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

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| **J.L., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1629** |
| | ) | **Issued: July 3, 2017** |
| **U.S. POSTAL SERVICE, POST OFFICE, Bedford Park, IL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On July 27, 2015 appellant filed a timely appeal from an April 30, 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.[2]

### ***ISSUE***

The issue is whether appellant has met her burden of proof to establish more than two percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant submitted additional evidence after OWCP's April 30, 2015 decision. The Board cannot consider evidence which was not before OWCP at the time it issued its final decision. Thus, the Board is precluded from reviewing this evidence. *See* 20 C.F.R. § 501.2(c)(1).

## ***FACTUAL HISTORY***

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

Appellant, a 63-year-old former secretary, has an accepted occupational disease claim (Form CA-2) for bilateral carpal tunnel syndrome, right de Quervain's/radial styloid tenosynovitis, right hand/wrist tenosynovitis, right lateral epicondylitis, and right shoulder disorder of the bursae and tendons. These conditions arose on or about February 22, 2008. Appellant voluntarily retired effective May 31, 2011.

In a December 29, 2011 report, Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, indicated that, under Table 15-23 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), appellant had 23 percent permanent impairment of her left upper extremity due to carpal tunnel syndrome. He advised that, under Table 15-32 through Table 15-34, she had 56 percent permanent impairment of her right upper extremity due to limited range of motion (ROM) of her right wrist, elbow, and shoulder.[4]

On April 25, 2013 Dr. Chmell noted that his prior impairment rating was based not only on carpal tunnel syndrome, but also on tenosynovitis of the right hand and wrist, disorder of bursae/tendons of the right shoulder, and lateral epicondylitis of the right elbow.

Appellant filed a claim for a schedule award (Form CA-7) due to her accepted work injuries. In a February 7, 2014 decision, OWCP determined that she had failed to establish permanent impairment warranting a schedule award compensation.

OWCP subsequently referred appellant for a second opinion examination and impairment evaluation to Dr. Allan Brecher, a Board-certified orthopedic surgeon. In a June 30, 2014 report, Dr. Brecher determined that appellant's carpal tunnel syndrome, epicondylitis, and right shoulder tendinitis had resolved and, therefore, she had no permanent impairment due to these conditions. He also determined that appellant continued to have right de Quervain's tenosynovitis and concluded that she had two percent permanent impairment of her right upper extremity due to this condition under the standards of the sixth edition of the A.M.A., *Guides*. Dr. Brecher noted, "[W]e look at Table 15-5, she has a class 1, grade D, functional history 2, physical exam[ination] 2, clinical studies 3, and [*Quick*DASH] score 52 gives her [two] percent upper extremity impairment. Therefore, [appellant's] regional impairment is [two] percent."[5]

[3] Docket No. 14-1896 (issued January 15, 2015).

[4] Dr. Chmell noted that, with respect to her right wrist, appellant had three percent permanent impairment due to 45 degrees of flexion, three percent permanent impairment due to 40 degrees of extension, and two percent permanent impairment due to 10 degrees of ulnar deviation.

[5] Regarding Dr. Chmell's April 25, 2013 report, Dr. Brecher indicated that in the past Dr. Chmell had used the ROM impairment rating method, but noted that this was "not relevant as we are supposed to use diagnosis-related impairment."

In an August 4, 2014 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that he agreed with Dr. Brecher's assessment that appellant had two percent permanent impairment of her right upper extremity under the standards of the sixth edition of the A.M.A., *Guides.*

In an August 14, 2014 decision, OWCP granted appellant a schedule award for two percent permanent impairment of her right upper extremity. The award ran for 6.24 weeks from June 27 to August 9, 2014 and was based on the June 30, 2014 report of Dr. Brecher and the August 4, 2014 report of Dr. Garelick.

Appellant filed an appeal with the Board on August 25, 2014. In a January 15, 2015 decision, the Board set aside OWCP's August 14, 2014 decision and remanded the case for further development of the medical evidence.[6] The Board found that there were various deficiencies in Dr. Brecher's June 30, 2014 report that needed to be clarified. The Board noted that Dr. Brecher rated the right shoulder tendinitis condition using the diagnosis-based impairment (DBI) rating method, under Table 15-5 of the sixth edition of the A.M.A., *Guides*, without explaining why he chose this diagnosed condition as the primary condition for rating. The Board further indicated that Dr. Brecher did not provide adequate explanation for how he chose the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE), and grade modifier for Clinical Studies (GMCS). Additionally, the Board found that Dr. Brecher indicated that various accepted conditions other than de Quervain's tenosynovitis had resolved, including bilateral carpal tunnel syndrome and right epicondylitis, but he did not provide adequate rationale as to why he opined that they had resolved. Lastly, the Board determined that Dr. Brecher did not adequately explain why he discounted Dr. Chmell's use of the ROM impairment rating method, rather than the DBI impairment rating method. The Board directed OWCP to carry out development to clarify these matters and issue a decision regarding whether appellant has more than two percent permanent impairment of her right upper extremity.

On remand OWCP referred the case back to Dr. Brecher for a supplemental opinion clarifying the matters raised by the Board in its January 15, 2015 decision.

In a March 13, 2015 report, Dr. Brecher provided an assessment of appellant's impairment under the sixth edition of the A.M.A., *Guides*. He indicated that appellant had de Quervain's tenosynovitis, rather than right shoulder tendinitis, and that the portion of Table 15-2 regarding digital stenosing tenosynovitis (class 1) provided the correct standards to use for this diagnosis. Dr. Brecher opined that appellant's bilateral carpal tunnel and shoulder conditions had resolved based on her subjective complaints and the findings on physical examination. He noted that, under Table 15-7 through Table 15-9, appellant had a GMFH of 2 due to a moderate problem with a history of difficulty using her right hand, decreased sensation, and decreased ROM in the right thumb. Dr. Brecher also noted a GMPE of 2 due to moderate, clearly palpatory findings including a positive Finkelstein test. Finally, he found a GMCS of 2 due to clinical confirmation of moderate de Quervain's tenosynovitis. Dr. Brecher advised that

[6] *See supra* note 3.

application of the net adjustment formula meant that appellant had eight percent permanent impairment of her right upper extremity.

On April 6, 2015 Dr. Garelick, again serving as an OWCP medical adviser, reviewed the supplemental opinion of Dr. Brecher. He indicated that he disagreed with Dr. Brecher's conclusion that appellant had eight percent permanent impairment of her right upper extremity. Dr. Garelick noted that Dr. Brecher properly indicated that appellant had ongoing de Quervain's tenosynovitis, but improperly assigned the DBI category for the diagnosis of stenosing tenosynovitis in Table 15-2 of the sixth edition of the A.M.A., *Guides*. He opined that de Quervain's tenosynovitis fell under the DBI category for a wrist sprain in Table 15-3. Dr. Brecher found that the most appellant could be awarded for her permanent impairment under this DBI category was two percent of the right upper extremity.

By decision dated April 30, 2015, OWCP found that appellant did not meet her burden of proof to establish more than two percent permanent impairment of her right upper extremity for which she previously received a schedule award. It based this determination on Dr. Garelick's April 6, 2015 review of Dr. Brecher's March 13, 2015 report.[7]

## ***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 Director of the Office of Workers' Compensation Programs.[8] 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.[9] 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.[10]

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

[7] After appellant filed this appeal on July 27, 2015, OWCP issued a March 17, 2016 decision granting her an award for five percent permanent impairment of her left upper extremity and an additional five percent permanent impairment of her right upper extremity. This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same case. OWCP may not issue a decision regarding the same issue on appeal before the Board, in this instance, a schedule award for upper extremity impairment. *See Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990); *see also* 20 C.F.R. § 501.2(c)(3).

[8] *See* 20 C.F.R. §§ 1.1-1.4.

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

[10] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).[11] 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.[12]

## ***ANALYSIS***

The issue on appeal is whether appellant has met her burden of proof to establish more than two percent permanent impairment of her right upper extremity for which she 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 the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[13] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[14] 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 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 cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were 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.[15]

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 April 30, 2015 decision. Utilizing 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.

[11] *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).

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

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

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

[15] *Supra* note 13.

## ***CONCLUSION***

The Board finds this case not in posture for decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 30, 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: July 3, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board