. Breslow, in resolving a conflict of medical opinion concerning a recurrence claim, found that appellant did not sustain a recurrence of disability on September 22, 2010 causally related to his accepted conditions. Dr. Breslow also noted that appellant's physical examination revealed "symmetric range of motion [of the] bilateral shoulders with forward elevation, internal and external rotation."

<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).

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 issue on appeal is whether appellant met his burden of proof to establish permanent impairment of his right upper extremity, warranting 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 range of motion (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 any 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 are 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>

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 September 7, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied

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<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 (March 2017).

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

<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 10.

uniformly,<sup>13</sup> 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 appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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