United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 11-84**
	)	**Issued: September 21, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 14, 2010 appellant, through his attorney, filed a timely appeal of a June 25, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the schedule award case.

ISSUE

The issue is whether appellant has more than 17 percent impairment of her right upper extremity and 12 percent of the right lower extremity, for which she received schedule awards.

On appeal counsel contends that OWCP erred in using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), depriving appellant of property rights under the United States Constitution.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On January 26, 1994 appellant, a 54-year-old distribution clerk, entered an elevator which was not level with the floor, tripped and fell on her right side. OWCP accepted that she sustained a sprained left wrist, arm, right shoulder sprain, torn right rotator cuff and hematoma of the right ankle.

A magnetic resonance imaging (MRI) scan dated November 8, 1995 demonstrated a rotator cuff tear involving the supraspinatus tendon. Appellant underwent an arthroscopy of the right shoulder on March 5, 1996 due to a full thickness rotator cuff tear with anterior subluxation repaired with an arthroscopic acromioplasty and mini-open rotator cuff repair of the right shoulder. On November 11, 1997 Dr. Don A. Kovalsky, a Board-certified orthopedic surgeon, performed an arthroscopic debridement of the glenoid labrum, open acromioplasty, incision corocoacromial ligament and open rotator cuff repair of the right shoulder. A 1998 electromyogram (EMG) and nerve conduction velocity (NCV) test demonstrated borderline right carpal tunnel syndrome and cubital tunnel syndrome. On February 3, 1998 Dr. Kovalsky performed a surgical release of the right carpal tunnel. An MRI scan dated March 17, 1998 demonstrated a herniated disc at C5-6 with cord displacement. Dr. Kovalsky performed a cervical discogram at C3-4, C4-5, C5-6 and C6-7. He performed additional back surgery on June 13, 1998 due to a cervical epidural abscess which necessitated placement of methyl methacrylate spacers at C5-6 and C6-7. Dr. Kovalsky performed an anterior cervical discectomy and foraminotomy at C5-6 and C6-7 with anterior inner body fusion on September 29, 1998. An iliac crest graft was taken from her right hip. On July 14, 1999 OWCP expanded appellant's claim to include right carpal tunnel syndrome and herniated discs at C5-6 and C6-7. In a report dated August 2, 2000, Dr. Kovalsky stated that appellant developed heterotopic ossification over the right iliac bone graft donor site.

In a decision and order dated August 4, 2003,[2] the Board found that appellant's left hand nodules and requested surgery were not established as related to her employment. The facts and the circumstance of the Board's prior decision are incorporated herein by reference.

Appellant requested a schedule award on February 12, 2004. By decision dated November 23, 2004, OWCP granted him a schedule award for 17 percent impairment of the right upper extremity. It accepted that appellant had developed osteoarthritis of the right hip due to her employment injury and treatment as well as sustaining a recurrence of disability on January 23, 2007.

Appellant submitted a February 3, 2009 report from Dr. Arthur Becan, an orthopedic surgeon, describing her history of injury on January 23, 1989 and resulting surgeries.[3] Dr. Becan listed the employment injury on January 26, 1994. He stated that appellant had a *Quick*DASH

[2] Docket No. 03-912 (issued August 4, 2003).

[3] In a decision dated December 23, 2010, Docket No. 10-862 (issued December 23, 2010), the Board reviewed this report from Dr. Becan and affirmed OWCP's decision dated November 18, 2009 under claim number xxxxxx011 finding that appellant had no more than five percent impairment of each of her lower extremities due to her January 23, 1989 employment injury.

score of 61 percent. Dr. Becan provided physical findings relating to appellant's cervical spine, right upper extremity, right hip and right and left knees. He noted loss of strength on manual muscle testing including 4/5 in the right deltoid, triceps, biceps and supraspinatus. Dr. Becan found 28 centimeters of upper arm circumference on the right compared to 30 on the left as well as 24 centimeters of right lower arm circumference compared to 25 on the left. He found no perceived dermatonal abnormalities in either upper extremity. Dr. Becan examined appellant's right upper shoulder and found acromioclavicular joint and anterior cuff tenderness. He listed appellant's shoulder range of motion as forward elevation of 160 degrees, abduction of 150 degrees, adduction of 60 degrees, external rotation of 80 degrees and internal rotation of 60 degrees. Regarding appellant's right wrist, Dr. Becan found dorsal tenderness and positive Phalen's sign. He reported wrist range of motion of dorsiflexion of 60 degrees, palmar flexion of 70 degrees, radial deviation of 15 degrees and ulnar deviation of 25 degrees. Dr. Becan performed grip strength testing and found 4 kilograms in the right hand and 12 kilograms in the left. Pinch strength testing demonstrated two kilograms in the right and four kilograms on the left. Dr. Becan stated that monofilament testing revealed diminished light touch of the medial nerve distribution on the right. He examined appellant's right hip finding greater trochanteric tenderness and tenderness over the anterior superior iliac spine. Dr. Becan listed appellant's hip range of motion as forward flexion of 110 degrees, extension of 20 degrees, abduction of 25 degrees and external rotation of 30 degrees. He also noted that appellant's right knee was 120 degrees of flexion and extension. On manual muscle testing, Dr. Becan found quadriceps strength of four plus out of five on the right. He applied the fifth edition of the A.M.A., *Guides*[4] found that appellant had 4 percent impairment due to loss of range of motion of the right shoulder, 2 percent due to loss of range of motion of the right wrist, 10 percent impairment due to right shoulder resection arthroplasty, and 20 percent impairment due to right lateral pinch deficit, 31 percent impairment due to sensory deficit of the right median nerve for 54 percent impairment of the right upper extremity. Dr. Becan also found 25 percent impairment due to loss of range of motion of the right hip as well as 3 percent pain-related impairment for 28 percent impairment of the right lower extremity. He concluded that appellant reached maximum medical improvement on February 3, 2009. Appellant, through counsel, requested a schedule award on March 23, 2009.

Dr. Arnold T. Berman, district medical adviser for OWCP and a Board-certified orthopedic surgeon, reviewed this report on April 2, 2009 and found that, under a proper application of the fifth edition of the A.M.A., *Guides*, appellant had only 14 percent impairment of the right upper extremity and had previously received a schedule award for 17 percent impairment. He concluded that appellant was not entitled to an additional schedule award for upper extremity impairment. Dr. Berman found that appellant had 15 percent impairment of the right lower extremity due to loss of range of motion of the hip under the fifth edition of the A.M.A., *Guides*. He noted that Dr. Becan attributed additional impairment to appellant's right quadriceps, but stated that this was not an accepted condition as it would be related to appellant's knee.

The claims examiner requested a supplemental report from Dr. Berman on April 27, 2009 noting that appellant had previously received a schedule award for 12 percent impairment of the

[4] A.M.A., *Guides*, 5th ed. (2001).

right lower extremity under claim number xxxxxx011 for the right knee. He requested that Dr. Berman address whether appellant had a total of 15 percent impairment of the right lower extremity or an additional 15 percent impairment beyond the 12 percent already received.

In a letter dated May 20, 2009, OWCP requested a medical report addressing appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.[5] Counsel objected on May 22, 2009.

Dr. Berman responded that appellant had an additional 13 percent impairment due to his right hip conditions as 15 percent combined with 12 percent previously awarded for the right knee was 25 percent impairment of the right lower extremity.

Dr. Becan completed an addendum to his February 3, 2009 report in October 2009. He found that appellant had class 1 right shoulder full thickness tear with residual loss, five percent impairment.[6] Dr. Becan provided the functional history modifier of three based on his prior *Quick*DASH score of 61 percent.[7] He found a physical examination modifier of two based on atrophy.[8] Dr. Becan found that appellant had clinical studies modifier of two due to MRI scan findings.[9] He applied the applicable formula to reach a net adjustment of four or seven percent impairment of the right upper extremity. Dr. Becan also evaluated appellant's right lower extremity, finding a class 1 right hip trochanteric bursitis with motion deficit or default impairment of two percent.[10] He noted a functional history modifier of two, physical examination modifier of two, clinical studies of two[11] based on x-rays and applying the formula a net adjustment of two for three percent impairment of the right lower extremity. Dr. Becan also found that appellant had class 1 right knee patellofemoral arthritis, 10 percent impairment.[12] He applied the formula noting a functional history modifier of two, physical examination modifier of two, and clinical studies modifier of two based on x-rays to reach the net adjustment of three. Dr. Becan concluded that appellant had 13 percent impairment of the right lower extremity due to knee arthritis.

On October 29, 2009 Dr. Berman stated that the left lower extremity was not an accepted impairment and did not recommend a schedule award. He found that as appellant had reduced

[5] 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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[6] A.M.A., *Guides* 403, Table 15-5.

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

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

[9] *Id.* at 410, Table 15-9.

[10] *Id.* at 512, Table 16-4.

[11] *Id.* at 516, Table 16-6, 517, Table 16-7 and 519, Table 16-8, respectively.

[12] *Id.* at 511, Table 16-3.

range of motion, her upper extremity impairment should be based on range of motion impairment which resulted in an increased upper extremity rating of eight percent based on flexion of 160 degrees resulting in three percent upper extremity impairment, abduction of 150 degrees resulting in three percent upper extremity impairment, nonratable impairments for adduction and external rotation and internal rotation of 60 degrees resulting in two percent impairment.[13] Dr. Berman stated, "Utilizing page 449, Table 15-23 *Entrapment Neuropathy*, [appellant has] two percent default value for the right upper extremity due to carpal tunnel syndrome. This is combined with 8 percent impairment recommended for right shoulder impairment for right upper extremity impairment of 10 percent." Dr. Berman concluded that appellant should receive a schedule award for 10 percent impairment.

Regarding appellant's right lower extremity, Dr. Berman stated:

> "Class 1, Table 164 16-4: Hip Regional Grid, bursitis hip is two percent default value Grade C.
>
> "Utilizing the adjustment grid and grade modifiers, page 516, Table 16-6: Functional History Adjustment, Lower Extremities, grade modifier 1, page 517. Table 16-7: Physical Examination Adjustment, Lower Extremities, grade modifier 1, and page 519, Table 16-8: Clinical Studies Adjustment, Lower Extremities grade modifier 1.
>
> "Utilizing page 521, net adjustment formula mathematical explanation, net adjustment is 0. Therefore, the right lower extremity based upon right hip trochanteric bursitis is two percent impairment."

Dr. Berman found that appellant did not have a default value of 10 percent due to patellofemoral arthritis because of lack of documentation of a two millimeter cartilage interval, rather a default value of 3 percent. He concluded that appellant had two percent impairment of the right lower extremity.

By decision dated December 21, 2009, OWCP denied appellant's claim for an increase in her schedule award noting that she had previously received schedule awards for 17 percent impairment of the right upper extremity and 12 percent impairment of the right lower extremity, and that the evidence of record demonstrated percentages of impairment smaller than those previously awarded.

Counsel requested an oral hearing on December 30, 2009 held on April 20, 2010. He contended that the fifth edition of the A.M.A., *Guides* should apply. Counsel stated that the right knee was a separate claim for which appellant had received a schedule award.

In a decision dated June 25, 2010, the hearing representative affirmed the December 21, 2009 decision finding that Dr. Berman's opinion was entitled to the weight of the medical evidence as it comported with the appropriate edition of the A.M.A., *Guides*. Based on the

[13] A.M.A., *Guides* 475.

opinions of Drs. Becan and Berman, the hearing representative expanded the acceptance of appellant's claim to include right hip bursitis.

LEGAL PRECEDENT

The schedule award provision of FECA[14] and its implementing regulations[15] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[16]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[17]

A similar formula is applicable for the lower extremities which requires that the physician determine the Class of Diagnosis (CDX) and apply the appropriate grade modifiers for GMFH, GMPE and GMCS and apply the following formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) to reach the appropriate grade within the class of diagnosis.[18]

In regard to entrapment neuropathies such as carpal tunnel syndrome, grade modifiers for test findings, history, physical findings and functional scale are evaluated using Table 15-23.[19] Additional impairment values are not permitted for decreased grip strength, loss of motion or pain.[20] Grade modifiers for test findings, history and physical findings are averaged and the default impairment for that average is further modified by the grade modifier for functional scale to determine the final impairment rating.[21]

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[14] 5 U.S.C. §§ 8101-8193, 8107.

[15] 20 C.F.R. § 10.404.

[16] 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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[17] A.M.A., *Guides* 411.

[18] *Id.* at 521.

[19] *Id.* at 449, Table 15-23.

[20] *Id.* at 433.

[21] *Id.* at 448-49.

ANALYSIS

Appellant has previously received schedule awards for 17 percent impairment of the right upper extremity and 12 percent impairment of the right lower extremity due to impairment of her knee. In support of her claim for additional schedule awards, she submitted reports from Dr. Becan received on March 30, 2009. In his initial report applying the fifth edition of the A.M.A., *Guides*, Dr. Becan found that appellant had 54 percent impairment of the right upper extremity and 28 percent impairment of the right lower extremity. Dr. Berman, the district medical adviser, reviewed this report on April 2, 2009 and found that, under the fifth edition of the A.M.A., *Guides*, appellant had no more than 14 percent impairment of the right upper extremity for which she had previously received a schedule award based on 17 percent impairment. He found that appellant had 15 percent impairment of the right lower extremity. The claims examiner, however, on April 27, 2009, requested clarification regarding whether this rating included the 12 percent previously awarded for the right lower extremity. Dr. Berman did not respond until May 19, 2009, after the sixth edition of the A.M.A., *Guides* became effective.

The claims examiner then requested additional medical evidence from appellant addressing her permanent impairment under the sixth edition of the A.M.A., *Guides*.

Dr. Becan found in October 2009 that appellant had class 1 right shoulder full thickness tear with residual loss, five percent impairment.[22] He utilized the upper extremity formula to reach seven percent impairment of the right upper extremity. The medical adviser, Dr. Berman applied the A.M.A., *Guides*, to Dr. Becan's finding and concluded that appellant's impairment should be evaluated through her loss of range of motion in accordance with the A.M.A., *Guides*.[23] The Board finds that this method was appropriate and operated in appellant's favor. Dr. Berman found that flexion of 160 degrees was three percent impairment, abduction of 150 degrees was three percent impairment, nonratable impairments for adduction and external rotation and internal rotation of 60 degrees was two percent impairment reaching an upper extremity rating of eight percent.[24] He also found appellant was entitled to an impairment rating for entrapment neuropathy of two percent impairment due to her accepted condition of carpal tunnel syndrome.[25] Dr. Becan reported test findings of an abnormal EMG, history of mild intermittent symptoms and decreased sensation on physical findings, these resulting grade modifiers of 1, 1 and 2, respectively. These values are added and average as 1 for a grade 1. The A.M.A., *Guides* provided that the value is modified up or down based on the functions scale grade. With a *Quick*DASH score of 61, the functional scale is 2 and appellant should receive an impairment rating of three percent.[26] Combining appellant's range of motion impairment rating of eight with her compression neuropathy impairment of three percent[27] results in an upper

[22] *Id.* at 403, Table 15-5.

[23] *Id.* at 390, 403.

[24] *Id.* at 475, Table 15-34.

[25] *Id.* at 449, Table 15-23.

[26] *Id.* at 449.

[27] *Id.* at 481.

extremity impairment rating of 11 percent. As the medical evidence in the record based on the proper edition of the A.M.A., *Guides* establishes that appellant has no more than 11 percent impairment of her right upper extremity,[28] the Board finds that OWCP properly denied her claim for an additional schedule award due to upper extremity impairment.

Dr. Becan provided impairment ratings for appellant's right lower extremity, based on right hip trochanteric bursitis with motion deficit and knee patellofemoral arthritis. He concluded that appellant had 23 percent impairment of the right lower extremity due to these conditions. In regard to appellant's hip bursitis, Dr. Becan accorded a functional history modifier three, physical examination modifier two and clinical studies modifier two. However, he did not elaborate on the findings that lead him to reach these modifiers and the impairment rating of three percent. Dr. Berman disagreed with Dr. Becan's conclusions. He noted findings of tenderness over the right hip and slight decrease in range of motion. Dr. Berman stated that hip bursitis had a default value of two for grade C based on consistent motion deficits.[29] He found that appellant had grade modifiers one for physical examination,[30] clinical studies[31] and functional history[32] resulting in a net adjustment of zero for an impairment rating of two for right hip trochanteric bursitis.[33] The Board finds that the medical adviser's conclusions are proper under the A.M.A., *Guides*.

Dr. Becan also found that appellant had class 1 right knee patellofemoral arthritis, 10 percent impairment.[34] The Board notes that this impairment is based on a two-millimeter cartilage interval.[35] Dr. Becan applied the formula noting a functional history modifier two, physical examination modifier two, and clinical studies modifier two based on x-rays to reach the net adjustment of three. He concluded that appellant had 13 percent impairment of the right lower extremity due to knee arthritis. The Board finds that Dr. Berman properly noted that as the record did not contain x-rays documenting two-millimeter cartilage interval value, the proper impairment range was from one to five percent impairment with a default value of three percent.[36] Appellant's lower extremity impairment rating includes three percent for

[28] The A.M.A., *Guides* provide that in most cases only one diagnosis will be appropriate. The A.M.A., *Guides* state, "If a patient has two significant diagnoses, for instance rotator cuff tear and biceps tendinitis, the examiner should use the diagnosis with the highest causally-related impairment rating for the impairment calculation." A.M.A., *Guides*, 387. Neither physical explained why an impairment for carpal tunnel should be used given this provision of the A.M.A., *Guides*. Furthermore, if the additional two percent impairment for carpal tunnel is used, the combined value is still less than the 17 percent impairment rating previously received by appellant.

[29] A.M.A., *Guides* 512, Table 16-4.

[30] *Id.* at 517, Table 16-7.

[31] *Id.* at 519, Table 16-8.

[32] *Id.* at 516, Table 16-6.

[33] *Id.* at 512, Table 16-4.

[34] *Id.* at 511, Table 16-3.

[35] *Id.*

[36] *Id.*

patellofemoral arthritis and two percent impairment for right hip trochanteric bursitis for a combined lower extremity impairment rating of five percent.[37] The Board finds that the weight of the medical evidence clearly establishes that she has no more than seven percent impairment of the right lower extremity for which she has previously received a schedule award.

On appeal, appellant asserts that she 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 in Mathews Social Security benefits) could not have those benefits terminated without procedural due process.[38] In this case, appellant is simply making a claim for a schedule award. Appellant was not in receipt of schedule award benefits nor was OWCP attempting to terminate benefits. She 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*. The Board does not find that there was any delay in the adjudication of the schedule award claim. In *Harry Butler*,[39] 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.[40] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[41] 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. OWCP properly determined appellant's right upper extremity and lower extremity permanent impairment under that edition.

CONCLUSION

The Board finds that appellant has no more than 17 percent impairment of her right upper extremity and 12 percent of the right lower extremity for which she has received schedule awards.

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[37] *Id.* at 529, 604.

[38] 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.

[39] 43 ECAB 859 (1992).

[40] *Id*. at 866.

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

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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