

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

---

**S.L., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
RANDOLPH AIR FORCE BASE, TX, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 17-0666  
Issued: March 5, 2018**

*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 2, 2017 appellant filed a timely appeal from an October 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**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.

**FACTUAL HISTORY**

OWCP accepted that on October 25, 2012 appellant, then a 36-year-old firefighter, sustained a right shoulder sprain and right shoulder superior labrum anterior and posterior

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

(SLAP) tears when the hydrant marker he was placing got hung up on the handle and pulled the marker out of his hand in a jerking fashion. He stopped work on October 26, 2012.

On March 20, 2013 appellant returned to full-time limited-duty employment.

On April 1, 2013 appellant underwent authorized right shoulder surgery and stopped work. OWCP paid him disability compensation on the periodic rolls from April 7 through September 10, 2013. On September 11, 2013 appellant returned to full-duty employment.

Appellant underwent a second authorized right shoulder surgery on September 23, 2014 and stopped work again. OWCP paid him disability compensation and placed him on the periodic rolls, effective September 24, 2014. On February 25, 2015 appellant returned to full-time light duty.

On December 11, 2015 appellant filed a claim for a schedule award (Form CA-7). He submitted a September 23, 2015 report by Dr. Daniel M. Veltri, a Board-certified orthopedic surgeon, who examined appellant for a work-related right shoulder injury. Dr. Veltri reviewed the medical treatment that appellant had received. He related appellant's complaints of only mild pain with extremes of range of motion (ROM) and swelling. Upon examination of both of appellant's shoulders, Dr. Veltri reported negative Neer and Hawkins impingement tests, Speed test, belly-press test, lift-off test, Rowe apprehension test, and Jobe relocation test. ROM examination of the right shoulder showed forward flexion to 140 degrees, extension to 40 degrees, abduction to 140 degrees, adduction to 30 degrees, external rotation to 70 degrees, and internal rotation to 40 degrees. Dr. Veltri noted that appellant, on that day, had reached maximum medical improvement (MMI). He opined that, based on Table 15.34, on page 475 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>2</sup> appellant had 12 percent permanent impairment of his right upper extremity due to his ROM deficits. Dr. Veltri advised that appellant could return to regular duty work.

In a June 9, 2016 report, Dr. David Garelick, a Board-certified orthopedic surgeon and OWCP medical adviser, indicated that he reviewed the statement of accepted facts and Dr. Veltri's September 23, 2015 report. He noted that appellant underwent two right shoulder surgeries and complained of mild pain at the extremes of motion. Dr. Garelick related that physical examination of appellant's shoulders showed minimally diminished rotator cuff strength and minimally diminished right shoulder ROM. He reported that the rest of the examination was unremarkable. Dr. Garelick opined: "Given the [appellant's] excellent result, I would suggest he be awarded 10 percent right upper extremity permanent impairment for a distal clavicle resection according to Table 15-5, page 403, of the A.M.A., *Guides*." He explained that there would be no change to the award based on the net adjustment formula. Dr. Garelick reported a MMI date of September 23, 2015 based on Dr. Veltri's recommendation.

Dr. Veltri indicated in a July 25, 2016 report that he disagreed with Dr. Garelick's June 9, 2016 impairment rating. He explained that, according to the A.M.A., *Guides*, appellant could be rated either for his surgical procedure, as Dr. Garelick provided, or based on ROM

---

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

measurements. Dr. Veltri related that he chose ROM based on the actual objective measurements that he performed on September 23, 2015. He reiterated that according to the A.M.A., *Guides*, Table 15-34, page 475, appellant had 12 percent permanent impairment of the right upper extremity. Dr. Veltri noted that his opinion remained unchanged as he obtained accurate measurements as opposed to chart review. He indicated that there was a theoretical 10 percent right upper extremity permanent impairment that could be provided by appellant's surgical procedure. Dr. Veltri explained, however, that he believed that his ROM ratings were a more accurate representation of appellant's level of function.

On September 26, 2016 OWCP requested clarification from Dr. Garelick to explain his reasoning for using postsurgical diagnostic results as opposed to ROM measurements for classification purposes. In a September 26, 2016 report, Dr. Garelick noted that he reviewed Dr. Veltri's July 25, 2016 impairment rating report and disagreed with an impairment rating based on ROM. He noted that column 1 on page 387 of the A.M.A., *Guides* provided: "ROM is used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment." Dr. Garelick related that given the fact that there was a diagnosis-based impairment (DBI) method for rating appellant's condition (the distal clavicle resection), then the DBI method was the appropriate manner in which to award permanent impairment in this particular case. He opined that there should be no change to his previous permanent impairment rating of 10 percent right upper extremity impairment.

By decision dated October 5, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of his right upper extremity. The award ran from September 23, 2015 to April 28, 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 FECA program with the director of OWCP.<sup>3</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>4</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>5</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

---

<sup>3</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>4</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>5</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

Corrections, [s]ixth [e]dition, [A.M.A.,] *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>6</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>7</sup>

### ANALYSIS

The issue on appeal is whether appellant has more than 10 percent permanent impairment of his right upper extremity, for which he 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 has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>8</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>9</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 has 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 finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>10</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 October 5, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied

---

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

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

<sup>8</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>9</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>10</sup> *Supra* note 8.

uniformly,<sup>11</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 this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 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: March 5, 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

---

<sup>11</sup> See FECA Bulletin No. 17-06 (issued May 8, 2017).