United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
	)	**Docket No. 17-1424**
and	)	**Issued: October 25, 2017**
	)	
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 15, 2017 appellant filed a timely appeal from a February 2, 2017 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 11 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

On appeal appellant contends that the medical opinion of OWCP's district medical adviser (DMA) lacks probative value and cannot carry the weight of the medical evidence.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 29, 2015 appellant, then a 40-year-old internal revenue agent, filed an occupational disease claim (Form CA-2) alleging that on October 3, 2014 he first became aware of his right rotator cuff injury and first realized that his condition was caused by his federal employment. He claimed that, while he was assembling documents for review and closure by a group manager, he felt a very sharp pain go through his right shoulder while using a hole-puncher to perforate case file documents.

OWCP accepted the claim for sprain of the right shoulder and upper arm, acromioclavicular (AC) and disorder of the bursae and tendons in the right shoulder region, unspecified, complete right rotator cuff rupture, and right brachial neuritis or radiculitis, not otherwise specified. It authorized right shoulder arthroscopy with subacromial decompression and distal clavicle resection performed on July 7, 2015 by Dr. Steven H. Bernstein, an attending Board-certified orthopedic surgeon. OWCP paid wage-loss compensation benefits.

Appellant returned to limited-duty work six hours a day, five days a week, with restrictions on October 3, 2015. He returned to full-time work with restrictions on June 18, 2016.

On June 28, 2016 appellant filed a claim for a schedule award (Form CA-7). He submitted a June 17, 2016 letter from Dr. Bernstein in which he noted a history of appellant's medical treatment. On physical examination, Dr. Bernstein utilized diagnosis-based (DBI) method to determine the degree of permanent impairment. He advised that, in accordance with Table 15-5, page 402 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] appellant's rotator cuff contusion with impingement and residual loss, but functional, equated to five percent upper extremity impairment. Dr. Bernstein further advised that an AC joint injury/disease equated to eight percent upper extremity impairment. Using the Combined Values Chart on page 604, he calculated a 13 percent impairment of the upper extremity and an 8 percent whole person impairment. Dr. Bernstein awarded an additional four percent impairment each for pain, weakness, and loss of endurance and function. He found no additional impairment for atrophy. Dr. Bernstein concluded that appellant had 29 percent total upper extremity permanent impairment and 24 percent whole body impairment. He advised that appellant could return to his internal revenue field agent position with restrictions.

On July 21, 2016 an OWCP DMA reviewed the medical record, including Dr. Bernstein's report. He noted appellant's diagnoses of impingement syndrome and AC disease. The DMA used the range of motion (ROM) method as opposed to a DBI methodology, which required normal ROM. He referenced Dr. Bernstein's ROM measurements and applied Table 15-34, page 475 of the sixth edition of the A.M.A., *Guides*. The DMA found 3 percent impairment each for flexion and abduction, no impairment for external rotation, and 4 percent impairment for internal rotation, totaling 10 percent impairment. He assigned a grade modifier 1 for ROM under Table 15-35, page 477. The DMA found a grade modifier 1 for decreased total

[2] A.M.A., *Guides* (6th ed. 2009).

ROM according to Table 15-36, page 477. He assigned a grade modifier 2 for functional history for pain with normal activity based on Table 15-7, page 406. The DMA then calculated a 10.5 percent or 11 percent impairment of the right upper extremity. He explained that his impairment rating was markedly lower than Dr. Bernstein's impairment rating because Dr. Bernstein had rated two diagnoses under the DBI method and added the impairment ratings. The DMA referenced page 387 of the A.M.A., *Guides*, which directed that, if a patient had two significant diagnoses, the examiner should use the diagnosis with the highest causally related impairment for the impairment calculation. He also noted that Dr. Bernstein awarded additional impairment ratings for pain, weakness, and loss of endurance and function which was not acceptable under the sixth edition of the A.M.A., *Guides*. The DMA determined that appellant had reached maximum medical improvement on June 17, 2016, the date of Dr. Bernstein's evaluation.

By letter August 4, 2016, OWCP requested that appellant obtain a supplemental report from Dr. Bernstein regarding the extent of his permanent impairment based on the physician's review of the DMA's report.

In an August 19, 2016 letter, Dr. Bernstein reviewed the DMA's report and disagreed with his use of the ROM methodology to calculate appellant's impairment rating. He maintained that this methodology was inappropriate and inadequate as it failed to capture the degree of appellant's pain, difficulty, and impairment. Dr. Bernstein reiterated his prior finding that appellant had 29 percent arm impairment and 24 percent whole body impairment.

The DMA, on September 20, 2016, reviewed Dr. Bernstein's August 19, 2016 report. He reiterated why his use of the ROM methodology to calculate appellant's impairment rating was more appropriate under the A.M.A., *Guides*. The DMA also restated why Dr. Bernstein's impairment rating was not acceptable under the A.M.A., *Guides*.

By decision dated October 4, 2016, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity, based on the opinion of the DMA. The period of the award ran from June 18, 2016 to February 13, 2017.[3]

In an appeal request form and letter received on November 4, 2016, appellant requested reconsideration.

By decision dated February 2, 2017, OWCP denied modification of the October 4, 2016 decision. It found that the weight of the medical evidence remained with the DMA's opinion.

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

[3] On November 30, 2016 appellant accepted a lump-sum payment of the schedule award.

[4] *See* 20 C.F.R. §§ 1.1-1.4.

use of specified members, functions, and organs of the body.[5] 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 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 11 percent permanent impairment of the 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 had been followed regarding the proper use of the DBI or ROM 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 were at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial

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

[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 (March 2017).

[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).

medical examiners, and DMAs 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.[11]

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the February 2, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, 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.

On appeal appellant contends that the medical opinion of OWCP's DMA lacks probative value and cannot carry the weight of the medical evidence. As set forth above, the case is not in posture for decision and will be remanded for additional action.

CONCLUSION

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

[11] *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: October 25, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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