United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant **and** **DEPARTMENT OF THE NAVY, U.S. MARINE CORPS AIR STATION, Kaneohe Bay, HI, Employer**	)	**Docket No. 16-1269** **Issued: March 20, 2017**

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 6, 2016 appellant filed a timely appeal from a March 24, 2016 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.[2]

ISSUE

The issue is whether appellant has more than three percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

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[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence following the March 24, 2016 decision. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt,* 57 ECAB 126 (2005).

FACTUAL HISTORY

On January 26, 2012 appellant, then a 56-year-old high voltage electrician, filed a traumatic injury claim (Form CA-1) alleging that on January 23, 2012 he strained his left shoulder as a result of lifting a steel clam shell door to access electrical switching point. He did not stop work, but returned to work in a light-duty capacity. OWCP accepted his claim for left shoulder strain.

On June 28, 2012 appellant underwent authorized left shoulder arthroscopy, superior labral tear from anterior to posterior (SLAP) repair, decompression, anterior-inferior capsular repair, and extensive debridement of the articular side rotator cuff tendon tear. He stopped work and returned on July 18, 2012. Appellant filed a claim for leave buy back compensation (Form CA-7) for the period June 27 to July 17, 2012. OWCP paid compensation for the period June 28 to July 17, 2012.

In August 2012 appellant retired from federal employment.

In a July 22, 2015 report, Dr. Gary Y. Okamura, a Board-certified orthopedic surgeon, conducted a follow-up examination of appellant and related that x-ray scans showed a "little bit" of arthritis in the acromioclavicular (AC) joint. Upon physical examination, he observed good rotator cuff strength and normal strength involving the elbow flexors and supinator. Dr. Okamura noted subacromial crepitus. Range of motion testing demonstrated forward flexion to 170 degrees, external rotation to 40 degrees, and limited internal rotation. Dr. Okamura reported that impingement signs and O'Brien's tests were negative.

On August 24, 2015 appellant filed a claim for schedule award (Form CA-7).

By letter dated August 26, 2015, OWCP requested that appellant provide a medical report from his treating physician with an opinion on whether he had reached maximum medical improvement (MMI) and whether he had a permanent impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Neelesh B. Fernandes, a Board-certified orthopedic surgeon and second opinion examiner, in order to determine whether appellant sustained ratable permanent impairment of his accepted left shoulder injury in accordance with the A.M.A., *Guides.*

In a narrative report dated February 4, 2016, Dr. Fernandes reviewed appellant's history, including the SOAF and medical records, and accurately described the January 23, 2012 employment injury. He related appellant's complaints of left shoulder pain worsened with lifting or working overhead. Upon physical examination of appellant's left shoulder, Dr. Fernandes observed tenderness to palpation at the left supraspinatus and infraspinatus tendons and tenderness to palpation at the right supraspinatus, infraspinatus, and subscapularis tendons. Neurological examination showed grossly intact light touch sensation in the bilateral upper extremities. Dr. Fernandes provided a series of range of motion findings. He diagnosed left shoulder pain secondary to SLAP tear, posterior labral tear, distal supraspinatus tear, distal

infraspinatus tear, and anterior capsule tear status post left shoulder arthroscopy. Dr. Fernandes noted a date of MMI of February 11, 2013. He utilized the range of motion methodology set forth in Table 15-34, page 475, Shoulder Range of Motion of the A.M.A., *Guides* due to appellant's decreased range of motion of the left shoulder, to calculate permanent impairment. Dr. Fernandes reported that appellant had three percent upper extremity impairment due to flexion to 150 degrees, three percent upper extremity impairment due to abduction to 160 degrees, and two percent upper extremity impairment due to external rotation to 40 degrees. He calculated total motion deficit of the upper extremity impairment at eight percent. Dr. Fernandes noted a grade modifier of 0 for functional history due to appellant's *Quick*DASH score of 18, which resulted in final left upper extremity permanent impairment of eight percent.

In a March 12, 2016 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record, including Dr. Fernandes' February 4, 2016 impairment rating report. He indicated that appellant was doing well following his left shoulder surgery, but still had subjective complaints of residual left shoulder pain. Dr. Garelick reported that physical examination of appellant's left shoulder revealed good strength and well-healed surgical incisions. Range of motion examination demonstrated 175 degrees of forward flexion, 40 degrees of external rotation, and limited internal rotation. Dr. Garelick noted a *Quick*DASH score of 18. He disagreed with Dr. Fernandes' impairment rating of eight percent permanent impairment of the left upper extremity because the impairment rating was based on the range of motion methodology. Dr. Garelick quoted page 387 of the A.M.A., *Guides,*[3] which indicated that range of motion should only be used to determine actual impairment values when it was not possible to otherwise define impairment. He referenced Table 15-5, page 404, of the A.M.A., *Guides* utilizing the diagnosis-based impairment (DBI) methodology and opined that appellant had three percent permanent impairment of the left upper extremity as the default value for a SLAP tear. Dr. Garelick noted that there was no change to the award with the net adjustment formula. He indicated that the date of MMI was February 11, 2013.

In a decision issued March 24, 2016, OWCP granted a schedule award for three percent permanent impairment of the left upper extremity, based on Dr. Garelick's March 12, 2016 report. The award ran from February 11 to April 17, 2013.

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.[4] 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.[5] FECA, however, does not specify

[3] Physicians interchangeably cite to language in the first printing or the second printing when justifying use of either range of motion or DBI methodology under the current edition of the A.M.A., *Guides*.

[4] *See* 20 C.F.R. §§ 1.1-1.4.

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

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.[6]

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).[7] 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.[8]

ANALYSIS

The issue on appeal is whether appellant has more than three percent permanent impairment of his left 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 range of motion methodology when assessing the extent of permanent impairment for schedule award purposes.[9] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[10] 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 range of motion 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 range of motion or DBI methodology. Because OWCP's

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[6] 20 C.F.R. § 10.404. *See also, Ronald R. Kraynak,* 53 ECAB 130 (2001).

[7] *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).

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

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

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

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.[11]

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 March 24, 2016 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 is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 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 20, 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

[11] *Supra* note 9.