



## ISSUE

The issue is whether OWCP properly rescinded a June 1, 2011 schedule award as the percentage of permanent impairment of the left upper extremity had decreased from 11 to 8 percent.

## FACTUAL HISTORY

OWCP accepted that on November 16, 2009 appellant, then a 40-year-old rural letter carrier in modified duty status, sustained a left shoulder and upper arm sprain, left rotator cuff tear, and complete left rotator cuff rupture. On April 14, 2010 appellant underwent left shoulder arthroscopy with subacromial decompression, rotator cuff repair, and a Mumford revision. On October 5, 2010 appellant underwent an arthroscopic left biceps tenodesis. OWCP authorized both procedures.

On March 17, 2011 appellant filed a claim for a schedule award (Form CA-7). OWCP obtained a second opinion medical examination of appellant on April 25, 2011 from Dr. Tai Q. Chung, a Board-certified orthopedic surgeon. Dr. Chung reviewed the medical record and statement of accepted facts. He opined that appellant had reached maximum medical improvement (MMI). Dr. Chung reviewed and adopted a February 2, 2011 functional capacity evaluation (FCE) performed by a physical therapist, who observed the following ranges of motion of the left shoulder: 130 degrees flexion; 130 degrees abduction; 45 degrees external rotation; 60 degrees internal rotation; and 30 degrees extension. He referred generally to the sixth edition of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> finding that appellant had five percent permanent impairment of the left upper extremity.

An OWCP medical adviser reviewed Dr. Chung's report on May 20, 2011. He found that according to Table 15-34,<sup>4</sup> appellant had the following percentages of impairment due to lost ROM: 3 percent for flexion at 130 degrees; 3 percent for abduction at 130 degrees; 2 percent for external rotation at 45 degrees; 2 percent for internal rotation at 60 degrees and; 1 percent for extension at 30 degrees. OWCP's medical adviser combined these impairments to find 11 percent permanent impairment of the left upper extremity. He noted that the ROM method of rating permanent impairment produced a more favorable result than the diagnosis-based impairment (DBI) rating method, which would have assessed 10 percent impairment of the left upper extremity. The medical adviser noted a grade modifier for findings on physical examination (GMPE) of 1 according to Table 15-35,<sup>5</sup> and a grade modifier for functional history (GMFH) of 1, according to Table 15-7.<sup>6</sup> Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (1-1) + (1-1), the medical adviser found no change in the 11 percent impairment rating.

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

<sup>4</sup> Table 15-34, page 475 of the A.M.A., *Guides* is entitled, "Shoulder Range of Motion."

<sup>5</sup> Table 15-35, page 477 of the A.M.A., *Guides* is entitled, "Range of Motion Grade Modifiers."

<sup>6</sup> Table 15-7, page 406 of the A.M.A., *Guides* is entitled, "Functional History Adjustment: Upper Extremities."

By decision issued June 1, 2011, OWCP granted appellant a schedule award for 11 percent permanent impairment of the left arm, based on Dr. Chung's opinion, as interpreted by the OWCP medical adviser, as the weight of the evidence. The period of the award ran from May 26, 2011 to January 21, 2012.

Beginning in May 2011, appellant performed modified light duty work. She remained under medical treatment.<sup>7</sup>

On November 5, 2012 appellant claimed an additional schedule award (Form CA-7). She submitted reports dated from November 1, 2012 to January 10, 2013 from Dr. Daryl Dykes, an attending Board-certified orthopedic surgeon, who recommended a left supraspinatus tendon repair.<sup>8</sup>

On March 20, 2013 Dr. Chad Mathis, Board-certified in sports medicine, performed an arthroscopic left supraspinatus tenodesis with extensive debridement, bursectomy, and lysis of adhesions as authorized by OWCP. In May 30 and 31, 2013 reports, Dr. Mathis found that according to a May 30, 2013 FCE, performed by a physical therapist, appellant had attained MMI as of that day. The physical therapist noted the following ranges of motion: "Flexion=130, Extension=50, Abduction=30, Adduction=40, I[nternal] R[otation]=50, E[xternal] R[otation]=80." The physical therapist noted that according to Table 15-34, appellant had eight percent impairment of the left upper extremity. He did not provide an impairment calculation. Dr. Mathis released appellant from his care.<sup>9</sup>

On July 16, 2013, appellant claimed an additional schedule award (Form CA-7) for impairment of the left upper extremity. OWCP referred the medical record to an OWCP medical adviser for an impairment rating. In a July 23, 2013 report, an OWCP medical adviser found that according to Table 15-34, the May 30, 2013 ROM measurement percentages of impairment were: 3 percent for flexion at 130 degrees; 3 percent for abduction at 130 degrees; 2 percent for internal rotation at 50 degrees; 0 percent for extension at 50 degrees; adduction at 40 degrees; and external rotation at 80 degrees. The medical adviser combined these percentages to equal

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<sup>7</sup> On May 17, 2012 appellant claimed a recurrence of disability (Form CA-2) beginning December 6, 2011 due to pushing a heavy cart and repetitive lifting. By decision dated September 11, 2012, OWCP denied appellant's claim for recurrence of disability as she identified intervening factors that broke the chain of causation from the accepted injury. Counsel requested a telephonic hearing, held January 15, 2013, at which appellant acknowledged that she sustained a new left arm injury on December 6, 2011. By decision dated April 23, 2013, an OWCP hearing representative set aside the September 11, 2012 decision as it was unclear whether there was a valid light-duty job offer in place at the time of the claimed recurrence of disability.

<sup>8</sup> A July 25, 2012 arthrogram of the left shoulder showed an undersurface supraspinatus tendon tear with a cyst connecting to the subacromial bursa.

<sup>9</sup> On April 30, 2013, the employing establishment offered appellant a modified duty position with no use of the left arm. OWCP advised appellant by May 7, 2013 letter that the position was suitable work and of the penalties under FECA for refusing the offer. Appellant accepted the offer on May 28, 2013 and resumed work on May 31, 2013. By decision dated May 31, 2013, OWCP terminated appellant's compensation under 5 U.S.C. § 8115 as appellant returned to work with no loss of wages. By decision dated June 27, 2013, it terminated appellant's compensation effective October 4, 2012 as she refused an offer of suitable work. Counsel requested a telephonic hearing.

eight percent. He noted that there was no additional impairment beyond the 11 percent previously awarded.

By notice dated September 13, 2013, OWCP advised appellant of its preliminary determination of a \$5,783.70 overpayment of compensation from November 7, 2011 to January 21, 2012, as she had only eight percent left arm impairment, but she had already received compensation for 11 percent permanent impairment.<sup>10</sup> Counsel requested a telephonic prerecoumpment hearing. Appellant submitted financial information indicating that the schedule award should have been paid at the argued compensation rate or 75 percent, for a claimant with one or more dependents, but was instead paid at the 66 and 2/3 percent rate. At the March 19, 2014 telephonic prerecoumpment hearing, counsel asked that the record remain open for 30 days to allow submission of additional evidence. After the hearing, appellant submitted an April 2, 2014 chart note regarding pain management.

By decision dated and finalized June 3, 2014, OWCP found an overpayment of compensation from November 7, 2011 to January 21, 2012. The hearing representative rescinded the June 1, 2011 schedule award, finding that the May 30, 2013 range of motion measurements obtained by a physical therapist, as reviewed and adopted by Dr. Mathis, and subsequently reviewed by an OWCP medical adviser, established an overpayment of compensation from November 7, 2011 to January 21, 2012. The hearing representative found, however, that the amount of the overpayment was not in posture for a decision, as additional development was needed regarding the appropriate compensation rate during the period of overpayment.<sup>11</sup> The hearing representative remanded the case to OWCP for additional development regarding the correct amount of the overpayment.

### **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>12</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>13</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

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<sup>10</sup> During development of the overpayment issue, OWCP issued a November 25, 2013 decision terminating her compensation effective that day for refusing a June 2013 offer of suitable work. OWCP affirmed the termination by decision dated February 19, 2014, referring to the October 4, 2012 termination. As counsel did not appeal the February 19, 2014 decision to the Board, the Board does not have jurisdiction over the termination issue on the present appeal.

<sup>11</sup> The issue of amount of overpayment of compensation, if any, and issues of recovery of overpayment under 5 U.S.C. § 8129(a) are not before the Board on the current appeal.

<sup>12</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>13</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>14</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>15</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>16</sup>

### ANALYSIS

The issue on appeal is whether OWCP properly rescinded a June 1, 2011 schedule award as the percentage of permanent impairment of the left upper extremity had decreased from 11 to 8 percent.

The Board finds that this case is not in posture for decision as the underlying overpayment finding has not been properly developed by OWCP.

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>17</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>18</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

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<sup>14</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>15</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 2.808.6a (February 2013).

<sup>16</sup> *In the Matter of Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>17</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>18</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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>19</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 3, 2014 decision. Following OWCP's development of 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, and thereafter determine the extent, if any, of an overpayment of disability benefits.

**CONCLUSION**

The Board finds this case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 3, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.<sup>20</sup>

Issued: March 1, 2017  
Washington, DC

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

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

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<sup>19</sup> *Supra* note 17.

<sup>20</sup> James A. Haynes, Alternate Judge, participated in the original decision, but was no longer a member of the Board effective November 16, 2015.