United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
and	)	**Docket No. 15-1379**
	)	**Issued: March 23, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Newington, CT, Employer	)	

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 June 10, 2015 appellant filed a timely appeal from an April 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 five percent impairment of his right upper extremity.

FACTUAL HISTORY

On November 9, 2012 appellant, a 56-year-old claims examiner, sustained a traumatic injury in the performance of duty while exiting a bathroom door. He had his right arm extended

[1] 5 U.S.C. § 8101 *et seq.*

to push the door open, but another employee pushed the door from the other side, jamming appellant's right shoulder. OWCP accepted appellant's claim for a complete rupture of the right rotator cuff and right rotator cuff strain. Appellant underwent surgery on February 20, 2013 including a mini-open partial rotator cuff repair.

Appellant filed a claim for a schedule award (Form CA-7). Dr. John D. Kelley, the Board-certified orthopedic surgeon who performed the operation, evaluated appellant on February 10, 2014, about one year after surgery. Based on the average of three undisclosed goniometric measurements, active range of motion (ROM) was 150 degrees of flexion, 30 degrees of extension, 150 degrees of abduction, 30 degrees of adduction, 50 degrees of internal rotation, and 70 degrees of external rotation.

X-rays showed satisfactory glenohumeral and acromioclavicular joint alignment, good glenohumeral joint space, a reasonable space between the superior articular surface and the undersurface of the acromion, and a mild type 2 acromion.

Referencing Table 15-34, page 475, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*), Dr. Kelley found 10 percent impairment of the right upper extremity utilizing the ROM methodology.

An OWCP medical adviser reviewed Dr. Kelley's evaluation. He noted that Dr. Kelley did not document his calculations and failed to follow the protocols for rating impairment using the ROM method. Noting that the diagnosis-based impairment (DBI) methodology was the preferred rating method for the upper extremity, the medical adviser used Table 15-5, page 403, of the A.M.A., *Guides* to find a default impairment value of five percent for a full-thickness rotator cuff tear with residual loss. This rating was unaffected by mild functional history, decreased for the unusable ROM findings, and increased for moderate clinical studies, resulting in no modification of the default rating. The medical adviser concluded that appellant had five percent permanent impairment of the right upper extremity.

Dr. Kelley reviewed the medical adviser's opinion and explained that it was his own opinion that the ROM methodology better denoted appellant's permanent impairment and was in the realm of allowed uses.

On April 2, 2015 OWCP issued appellant a schedule award for five percent permanent impairment of his right upper extremity. It found that the weight of the medical evidence rested with the medical adviser, who correctly applied the A.M.A., *Guides*.

On appeal, appellant argues that the ROM methodology can be used as a stand-alone method for evaluating impairment. He adds that he believes the method that gives the employee the higher evaluation should be used.

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.[2] 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.[3] 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.[4]

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).[5] 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.[6]

ANALYSIS

The issue on appeal is whether appellant has more than five percent permanent impairment of his right upper extremity.

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.[7] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal

[2] *See* 20 C.F.R. §§ 1.1-1.4.

[3] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[4] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[5] *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).

[6] *Isidoro Rivera*, 12 ECAB 348 (1961).

[7] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

justice under the law to all claimants.[8] 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.[9]

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 April 2, 2015 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.

CONCLUSION

The Board finds this case not in posture for decision.

[8] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[9] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2015 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 23, 2017
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