

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than six percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On January 8, 2014 appellant, then a 36-year-old medical instrument technician (hemodialysis), filed a traumatic injury claim (Form CA-1), alleging that she sustained injuries on December 16, 2013 when she slipped and fell on ice when entering her work building. OWCP accepted the claim for neck sprain, right shoulder sprain, right elbow sprain, and right wrist sprain. Appellant continued working light duty with restrictions of no overhead work, no lifting over 20 pounds, no lifting overhead, and limited use of her right upper extremity.³

On September 10, 2015 appellant filed a claim for a schedule award (Form CA-7).

In an October 22, 2015 letter, OWCP advised appellant that she needed to have her physician submit a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁴ OWCP afforded her 30 days to submit the requested medical evidence and respond to its inquiries.

In response, appellant submitted a November 22, 2015 report from Dr. Joshua Macht, a Board-certified internist, who found that appellant had 13 percent permanent impairment of the right upper extremity under the A.M.A., *Guides* (6th ed. 2009). Dr. Macht rated appellant for loss of shoulder range of motion (ROM). He found mild tenderness upon palpation about the later right shoulder, slight weakness of the right shoulder and elbow, and mild elbow pain with resisted motion. Right shoulder flexion was 165 degrees, extension was 55 degrees, abduction was 155 degrees, adduction was 45 degrees, external rotation was 85 degrees, and internal rotation was normal. Right elbow flexion was 140 degrees, extension was 0 degrees, pronation was 90 degrees, and supination was 90 degrees. Right wrist flexion was 65 degrees, extension was 45 degrees, radial deviation was 30 degrees, and ulnar deviation was 20 degrees. Dr. Macht indicated that there were no other findings upon examination relative to the allowed conditions of the claim. He concluded that appellant had reached maximum medical improvement (MMI) for her accepted employment-related conditions on April 26, 2014.

OWCP referred the case to its district medical adviser (DMA), Dr. Morley Slutsky, who is Board-certified in occupational medicine. In a December 19, 2015 report, Dr. Slutsky explained

³ Appellant filed claims for 22.5 hours of intermittent wage-loss compensation (Form CA-7) for the periods March 3 to 12, and March 10 to May 31, 2014. By decision dated September 17, 2014, OWCP denied the claim because the medical evidence of record was insufficient to establish disability for the periods claimed. On September 22, 2014 counsel requested an oral hearing by a representative of the Branch of Hearings and Review. A telephonic hearing was held on April 9, 2015. By decision dated June 25, 2015, an OWCP hearing representative affirmed the prior decision, in part, finding that appellant was disabled for four hours on March 3, 2014 due to a doctor's appointment.

⁴ A.M.A., *Guides* (6th ed. 2009).

that he rated appellant's impairment using the preferred diagnosis-based impairment (DBI) method, whereas Dr. Macht used the ROM method. He rated appellant based on right shoulder tendinitis with residual dysfunction, which was a Class of Diagnosis 1 (CDX 1) with a net adjustment of 1, equaling a rating (grade D) of four percent under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2009). Dr. Slutsky assigned a grade modifier of 2 for Functional History (GMFH) based on appellant's *QuickDASH* score of 52. He assigned a grade modifier of 1 for Physical Examination (GMPE) based on appellant's tenderness to palpation and ROM limitations. Dr. Slutsky calculated a net adjustment of +1, and found four percent (grade D) right upper extremity permanent impairment under Table 15-5, A.M.A., *Guides* 402 (6th ed. 2009).⁵ He rated appellant based on right elbow sprain, which was a CDX 1 with a net adjustment of zero, equaling a default rating (grade C) of one percent under Table 15-4, Elbow Regional Grid, A.M.A., *Guides* 398-400 (6th ed. 2009). Dr. Slutsky assigned a grade modifier of 1 for physical examination based on appellant's tenderness with resisted motion. He calculated a net adjustment of +0, and found one percent (grade C) right upper extremity permanent impairment under Table 15-4, A.M.A., *Guides* 398-400 (6th ed. 2009).⁶ Dr. Slutsky rated appellant based on right wrist sprain, which was a CDX 1 with a net adjustment of zero, equaling a default rating (grade C) of one percent under Table 15-3, Wrist Regional Grid, A.M.A., *Guides* 395-97 (6th ed. 2009). He assigned a grade modifier of 1 for physical examination based on appellant's tenderness with resisted motion. Dr. Slutsky calculated a net adjustment of +0, and found 1 percent (grade C) right upper extremity permanent impairment under Table 15-3, A.M.A., *Guides* 395-97 (6th ed. 2009).⁷ He combined appellant's impairments using the values chart on page 604 and concluded that she had six percent permanent impairment of the right upper extremity. Dr. Slutsky indicated that appellant reached MMI as of November 18, 2015, the date of "Dr. Macht's rating examinations."

In a January 5, 2016 report, Dr. Macht noted that he reviewed the DMA's December 19, 2015 report. He explained that the primary point of discrepancy between their evaluations was the use of DBI and ROM methods. Dr. Macht asserted that he properly performed three ROM measurements per joint motion and recorded the highest active motion in his impairment evaluation. He explained that there was "no class of impairment for the diagnosis of shoulder tendinitis that include[d] abnormal motion" and, for that reason, ROM was the preferred methodology in appellant's case.

On January 23, 2016 Dr. Slutsky reviewed Dr. Macht's January 5, 2016 report and explained that he failed to first average the three ROM measurements for each joint motion before determining whether each of the three measurements were within 10 degrees of the average, which was a key part of the criteria validating the use of the ROM method. He further opined that the ROM method was only to be used as a last resort when other impairment methods were unavailable and in appellant's case the DBI method was available.

⁵ Net Adjustment = (GMFH 2 – CDX 1) + (GMPE 2 – CDX 1) + (GMCS 1 – CDX 1). See Section 15.3d, A.M.A., *Guides* 411 (6th ed. 2009).

⁶ *Id.*

⁷ *Id.*

By decision dated March 10, 2016, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The award covered an 18.72-week period, November 18, 2015 to March 28, 2016.

Counsel timely requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 8, 2016. He challenged OWCP's reliance on Dr. Slutsky's report(s), and specifically his opinion regarding usage of the ROM-based impairment methodology. OWCP did not receive any additional medical evidence regarding the extent of appellant's right upper extremity permanent impairment.

In a decision dated January 6, 2017, the hearing representative accepted the DMA's opinion and found that appellant had not established greater than the six percent permanent impairment of the right upper extremity previously awarded. Consequently, the hearing representative affirmed OWCP's March 10, 2016 schedule award decision.

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.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. 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 OWCP's use of the A.M.A., *Guides* for

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).

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 (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

ANALYSIS

The issue is whether appellant has met her burden of proof to establish greater than six percent permanent impairment of her right upper extremity, for which she 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 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 district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis.¹⁵ 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.¹⁶

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 January 6, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly,¹⁷ and following 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 this case is not in posture for decision.

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).

¹⁵ *Supra* note 13.

¹⁶ *Id.*

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

ORDER

IT IS HEREBY ORDERED THAT the January 6, 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: July 6, 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