

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Spokane, WA, Employer**

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**Docket No. 10-994
Issued: December 6, 2010**

Appearances:
Gordon Reisel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 26, 2010 appellant filed a timely appeal from the February 1, 2010 merit decision of the Office of Workers' Compensation Programs concerning a schedule award. Pursuant to 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 met his burden of proof to establish that he has more than a one percent permanent impairment of his right arm, for which he received a schedule award.

FACTUAL HISTORY

In early 2007, the Office accepted that appellant, then a 59-year-old letter carrier, sustained right lateral epicondylitis due to the repetitive duties of his job. On May 20, 2008 appellant filed a claim for a schedule award due to his accepted employment injury.

In a May 3, 2008 report, Dr. Barry Maron, an attending Board-certified orthopedic surgeon, determined that appellant had a 43 percent permanent impairment of his right arm.¹ On June 16, 2008 an Office medical adviser determined that Dr. Maron's report contained multiple inconsistencies and he recommended a second opinion evaluation. On October 15, 2008 Dr. Allan R. Wilson, a Board-certified orthopedic surgeon serving as a second opinion physician, opined that the accepted condition of right lateral epicondylitis had resolved and found that appellant had a zero percent permanent impairment of his right arm. On November 6, 2008 an Office medical adviser also found that appellant had a zero percent permanent impairment of his right arm. In a November 12, 2008 decision, the Office denied appellant's claim for entitlement to schedule award compensation.²

In a May 14, 2009 decision, an Office hearing representative set aside the Office's November 12, 2008 decision and remanded the case to the Office for further development. She found that appellant's counsel was not notified of the second opinion examination which took place on October 15, 2008 and that this failure to notify effectively denied appellant the opportunity to have a physician designated and paid by him present to participate in the examination as provided for at section 8123(a) of the Federal Employees' Compensation Act. The Office hearing representative determined that the Office therefore was precluded from relying on the opinion produced by the second opinion examination and directed the Office to refer him for a new second opinion examination to evaluate his right arm impairment under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009), the edition then in effect.

The Office referred appellant to Dr. Clarence Fossier, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on his right arm impairment under the standards of the sixth edition of the A.M.A., *Guides*. In a June 22, 2009 letter, the medical scheduling company advised him, but not counsel, of an appointment with Dr. Fossier on July 15, 2009. In a June 29, letter, the Office advised appellant and counsel of the July 15, 2009 appointment.

On July 15, 2009 Dr. Fossier stated that on physical examination there is a full range of motion of the right elbow with pain on maximum dorsiflexion. Pain was reproduced in the upper forearm and lateral elbow region with maximum dorsiflexion and resisted dorsiflexion but also with resisted extension of the middle finger. Appellant was somewhat tender just anterior and distal to the lateral epicondyle. Dr. Fossier stated that there were no skin changes noted from previous steroid injections and indicated that appellant was more tender over the course of the radial nerve distal to the elbow in the mobile wad. He diagnosed right lateral epicondylitis and

¹ Dr. Maron indicated that appellant had a 40 percent impairment due to decreased pinch strength and a 3 percent impairment due to limited elbow motion.

² The standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) were in effect at the time this decision was issued. See *infra* note 7.

indicated that appellant had reached maximum medical improvement by May 3, 2008.³ Dr. Fossier applied the sixth edition of the A.M.A., *Guides* and stated:

“[U]tilizing Table 15-4 on page 399, under muscle/tendon epicondylitis, lateral or medial, the claimant would be Class 1 which would be [G]rade C with [one] percent upper extremity impairment. According to the *QuickDASH* form completed by the claimant, his response adds up to 34, which would make him a Grade Modifier 1, which would be consistent with the diagnosis-based impairment rating, equal to [one] percent right upper extremity impairment.”⁴

On July 30, 2009 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an Office referral physician, also provided an opinion that appellant had a one percent permanent impairment of his right arm. He stated that, under Table 15-4 (Elbow Regional Grid) of the sixth edition of the A.M.A., *Guides*, appellant’s primary diagnosis in the right elbow region was right lateral epicondylitis, Class 1, with a default Grade C equal to a one percent permanent impairment of the right arm. With respect to the function history grade modifier under Table 15-7, Dr. Slutsky agreed with Dr. Fossier that appellant had a grade modifier 1 due to his *QuickDASH* score of 34. For the physical examination grade modifier under Table 15-8, he indicated that appellant had palpable pain over the lateral epicondyle and therefore fell under grade modifier 1 (palpable and observed findings). With respect to the clinical studies grade modifier under Table 15-9, Dr. Slutsky stated that clinical studies did not reflect the diagnosis and therefore appellant fell under grade modifier 0. Applying the net adjustment formula found on page 411, Dr. Slutsky stated that the net adjustment value was -1, which meant that under Class 1 on Table 15-4 there would be a movement one space to the left from the default Grade C value. The resultant Grade B finding also corresponded to a one percent impairment and therefore this represented appellant’s total right arm impairment.

In an August 7, 2009 decision, the Office granted appellant a schedule award for a one percent permanent impairment of his right arm. The award ran for 3.12 weeks from July 15 to August 5, 2009.⁵

Appellant requested a telephonic hearing with an Office hearing representative. During the December 10, 2010 hearing, counsel argued that he was not advised in advance of the July 15, 2009 second opinion examination with Dr. Fossier and therefore appellant was deprived of his rights under section 8123 of the Act to have a physician designated and paid by him present to participate in the examination.

³ Dr. Fossier indicated that April 4, 2008 magnetic resonance imaging scan testing confirmed the right lateral epicondylitis.

⁴ The record contains a copy of the *QuickDASH* form. The DASH in *QuickDASH* stands for disabilities of the arm, shoulder and hand. The *QuickDASH* form contains survey questions asking a given claimant to specify his or her ability to carry out various activities and the symptoms that he or she experiences while performing them.

⁵ The Office stated that the schedule award was based on the opinions of Dr. Fossier and Dr. Slutsky who both found the same level of impairment. It noted that these reports provided “the most contemporaneous and comprehensive medical evidence in the file” and provided ratings under the sixth edition of the A.M.A., *Guides*, the edition in effect since May 1, 2009.

In a February 1, 2010 decision, the Office hearing representative affirmed the Office's August 7, 2009 decision. She found that Dr. Fossier and Dr. Slutsky properly evaluated appellant's right arm impairment and indicated there was no medical evidence showing that she had a greater impairment. The Office hearing representative stated that, although the medical scheduling company did not send counsel a copy of the June 22, 2009 letter regarding appellant's July 15, 2009 second opinion examination appointment, the Office did send counsel a June 29, 2009 letter advising him of the appointment. Therefore, counsel was advised in advance of the scheduled second opinion appointment as required.

LEGAL PRECEDENT

The schedule award provision of the Act⁶ and its implementing regulations⁷ 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.⁸ For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.⁹ Under section 8123 of the Act, a claimant may have a physician designated and paid by him present to participate at a second opinion examination.¹⁰

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the elbow, the relevant portion of the arm for the present case, reference is made to Table 15-4 (Elbow Regional Grid) beginning on page 399. Then the associated class is determined from the Elbow Regional Grid and the adjustment grid and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class, modified by the adjustments as calculated.¹¹

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ See FECA Bulletin No. 9-03 (issued March 15, 2009). For Office decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

¹⁰ 5 U.S.C. § 8123(a). According to Office regulations, any notice requirement under the Act is fully satisfied if served on counsel and has the same force and effect as if sent to the claimant. 20 C.F.R. § 10.700(c).

¹¹ See A.M.A., *Guides* (6th ed. 2009) 398-400.

ANALYSIS

The Office accepted that appellant sustained right lateral epicondylitis due to the repetitive duties of his job. On May 20, 2008 appellant filed a claim for a schedule award due to his accepted employment injury. After development of the medical evidence, an Office hearing representative issued a May 14, 2009 decision setting aside the Office's November 12, 2008 decision and remanded the case to the Office for referral to a new second opinion examination to evaluate his right arm impairment under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009), the edition then in effect.¹² In granting appellant a schedule award for a one percent permanent impairment, the Office relied on the July 30, 2009 opinion of Dr. Slutsky, a Board-certified occupational medicine physician who served as an Office medical adviser, who evaluated the July 15, 2009 assessment of Dr. Fossier, a Board-certified orthopedic surgeon serving as an Office referral physician. Counsel had argued that he was not informed of the appointment prior to its scheduled date, July 15, 2009 and therefore appellant could not exercise his right to have a physician designated and paid by him present to participate at a second opinion examination. However, the record reflects that proper notification was given by the Office in a June 29, 2009 letter.¹³ Moreover, the referral to Dr. Fossier for the provision of an opinion under the sixth edition of the A.M.A., *Guides* was necessary as this was the edition in effect at that time.¹⁴

The Board finds that appellant did not submit medical evidence showing that he has more than a one percent permanent impairment of his right arm, for which he received a schedule award. The opinions of Dr. Fossier and Dr. Slutsky properly found that the medical evidence reflects that appellant only has a one percent impairment of his right arm. Both physicians correctly found that under Table 15-4 (Elbow Regional Grid) of the sixth edition of the A.M.A., *Guides*, appellant's primary diagnosis in the right elbow region was right lateral epicondylitis, Class 1, with a default Grade C equal to a one percent permanent impairment of the right arm.¹⁵ Both physicians properly found that evaluation of the grade modifier scheme did not change the level of impairment. Dr. Slutsky provided detailed reasons for the scores for the function history grade modifier under Table 15-7, the physical examination grade modifier under Table 15-8 and the clinical studies grade modifier under Table 15-9 and properly applied the net adjustment formula found on page 411 to find a one percent impairment.¹⁶

¹² In the November 12, 2008 decision, the Office denied appellant's claim for entitlement to schedule award compensation. In the May 14, 2009 decision, the Office hearing representative found that appellant's counsel was not notified of the second opinion examination which took place on October 15, 2008 and determined that this failure to notify effectively denied appellant the opportunity to have a physician designated and paid by him present to participate in the examination as provided for at section 8123(a) of the Act.

¹³ See *supra* note 10; *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

¹⁴ See *supra* note 9.

¹⁵ See A.M.A., *Guides* 399, Table 15-4.

¹⁶ See *id.* at 405-11.

Appellant did not submit evidence showing that he has more than a one percent permanent impairment of his right arm and the Office properly denied his claim for additional schedule award compensation.¹⁷

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a one percent permanent impairment of his right arm, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ On appeal, counsel argued that the Office's February 1, 2010 decision was "contrary to the facts and to the law," but he did not further explain this statement.