United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 17-0320**
	)	**Issued: July 10, 2017**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PATROL, El Paso, TX, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 28, 2016 appellant filed a timely appeal from an August 17, 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 to consider the merits of the case.

ISSUE

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

On appeal appellant disagrees with his impairment rating as he feels that his right arm is significantly weaker than his left. He notes that he was required to pass a yearly physical fitness

[1] 5 U.S.C. § 8101 *et seq.*

test in his position which necessitated daily exercise. Appellant contends that his strength and endurance has been significantly reduced due to his employment injury.

FACTUAL HISTORY

On November 27, 2013 appellant, then a 34-year-old BORSTAR operator, filed a traumatic injury claim (Form CA-1) alleging that on November 5, 2013, while loading a plastic case containing equipment into the back of his service vehicle, he felt and heard a loud pop and experienced severe pain in his right elbow. He alleged that he sustained pain and sensitivity to touch in his right elbow as well as pain and weakness during flexion and extension. Appellant also alleged right shoulder pain and weakness. He returned to full duty with no restrictions on December 9, 2013.

On February 21, 2014 OWCP accepted appellant's claim for sprain of the right elbow and forearm.

Appellant underwent a magnetic resonance imaging (MRI) scan of his right elbow on February 26, 2014. This scan demonstrated olecranon bone contusion or stress reaction and partial thickness tear of the triceps tendon without full-thickness tear or tendon retraction. A second MRI scan on November 26, 2014 showed intact common flexor and extensor tendons, normal biceps and triceps tendon attachments, and a normal marrow signal.

Dr. Andrew J. Palafox, a Board-certified orthopedic surgeon, examined appellant on December 22, 2014 and reviewed the November 26, 2014 MRI scan. He disagreed with the findings of the MRI scan noting that appellant had "a very significant palpable defect in the triceps tendon." Dr. Palafox noted appellant's continued difficulty with push-ups overhead activities, and bench press. He diagnosed triceps tendon tear and recommended that appellant's MRI scan be reread. On March 2, 2015 Dr. Palafox reported that appellant's November 26, 2014 MRI scan was reread to reveal a partial thickness tear of the triceps tendon. He recommended an open surgical repair with debridement of the osteophyte on the olecranon and augmented repair of the tendon.

In a report dated February 24, 2016, Dr. Palafox opined that appellant injured his dominant right elbow at work resulting in a partial triceps tendon rupture that did not require surgery. He reported that appellant returned to regular full-duty work with residual symptoms including stiffness, pain, and swelling in his elbow as well as weakness compared to his left arm. Dr. Palafox performed a physical examination and found full range of motion (ROM) with crepitus and point tenderness. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*) and noted that there was no diagnosis-based impairment (DBI) for triceps tendon. Dr. Palafox opined that a triceps tendon rupture would be similar to a biceps tendon rupture and applied Table 15-4.[3] He utilized the net

[2] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); *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).

[3] A.M.A., *Guides* 399, Table 15-4.

adjustment formula of the A.M.A., *Guides*[4] and determined that appellant had a class 1 injury, with grade modifier Functional History (GMFH) of 1, grade modifier Physical Examination (GMPE) of 1, and grade modifier Clinical Studies (GMCS) of 1 based on partial tear of the triceps tendon as seen on MRI scan. Dr. Palafox determined that appellant had default grade C or five percent permanent arm impairment. He advised that appellant had reached maximum medical improvement.

Appellant filed a schedule award claim (Form CA-7) on June 15, 2016.

OWCP's medical adviser reviewed Dr. Palafox's report on June 27, 2016. Dr. Palafox noted appellant's diagnosed condition of triceps tendon tear and agreed to the method of using the DBI method for biceps tendon rupture as appropriate for determining appellant's impairment rating. He determined that appellant had GMFH of 1[5] as his elbow was still symptomatic, that he had a GMPE of 1[6] as there was tenderness to palpation, and that the GMCS[7] was not applicable as it was used to place appellant in the correct diagnostic category. The medical adviser applied the net adjustment formula and determined that appellant's grade of impairment was the default C with five percent permanent impairment of the right upper extremity.[8]

By decision dated August 17, 2016, OWCP granted appellant a schedule award for five percent permanent impairment of his right upper extremity.

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.[9] 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.[10] 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

[4] *Id*. at 411.

[5] *Id*. at 406, Table 15-7.

[6] *Id*. at 408, Table 15-8.

[7] *Id*. at 411. "If a particular criterion, … was used to determine the impairment class, it may not be used again to determine the grade and is disregarded in the impairment calculation."

[8] *Id*. at 399, Table 15-4.

[9] *See* 20 C.F.R. §§ 1.1-1.4.

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

regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[11]

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).[12] 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.[13]

ANALYSIS

The issue is whether appellant has met his burden of proof to establish more than five percent permanent impairment of his right upper extremity for which he 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.[14] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[15] 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 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

[11] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[12] Federal (FECA) Procedure Manual, *supra* note 2.

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

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

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

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.[16]

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 August 17, 2016 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.

CONCLUSION

The Board finds the case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: July 10, 2017
Washington, DC

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

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

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

[16] *Supra* note 14.