

² The record forwarded to the Board includes medical evidence and other documents that were either received or created after OWCP issued its September 28, 2011 schedule award. Because this evidence was not part of the record when OWCP issued its September 28, 2011 decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 37-year-old former customs patrol officer, was involved in an employment-related motor vehicle accident on June 22, 2006. OWCP accepted his claim for closed fracture of mandible, closed fracture of right scapula, closed fractures of neck and shaft of right femur, closed fracture of acetabulum, aseptic necrosis of head and neck of right femur, and joint pain, right pelvic region and thigh. Appellant underwent multiple surgical procedures to repair his jaw, right hip, right femur and right shoulder. Because of his various injuries, he was unable to resume his duties as a customs patrol officer.³ OWCP paid appropriate wage-loss compensation.

On March 28, 2011 appellant filed a claim for a schedule award (Form CA-7).

In a report dated June 17, 2011, Dr. Susan B. Fleming, M.D., found, *inter alia*, 36 percent impairment of the right upper extremity (RUE) under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Her RUE impairment rating was based on loss of motion in the shoulder (25 percent) and peripheral nerve injury (15 percent) involving the suprascapular nerve.⁴ With respect to appellant's right lower extremity (RLE), Dr. Fleming found 16 percent impairment based on his right hip avascular necrosis.

Dr. Mark E. Frankel, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on August 15, 2011, and found 24 percent RUE impairment based on a class 2 acromioclavicular (AC) joint injury under Table 15-5, A.M.A., *Guides* 403 (6th ed. 2008). Dr. Frankel also found 15 percent RLE impairment based on a class 2 hip dislocation with relocation and avascular necrosis. He referenced Table 16-4, A.M.A., *Guides* 513 (6th ed. 2008).

The district medical adviser (DMA), Dr. Leonard A. Simpson, reviewed the record on September 10, 2011, and concurred with Dr. Frankel's August 15, 2011 impairment rating of 24 percent RUE and 15 percent RLE. His report did not reference Dr. Fleming's June 17, 2011 findings.

By decision dated September 28, 2011, OWCP granted a schedule award for 24 percent RUE impairment and 15 percent RLE impairment.⁵ The award was based on the medical findings of Dr. Frankel and the DMA.

LEGAL PRECEDENT

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.⁶ FECA,

³ Appellant retired effective September 5, 2007.

⁴ Regarding appellant's right shoulder impairment, Dr. Fleming explained that the A.M.A., *Guides* permitted an alternative rating for loss of shoulder motion instead of utilizing the diagnosis-based rating for shoulder fracture under Table 15-5, A.M.A., *Guides* 405 (6th ed. 2008).

⁵ The award covered a period of 118.08 weeks from September 25, 2011 to December 29, 2013.

⁶ For a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1). A total loss of use of a leg (100 percent) warrants 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

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. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁸

ANALYSIS

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.

Appellant's physician, Dr. Fleming, provided a June 17, 2011 impairment rating under the A.M.A., *Guides* (6th ed. 2008). Her 36 percent RUE impairment rating was based on loss of shoulder motion and peripheral nerve injury.⁹ Dr. Fleming also found 16 percent RLE impairment. OWCP's referral physician, Dr. Frankel, and the DMA found 24 percent RUE impairment and 15 percent RLE impairment. Neither Dr. Frankel nor the DMA specifically commented on Dr. Fleming's June 17, 2011 impairment rating. Similarly, the September 28, 2011 decision made no mention of Dr. Fleming's impairment rating.

FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹⁰ Because of an unresolved conflict in medical opinion between appellant's physician, Dr. Fleming and Dr. Frankel and the DMA on behalf of OWCP, the case shall be remanded to OWCP for referral to an impartial medical examiner. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued regarding appellant's claim for a schedule award.

CONCLUSION

The case is not in posture for decision.

⁷ 20 C.F.R. § 10.404.

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

⁹ Although the diagnosis-based approach is the preferred method of evaluating permanent impairment under the sixth edition of the A.M.A., *Guides*, the Shoulder Regional Grid, Table 15-5, A.M.A., *Guides* 401-05 (6th ed. 2008), provides that, if loss of motion is present, the impairment may alternatively be assessed using section 15-7, Range of Motion (ROM) Impairment. See section 15-7, A.M.A., *Guides* 459, 461.

¹⁰ 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321(b); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale." *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 10, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board