

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

C.I., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Placitas, NM, Employer**

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**Docket No. 10-2288
Issued: July 25, 2011**

Appearances:

Gordon Reiselt, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 13, 2010 appellant timely appealed the May 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed a prior schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 a ratable impairment of the upper extremity due to her accepted right elbow injury.

FACTUAL HISTORY

Appellant, then a 36-year-old clerk, has an accepted occupational disease claim for right shoulder strain and right ulnar nerve lesion, which arose on or about April 16, 2007. OWCP approved two surgical procedures; one involving the right shoulder and another for the right

¹ 5 U.S.C. §§ 8101-8193.

elbow. On January 2, 2008 appellant underwent an arthroscopic right distal clavicle resection and right shoulder subacromial decompression and acromioplasty on April 16, 2008, she underwent a right anterior ulnar nerve transposition at the elbow.

On September 2, 2008 appellant filed a claim for a schedule award. She submitted impairment ratings from both of her surgeons. In a report dated May 27, 2008, Dr. Dwight W. Burney III, a Board-certified orthopedic surgeon, found 10 percent impairment of the right upper extremity due to appellant's distal clavicle excision.² He did not rate appellant's right elbow because at that time she was about five weeks postsurgery and had yet to be released by her other surgeon.

Dr. John M. Veitch, a Board-certified orthopedic surgeon, performed the April 16, 2008 right elbow ulnar nerve transposition, provided an August 1, 2008 impairment rating. He noted that appellant was doing well following surgery and had regained full strength in her right arm. Dr. Veitch indicated that she had reached maximum medical improvement (MMI) and was able to return to full work activities. He noted that appellant's work-related condition appeared to have resolved. Dr. Veitch found five percent impairment of the right upper extremity.³

On October 14, 2008 the district medical adviser (DMA) reviewed the record, including the impairment ratings provided by Dr. Veitch and Dr. Burney. With respect to appellant's right shoulder distal clavicle resection arthroplasty, he found that this represented 10 percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides* (2001).⁴ However, the DMA disagreed with Dr. Veitch's August 1, 2008 rating of five percent. He explained that Dr. Veitch reported normal strength and function in the right upper extremity with resolution of the work-related problem. The DMA further noted that Dr. Veitch recommended full work activities. According to him, this description did not support the presence of residual impairment resulting from the lesion of the ulnar nerve. In contrast to Dr. Veitch's five percent rating, the DMA found zero percent impairment of the right upper extremity.

By decision dated November 19, 2008, OWCP granted a schedule award for 10 percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides* (2001).⁵ The award covered a period of 31.2 weeks, from August 1, 2008 through March 7, 2009.

OWCP subsequently received an April 17, 2009 nerve conduction study and electromyography that was interpreted as "a normal right upper extremity ... study."⁶

² Dr. Burney referenced Table 15-5, page 403 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). At the time, OWCP had yet to adopt the sixth edition of the A.M.A., *Guides*. The fifth edition remained in effect through April 30, 2009.

³ Dr. Veitch too relied on the sixth edition of the A.M.A., *Guides* (2008). Dr. Burney and Dr. Veitch did not identify the specific table or tables he relied upon in finding five percent impairment of the right upper extremity.

⁴ The DMA cited Table 16-27, page 506 of the A.M.A., *Guides* (5th ed. 2001).

⁵ OWCP explained that the DMA found that Dr. Veitch's description of appellant's condition did not support the presence of residual impairment resulting from the lesion of the ulnar nerve.

⁶ Appellant's two previous electrodiagnostic studies from July 2007 and March 2008 were also normal.

Dr. Veitch's April 17, 2009 treatment notes referenced the normal test results and he described appellant's problem as "relatively mild."⁷ In an April 24, 2009 letter to OWCP, he indicated that appellant was a patient of his who had a right ulnar nerve transposition. He further stated that she had reached MMI and had five percent impairment based on the nerves in the right upper extremity.

In a decision dated July 8, 2009, the Branch of Hearings and Review affirmed the November 19, 2008 schedule award.

On September 24, 2009 appellant requested reconsideration. OWCP received an August 26, 2009 report from Dr. Veitch. Based upon a review of his notes, Dr. Veitch explained that appellant had some residual discomfort on her elbow and hand area. He also reported slightly distorted tactile sensibility and minimal motor deficit. Dr. Veitch indicated that based on Table 16-10, Peripheral Nerve Disorders, page 482, A.M.A., *Guides* (5th ed. 2001), appellant had five percent impairment of the upper extremity secondary to her work-related problem.

OWCP referred appellant's case file to the DMA for review. In a report dated December 29, 2009, the DMA indicated that the description of abnormality Dr. Veitch provided on August 26, 2009 was inadequate. Based on the information provided, he was unable to recommend impairment. The DMA further noted that Dr. Veitch cited the fifth edition of the A.M.A., *Guides*, whereas OWCP currently utilized the sixth edition. He suggested that OWCP ask Dr. Veitch to provide another evaluation with recommendations for impairment based on the latest edition of the A.M.A., *Guides* (6th ed. 2008).

On March 31, 2010 OWCP advised appellant that Dr. Veitch's latest report would not suffice for purposes of determining her entitlement to a schedule award. It explained that the evaluation criteria had changed effective May 1, 2009 and that she needed to have her physician submit an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* (2008). OWCP afforded appellant 30 days to submit the requested information.

Appellant's attorney responded on April 28, 2010. He noted that Dr. Veitch's initial August 1, 2008 impairment rating was done under the sixth edition of the A.M.A., *Guides*. Counsel explained that the August 26, 2009 rating was done under the fifth edition because appellant's November 19, 2008 schedule award was under the fifth edition. He further noted that Dr. Veitch's latest report included rationale for his finding of five percent impairment, which was due to residual discomfort in the elbow and hand area.

OWCP did not receive an additional impairment rating under the A.M.A., *Guides* (6th ed. 2008) as requested.

In a decision dated May 19, 2010, OWCP considered the schedule award claim on the merits and denied modification of the July 8, 2009 decision.

⁷ Dr. Veitch previously examined appellant on December 5, 2008 and reported that her grip strength was equal bilaterally. At the time, appellant reported an occasional tingling sensation in her right hand, which prompted Dr. Veitch to order additional electrodiagnostic studies. Dr. Veitch noted that overall appellant appeared to be doing well.

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.⁸ FECA, 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.⁹ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).¹⁰

ANALYSIS

Appellant has already received a 10 percent award for impairment of the right upper extremity attributable to her January 2, 2008 right distal clavicle resection. Dr. Bruney found 10 percent impairment for the distal clavicle excision, albeit under the sixth edition of the A.M.A., *Guides* (2008). At the time, the DMA utilized the then-applicable fifth edition of the A.M.A., *Guides* (2001) and similarly found 10 percent impairment of the right upper extremity.¹¹ Appellant's counsel does not specifically challenge the percentage awarded for the right shoulder surgery. Moreover, the medical evidence does not establish entitlement to an increased upper extremity impairment as it pertains to appellant's accepted right shoulder injury.

Appellant claims entitlement to an additional five percent impairment of the right upper extremity based on Dr. Veitch's findings regarding her right elbow injury. The procedure manual provides that the attending physician should describe the impairment in sufficient detail to permit clear visualization of the impairment and the restrictions and limitations which have resulted.¹² The description should include the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, disturbance of sensation, or other pertinent description of the impairment.¹³ The procedure manual further notes that under the sixth edition of the A.M.A., *Guides* (2008), clinical history is also important in the diagnosis-based grid that ranks impairment within classes of severity.¹⁴

In his initial impairment rating dated August 1, 2008, Dr. Veitch indicated that appellant was doing well following surgery and she had regained full strength in her right arm. He also

⁸ For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁹ 20 C.F.R. § 10.404.

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

¹¹ See Table 16-27, A.M.A., *Guides* 506 (5th ed. 2001).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(2) (January 2010).

¹³ *Id.*

¹⁴ *Id.*

noted that her work-related condition appeared to have resolved. Dr. Veitch further indicated that appellant reached MMI and was able to return to full work activities. Notwithstanding what appeared to be a full recovery from her right ulnar nerve lesion, he found five percent impairment of the right upper extremity. Dr. Veitch ostensibly relied upon the sixth edition of the A.M.A., *Guides*, but failed to identify the specific tables he utilized in determining appellant's right upper extremity impairment rating.

When the DMA first reviewed the August 1, 2008 impairment rating, he reasonably questioned how Dr. Veitch's findings supported the presence of residual impairment resulting from the ulnar nerve lesion, particularly in light of appellant's reported normal strength and what Dr. Veitch described as the apparent resolution of the work-related injury. He had also released appellant to full work activities. The DMA properly concluded that Dr. Veitch's August 1, 2008 description of appellant's condition warranted zero percent impairment of the right upper extremity.

The above-noted defects in Dr. Veitch's August 1, 2008 report were not cured by his April 24, 2009 letter to OWCP wherein he stated that appellant had five percent impairment based on the nerves in the right upper extremity. When appellant saw Dr. Veitch on December 5, 2008 he noted that her grip strength was equal bilaterally. Dr. Veitch did not report any other findings on physical examination and her only complaint at the time was an occasional tingling sensation in the right hand. He ordered additional electrodiagnostic studies, which were normal and consistent with appellant's two prior studies. When he saw appellant on April 17, 2009, Dr. Veitch reviewed the normal test results and described appellant's problem as "relatively mild." His December 5, 2008 and April 17, 2009 treatment records and the recent electrodiagnostic studies provided no clarification or elucidation for his April 24, 2009 finding of five percent impairment based on the nerves in the right upper extremity.

Dr. Veitch attempted to elaborate on his five percent impairment rating in his August 26, 2009 report. He referenced Table 16-10 of the fifth edition of the A.M.A., *Guides* (2001) and noted some residual discomfort in appellant's elbow and hand area. Dr. Veitch also noted slightly distorted tactile sensibility and minimal motor deficit. The DMA reviewed this latest report and found that the description of abnormality Dr. Veitch provided was inadequate. Based on the DMA's recommendation, OWCP asked appellant to obtain another impairment rating from Dr. Veitch based on the sixth edition of the A.M.A., *Guides* (2008). However, appellant's counsel apparently believed Dr. Veitch's August 1, 2008 and August 26, 2009 impairment ratings should suffice. OWCP did not subsequently receive the requested report.

Notwithstanding the fact that appellant's 2008 schedule award calculated pursuant to the fifth edition of the A.M.A., *Guides*, all schedule award decisions issued on or after May 1, 2009 must be in accordance with the sixth edition of the A.M.A., *Guides* (2008). The problem with Dr. Veitch's August 1, 2008 impairment rating was not the version of the A.M.A., *Guides* he cited, but the fact that his then description of appellant's condition was inconsistent with a

finding of residual impairment attributable to the work-related right ulnar nerve lesion. As to the August 26, 2009 report, even if the fifth edition of the A.M.A., *Guides* remained in effect, this latest report would not suffice for purposes of establishing a peripheral nerve disorder.¹⁵ Dr. Veitch reportedly reviewed his notes and found evidence of “some residual discomfort on [appellant’s] elbow and hand area.” He also mentioned evidence of “slightly distorted tactile sensibility and minimal motor deficit.” It is not readily apparent from his various treatment notes where Dr. Veitch gleaned this particular information. Moreover, it is not clear how this information translated to a five percent impairment of the right upper extremity regardless of which version of the A.M.A., *Guides* one applies.¹⁶ Accordingly, the Board finds that Dr. Veitch’s various reports are insufficient to establish any additional impairment of the right upper extremity under the A.M.A., *Guides* (6th ed. 2008).¹⁷

CONCLUSION

Appellant has not established entitlement to any additional impairment of the upper extremity due to her accepted right elbow injury.

¹⁵ Dr. Veitch only referenced Table 16-10, A.M.A., *Guides* 482 (5th ed. 2001), which is just one step in the overall evaluation process for determining the extent of any peripheral nerve disorder.

¹⁶ The latest version of the A.M.A., *Guides* addresses upper extremity peripheral nerve impairments under Table 15-14, Table 15-21 and Table 15-23, A.M.A., *Guides* 425, 436-44, 449 (6th ed. 2008).

¹⁷ 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.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2011
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