

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

neck and shoulder. OWCP accepted cervical radiculopathy. Appellant did not stop work but returned to a light-duty position.

From March 19 to December 10, 2003, appellant was initially treated by Dr. Eric M. Lipnack, Board-certified in physiatry, for cervical pain and radiation into her upper extremities after a fall at work. On physical examination, Dr. Lipnack noted equivocal weakness and sensory changes. On April 2, 2003 he performed an electromyogram (EMG) which revealed acute C5-6 radiculopathy on the right. In a January 11, 2006 report, Dr. Lipnack noted appellant's complaints of trapezius and cervical myofasciitis. On May 27, 2003 a magnetic resonance imaging (MRI) scan of the cervical spine revealed straightening of the normally lordotic cervical curve, paraspinal muscle spasm, mild anterior mid-cervical spondylosis and bulging annulus at C5-6.

In a letter dated September 4, 2008, appellant through counsel requested a schedule award. In a July 10, 2008 report, Dr. Arthur Becan, a Board-certified orthopedic surgeon, provided an impairment rating under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> He advised that appellant had 15 percent impairment of the right arm. Dr. Becan found that she was at maximum medical improvement.

On September 12, 2008 OWCP requested that appellant submit a Form CA-7 to claim a schedule award. On February 24, 2009 appellant submitted a Form CA-7, claiming a schedule award. In a March 18, 2009 report, OWCP's medical adviser reviewed Dr. Becan's report and agreed with his conclusion that appellant had a total 15 percent impairment of the right arm.

OWCP subsequently asked that appellant submit a rating of permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*<sup>3</sup> effective May 1, 2009. In a January 29, 2010 report, Dr. Becan provided an impairment rating under the sixth edition of the A.M.A., *Guides*.<sup>4</sup> Cervical spine examination showed tenderness and muscle spasm in the right paravertebral and right trapezius muscles from C4-7, positive Spurling's test on the right, facet joint tenderness at C5-7 facet joints, restricted range of motion with right paraspinal and right shoulder pain. Manual muscle strength testing revealed the deltoid and biceps graded at 4/5 bilaterally and sensory examination revealed decreased sensation over the entire dorsal aspect of the right hand and arm as compared to the left. Dr. Becan noted that the April 2, 2003 EMG revealed right C5-6 radiculopathy and the July 23, 2003 MRI scan of the cervical spine revealed straightening of the normal cervical lordosis and herniated cervical disc at C5-6 to the right. He diagnosed chronic post-traumatic cervical strain and sprain, herniated C5-6 disc, post-traumatic, right C5-6 radiculopathy, post-traumatic, chronic trapezius myofasciitis and post-traumatic brachial neuropathy involving the right arm and shoulder secondary to thoracic outlet syndrome. Appellant's *QuickDash* disability score was 63 percent and the Pain Disability Questionnaire

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<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> *Id.* at (6<sup>th</sup> ed. 2009).

<sup>4</sup> *Id.*

equated to a raw score of 108 for severe cervical spine pain disability. Dr. Becan noted that appellant was at maximum medical improvement.

In accordance under Chapter 15 of the sixth edition of the A.M.A., *Guides* for radiculopathy/peripheral nerve impairment of the right upper extremity, appellant had a class 1 right upper extremity impairment for mild motor strength deficit of the right biceps (musculocutaneous), under Table 15-21, page 441, with a default grade of three percent.<sup>5</sup> He assigned grade modifiers, finding that the *QuickDASH* score of 63 yielded a Functional History (GMFH) modifier of three;<sup>6</sup> that the Physical Examination (GMPE) was used to get the involved nerve, therefore it could not also be used for an adjustment modifier; and the grade modifier for Clinical Studies (GMCS), based on a positive EMG, nerve conduction studies and MRI scan of the cervical spine, was two.<sup>7</sup> Dr. Becan applied the net adjustment formula to the grade modifiers to arrive at a net adjustment of three, with an assigned grade modifier of E, which yielded six percent right arm impairment due to motor strength deficit of the right biceps.<sup>8</sup> He advised that appellant was class 1 right upper extremity impairment for mild sensory deficit for the right radial nerve (lower arm), under Table 15-21, page 442, with a default grade of one percent.<sup>9</sup> Dr. Becan assigned grade modifiers, finding that the *QuickDASH* score of 63 yielded a GMFH modifier of three;<sup>10</sup> that the GMPE was used to get the involved nerve, therefore it could not also be used for an adjustment modifier; and the grade modifier for GMCS, based on a positive EMG, nerve conduction studies and MRI scan of the cervical spine, was two.<sup>11</sup> He applied the net adjustment formula to the grade modifiers to arrive at a net adjustment of three, with an assigned grade modifier of E, which remained at one percent right arm impairment for mild sensory deficit.<sup>12</sup> Dr. Becan then concluded that appellant had a combined right upper extremity impairment of seven percent.

In a March 11, 2010 report, OWCP's medical adviser reviewed Dr. Becan's report and agreed that appellant had seven percent impairment of the right arm.

On May 18, 2010 appellant was granted a schedule award for seven percent impairment of the right arm. The period of the award was July 10 to December 9, 2008.

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<sup>5</sup> *Id.* at 441, Table 15-21.

<sup>6</sup> *Id.* at 406, Table 15-7.

<sup>7</sup> *Id.* at 410, Table 15-9.

<sup>8</sup> *Supra* note 5. Dr. Becan noted a right lower extremity impairment after net adjustment of six percent; however, this appears to be a typographical error and should be six percent right upper extremity impairment.

<sup>9</sup> *Supra* note 5

<sup>10</sup> *Supra* note 6.

<sup>11</sup> *Supra* note 7.

<sup>12</sup> Dr. Becan noted a right lower extremity impairment after net adjustment of six percent; however, this appears to be a typographical error and should be six percent right upper extremity impairment.

On May 24, 2010 appellant requested a review of the written record and asserted that the schedule award claim should have been developed under the fifth edition of the A.M.A., *Guides*.

In a decision dated September 20, 2010, OWCP's hearing representative affirmed the May 18, 2005 OWCP decision.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>13</sup> and its implementing regulations<sup>14</sup> 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, FECA 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.<sup>15</sup>

For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>16</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.<sup>17</sup> It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.<sup>18</sup>

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).<sup>19</sup> Under the sixth edition of the A.M.A., *Guides*, for upper extremity impairments the evaluator identifies the impairment class for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>20</sup> The net adjustment formula is GMFH-CDX + GMPE - CDX + GMCS - CDX.<sup>21</sup>

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<sup>13</sup> 5 U.S.C. § 8107.

<sup>14</sup> 20 C.F.R. § 10.404.

<sup>15</sup> See *id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>17</sup> A.M.A., *Guides*, *supra* note 3.

<sup>18</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>19</sup> A.M.A., *Guides*, *supra* note 1 at 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>20</sup> *Id.* at 385-419.

<sup>21</sup> *Id.* at 411.

## ANALYSIS

The sixth edition of the A.M.A., *Guides* provides that upper extremity impairments be classified by diagnosis which is then adjusted by grade modifiers according to the formula noted above.<sup>22</sup> Appellant's accepted diagnosed conditions are for cervical radiculopathy. On May 18, 2010 she was granted a schedule award for seven percent permanent impairment of the right upper extremity. The Board finds that the medical evidence of record establishes seven percent impairment to appellant's right upper extremity.

By report dated January 29, 2010, Dr. Becan discussed the relevant tables in the sixth edition of the A.M.A., *Guides*. He followed the assessment formula of the sixth edition of the A.M.A., *Guides* and advised that, in accordance with Chapter 15, for mild motor strength deficit for the right biceps (musculocutaneous), using Table 15-21, Peripheral Nerve Impairment: Upper Extremity Impairments, appellant would fit a class 1 category, yielding a default grade C for three percent impairment.<sup>23</sup> As discussed, Dr. Becan then applied the grade modifiers for GMFH, three, and GMCS, two, to the net adjustment formula and determined that appellant had a net adjustment of three<sup>24</sup> which moved the default grade of C to grade E for six percent impairment. For mild sensory deficit affecting the right radial nerve (lower arm) using Table 15-21, Peripheral Nerve Impairment: Upper Extremity Impairments, appellant would fit a class 1 category, yielding a default grade C for one percent impairment.<sup>25</sup> As discussed, Dr. Becan then applied the grade modifiers for GMFH, three, and GMCS, two, to the net adjustment formula and determined that appellant had a net adjustment of three<sup>26</sup> which moved the default grade of C to grade E which also yielded one percent impairment.

Dr. Becan then combined the motor strength deficit of the right biceps of six percent with the mild sensory deficit of the right radial nerve of one percent, yielding a seven percent impairment of the right upper extremity. OWCP's medical adviser reviewed Dr. Becan's report and agreed with his conclusion that appellant had a total seven percent right upper extremity impairment.

The Board finds that OWCP's medical adviser properly applied the A.M.A., *Guides* to rate impairment to appellant's right upper extremity. OWCP's medical adviser, reviewed the medical evidence and fully explained how he determined appellant's rating in conformance with the A.M.A., *Guides*.

On appeal, appellant asserts that he has property rights in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*,

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<sup>22</sup> *Supra* notes 13, 14.

<sup>23</sup> A.M.A., *Guides* 441, Table 15-21.

<sup>24</sup> *See id.* at 441;  $(3-1) + (2-1) = 3$ .

<sup>25</sup> *Id.* at 442, Table 15-21.

<sup>26</sup> *See supra* note 24.

424 U.S. 319 (1976). These cases hold only that a claimant who was in receipt of benefits (in *Goldberg* public assistance, and in *Mathews* social security benefits) could not have those benefits terminated without procedural due process.<sup>27</sup> In this case appellant is simply making a claim for a schedule award. He is not in receipt of schedule award benefits nor is OWCP attempting to terminate any benefits. Appellant has not established a vested right to a schedule award decision under the fifth edition of the A.M.A., *Guides*. As noted, OWCP began using the sixth edition of the A.M.A., *Guides*, effective May 1, 2009.<sup>28</sup>

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant has seven percent impairment of the right upper extremity, for which she received a schedule award.

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<sup>27</sup> 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.

<sup>28</sup> *Supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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