

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

C.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Blackwood, NJ, Employer**

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**Docket No. 10-1910
Issued: July 6, 2011**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 14, 2010 appellant, through counsel, filed a timely appeal from a March 29, 2010 decision of the Office of Workers' Compensation Programs affirming a schedule award determination. Pursuant to the Federal Employees' Compensation Act¹ 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 established that she is entitled to a greater than six percent impairment of the left upper extremity, for which she received a schedule award.

On appeal appellant's counsel contends that the Office's delay in adjudicating appellant's schedule award claim under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) violated her due process rights as was deprived of a property right

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 21, 2003 appellant, then a 37-year-old rural letter carrier, filed a traumatic injury claim alleging that on October 8, 2003 she injured her left shoulder in the performance of duty. The Office accepted the claim for left shoulder impingement tendinopathy and authorized left shoulder arthroscopic subacromial decompression surgery, which was performed on September 5, 2007.

In a report dated August 26, 2008, Dr. David Weiss, an osteopath, provided a history and results on examination. He reported diagnoses of the right and left upper extremity including a left shoulder impingement syndrome and arthroscopic subacromial decompression. Dr. Weiss determined that appellant had a 13 percent left upper extremity impairment using the fifth edition of the A.M.A., *Guides*. Using Table 16-27, page 506, he found a 10 percent impairment due to left shoulder resection arthroplasty and a 3 percent impairment using Figure 18-1, page 574 for pain, resulting in a total 13 percent left upper extremity impairment.

On January 30, 2009 appellant filed a claim for a schedule award.

On August 18, 2009 the Office advised appellant that effective May 1, 2009 the sixth edition of the A.M.A., *Guides* was to be used in determining a schedule award and requested that she provide a report based on this edition of the A.M.A., *Guides*.

In an updated October 26, 2009 report, Dr. Weiss provided an impairment rating using the sixth edition of the A.M.A., *Guides*. Using Table 15-5, page 403,² he determined that appellant was a class 1 for left shoulder rotator cuff tear, resulting in a default value of 5C. Dr. Weiss identified grade modifier 1 for functional history on functional scale (*QuickDASH*) of 39 percent using Table 15-7, page 406, a grader modifier of 1 for physical examination using Table 15-8 for observed and palpatory findings, page 408 and grade modifier 2 for clinical studies using Table 15-9, page 410. The default value is five percent shoulder impairment. Applying the adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), the net adjustment was one, for a six percent left upper extremity impairment³ obtained by moving one over from 5C to 6D. The date of maximum medical improvement was August 26, 2008.

On December 22, 2009 an Office medical adviser reviewed the medical evidence and found that Dr. Weiss properly applied the A.M.A., *Guides*.

By decision dated January 8, 2010, the Office issued a schedule award granting appellant a six percent impairment of the left upper extremity. The period of the award was for 18.72 weeks and ran from August 26, 2008 to January 4, 2009.

In a letter dated January 18, 2010, appellant's counsel requested a review of the written record by an Office hearing representative.

² The physician incorrectly notes the page number as 402.

³ The equation was as follows: (1-1) = 0 + (1-1) = 0 + (2-1) = net adjustment of 1.

By decision dated March 29, 2010, the Office hearing representative affirmed the January 8, 2010 schedule award determination.

LEGAL PRECEDENT

The schedule award provision of the Act⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁷

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).⁸ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰

ANALYSIS

Appellant's claim was accepted by the Office's left shoulder impingement tendinopathy and for which she underwent left shoulder arthroscopic subacromial decompression on September 5, 2007. On January 30, 2009 she filed a claim for a schedule award. The Board finds that the medical evidence of record establishes six percent impairment to appellant's left upper extremity.

Under the sixth edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15. Section 15-2, entitled Diagnosis-Based Impairment, indicates that

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁹ A.M.A., *Guides* (6th ed. 2009), pp. 383-419.

¹⁰ *Id.* at page 411.

diagnosis-based impairment is the primary method of evaluation of the upper limb.¹¹ The initial step in the evaluation process is to identify the impairment class by using the corresponding diagnosis-based regional grid. Dr. Weiss utilized the Shoulder Regional Grid, Table 15-5, A.M.A., *Guides* 403, and identified a class 1 impairment based on left shoulder rotator cuff tear. He noted that appellant had a history of painful injury with residual loss and functional with normal motion warranting a class 1 designation. Once the impairment class was determined based on the diagnosis, the grade was initially assigned the default value, C. Under Table 15-5, the default grade, C, for a class 1 rotator cuff tear represents five percent upper extremity impairment.¹²

After determining the impairment class and default grade, Dr. Weiss determined whether there were any applicable grade adjustments for so-called nonkey factors or modifiers. These include adjustments for GMFH, GMPE and GMCS. The grade modifiers are used in the net adjustment formula to calculate a net adjustment.¹³ The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment. Dr. Weiss identified three modifiers; one based on the GMFH, one based on GMCS and the third based on GMPE. For the functional history, Dr. Weiss assigned a grade modifier 1 based on appellant *QuickDASH* score of 39.¹⁴ He next assigned a grade modifier 1 based on appellant's left shoulder physical examination findings.¹⁵ Lastly, Dr. Weiss assigned a grade 2 modifier for clinical studies.¹⁶ Applying the net adjustment formula resulted in a modifier of 1 resulting in six percent, which resulted in a grade adjustment from C to D. The corresponding upper extremity impairment for a class 1, grade D rotator cuff tear is six percent.¹⁷

The Board finds that Dr. Weiss properly applied the A.M.A., *Guides* (6th ed.) to rate impairment to appellant's left shoulder. The Office medical adviser reviewed the medical evidence and agreed that appellant had six percent impairment under the formula of the sixth edition. The weight of medical evidence from the treating physician and the Office medical adviser establishes the extent of permanent impairment in this case.

On appeal, appellant asserts that he has property right in a schedule award benefit under the fifth edition and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance and

¹¹ A.M.A., *Guides* 387, section 15.2.

¹² The grades range from A to E, with A representing three (3) percent upper extremity impairment, B representing four (4) percent impairment, C representing five (5) percent, D representing six (6) percent impairment and E representing seven (7) percent upper extremity impairment. A.M.A., *Guides* 402, Table 15-5.

¹³ Net Adjustment = (GMFH CDX) + (GMPE CDX) + (GMCS CDX). A.M.A., *Guides*, section 15.3d, page 411

¹⁴ A.M.A., *Guides* 406, Table 15-7.

¹⁵ *Id.* at 408, Table 15-8.

¹⁶ *Id.* at 410, Table 15-9.

¹⁷ *Id.* at 403, Table 15-5.

in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process.¹⁸ In this case, appellant is simply making a claim for a schedule award. He was not in receipt of schedule award benefits nor was the Office attempting to terminate benefits. Appellant has no vested right to a schedule award under the fifth edition of the A.M.A., *Guides*.

Appellant argued that there was a delay in the adjudication of the claim for a schedule award, which deprived her of due process rights regarding a determination under the fifth edition of the A.M.A., *Guides*. Counsel noted that appellant filed her schedule award claim on January 30, 2009, but the Office waited until January 8, 2010 to issue a decision on her claim. The Board does not find that there was any delay in the adjudication of the schedule award claim. In *Harry Butler*,¹⁹ the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.²⁰ On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.²¹ The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed. The Office properly determined appellant's left upper extremity impairment under that edition.

CONCLUSION

The Board finds the evidence does not establish that appellant has more than a six percent left upper extremity impairment, for which she received a schedule award.

¹⁸ In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient and due process would not require an evidentiary hearing.

¹⁹ 43 ECAB 859 (1992).

²⁰ *Id.* at 866.

²¹ FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2010 is affirmed.

Issued: July 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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