

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

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**G.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 17-0480  
Issued: June 22, 2018**

*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 January 3, 2017 appellant, through counsel, filed a timely appeal from a November 29, 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 that he has greater than three percent permanent impairment of his right upper extremity, for which he previously received schedule awards.

## FACTUAL HISTORY

On October 25, 2003 appellant, then a 36-year-old custodian filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome and tendinitis while in the performance of duty. On December 11, 2003 OWCP accepted the claim for right carpal tunnel syndrome and right flexor tendinitis/tenosynovitis. On January 23, 2009 it expanded the accepted conditions to include lesion of ulnar nerve on the right. Appellant did not stop work, but worked in a full-time, light/limited-duty capacity. On June 2, 2009 he underwent a right carpal tunnel release, right ulnar nerve decompression, and transposition of the right elbow, and right radial flexor tenosynovectomy of the right wrist. Appellant was off work until his return to full duty on July 15, 2009.

OWCP developed the claim and by decision dated July 22, 2011, granted appellant a schedule award for two percent permanent impairment of the right upper extremity. The award covered a period of 6.24 weeks, from July 24 to September 5, 2010.

By decision dated February 10, 2012, OWCP granted appellant an additional award of one percent permanent impairment of the right upper extremity.

On July 28, 2015 appellant underwent right median nerve compression surgery.

On January 7, 2016 appellant filed a Form CA-7 claim for an increased schedule award.

In support of his claim appellant provided a November 30, 2015 report from Dr. William R. Bohl, a Board-certified orthopedic surgeon. Dr. Bohl indicated that appellant had reached maximum medical improvement.

By letter dated January 8, 2016, OWCP advised appellant that additional evidence was needed to establish his claim for an increased schedule award. It informed him of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days. Appellant was advised that any impairment rating must utilize the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> as the appropriate edition for all awards issued after that date.

No additional evidence was received.

By decision dated February 11, 2016, OWCP denied appellant's claim for an increased schedule award.

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

On February 19, 2016 counsel for appellant requested a hearing, which was held on September 21, 2016. During the hearing, he submitted a February 20, 2013 report from Dr. Jessica Glazer Volsky, a Board-certified obstetrician. Dr. Volsky opined that appellant had 10 percent permanent impairment of his right upper extremity. Counsel argued that it was irrelevant that the report was completed prior to the surgery of July 28, 2015. He argued that postsurgery findings were less important than presurgery findings and the A.M.A., *Guides* dictated that presurgery findings be considered.

The record reflects that on May 13, 2013 OWCP's district medical adviser (DMA), Dr. Brian M. Tonne, a Board-certified orthopedic surgeon, concurred with Dr. Volsky, that appellant had 10 percent right upper extremity impairment under the A.M.A., *Guides*.<sup>4</sup>

By decision dated November 29, 2016, OWCP affirmed its prior schedule award decision, as modified. OWCP's hearing representative found that the prior decision incorrectly determined that the medical evidence of record was insufficient to demonstrate that the claimant had measurable permanent impairment causally related to the employment injury. OWCP found that appellant did not have greater than three percent permanent impairment of the right upper extremity, for which he previously received schedule awards.<sup>5</sup>

### **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 FECA program with the Director of OWCP.<sup>6</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>7</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>8</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., *Guides* issued a 52-page document entitled "Clarifications and Corrections, [s]ixth [e]dition of the [A.M.A.,] *Guides*." 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.

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<sup>4</sup> While the DMA indicated that he agreed with the 10 percent rating, OWCP did not issue a decision at that time.

<sup>5</sup> OWCP also explained that the medical evidence must demonstrate that maximum medical improvement had occurred.

<sup>6</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>7</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>8</sup> 20 C.F.R. § 10.404; see also, *Ronald R. Kraynak*, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>9</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>10</sup>

### ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish that he has greater than three 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 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>11</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>12</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>13</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 November 29, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly<sup>14</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.

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (March 2017); *id.*, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>10</sup> *In the Matter of Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>11</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>12</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>13</sup> *Supra* note 11.

<sup>14</sup> *See* FECA Bulletin No. 17-0006 (issued May 8, 2017).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 29, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 22, 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