United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 10-2383**
	)	**Issued: July 20, 2011**
U.S. POSTAL SERVICE, NEW JERSEY INTERNATIONAL BULK MAIL CENTER, Jersey City, NJ, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 29, 2010 appellant, through his attorney, filed a timely appeal from a June 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) granting him a schedule award. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than five percent right upper extremity impairment, for which he received a schedule award.

On appeal, appellant's attorney argues that OWCP deprived appellant of due process by failing to timely adjudicate his schedule award claim under the fifth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). Appellant noted that he submitted a schedule award claim on January 6, 2009 but OWCP did not

[1] 5 U.S.C. § 8101 *et seq.*

issue a decision until February 18, 2010, after the effective date of the sixth edition of the A.M.A., *Guides*.

FACTUAL HISTORY

On August 16, 2006 appellant, then a 55-year-old general mail expeditor, filed a claim alleging that on August 12, 2006 he sustained a bruise above the right eye, a cut and a fractured right elbow when he tripped on a concrete wheel stop. OWCP accepted the claim for contusions of the face, scalp and neck, an injury to the facial nerve, a closed fracture of the radius head and a closed fracture of the proximal end of the radius. On August 14, 2006 appellant underwent an open reduction and internal fixation of the right radial head fracture.[2]

In an impairment evaluation dated May 28, 2008, Dr. David Weiss, an osteopath, applied the fifth edition of A.M.A., *Guides* and found that appellant had 25 percent right upper extremity impairment.

On January 30, 2009 OWCP's medical adviser found that Dr. Weiss' grip strength measurements were not in accordance with the provisions of the A.M.A., *Guides* and requested that OWCP obtain documentation of his grip strength measurements. He concluded that appellant had a two percent right elbow impairment due to loss of range of motion.

On February 9, 2009 appellant filed a claim for a schedule award. By letter dated August 12, 2009, OWCP notified him that it now used the sixth edition of the A.M.A., *Guides* for schedule award purposes. It requested that Dr. Weiss submit an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*.

On September 28, 2009 Dr. Weiss applied the sixth edition of the A.M.A., *Guides* to the findings from his May 28, 2008 report. He identified a class 1 impairment due to a right elbow radial head fracture using Table 15-4 on page 399, which yielded a default value of three percent. After determining the impairment class and default grade, Dr. Weiss found a grade modifier of 3 for Functional History (GMFH) based on appellant's *Quick*DASH score of 73, a grade modifier of 3 for Physical Examination (GMPE) and a grade modifier of 2 for Clinical Studies (GMCS). Utilizing the Net Adjustment Formula discussed above, GMFH-CDX + GMPE-CDX + GMCS-CDX or (3-1) + (3-1) + (2-1) = 5, he found a net adjustment of five, for a total right upper extremity impairment of five percent.

On February 6, 2010 OWCP's medical adviser reviewed Dr. Weiss' September 28, 2009 report and concurred with his finding of five percent right upper extremity impairment.[3]

[2] By decision dated May 18, 2007, OWCP terminated appellant's compensation and authorization for medical benefits effective June 10, 2007. Appellant returned to work on May 22, 2007. In a decision dated May 13, 2008, OWCP modified its May 18, 2007 decision to reflect that appellant required further medical treatment for his accepted work injury.

[3] By letter dated December 14, 2009, OWCP referred appellant for a second opinion regarding the extent of his permanent impairment. On December 30, 2009 appellant's attorney submitted the revised report from Dr. Weiss and noted that he was currently unable to attend a schedule opinion examination.

By decision dated February 18, 2010, OWCP granted appellant a schedule award for a five percent right upper extremity impairment. The period of the award ran for 15.6 weeks from May 28 to September 14, 2008.

On March 9, 2010 appellant, through his attorney, requested a review of the written record. Counsel argued that OWCP's failure to issue a timely schedule award decision while the fifth edition of the A.M.A., *Guides* was in effect violated his due process rights.

By decision dated June 22, 2010, OWCP's hearing representative affirmed the February 18, 2010 decision.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[4] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5]

OWCP procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.[6] Any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. A claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.[7]

ANALYSIS

OWCP accepted that appellant sustained a contusion of the face, scalp and neck, an injury to the facial nerve, a closed fracture of the radius head and a closed fracture of the proximal end of the radius due to an August 12, 2006 employment injury. In a May 28, 2008 impairment evaluation, Dr. Weiss found that, according to the fifth edition of the A.M.A., *Guides*, appellant had 25 percent right upper extremity impairment. OWCP's medical adviser reviewed Dr. Weiss' report on January 30, 2009 and asserted that it was not in accordance with the A.M.A., *Guides*. He determined that appellant had a two percent impairment due to loss of range of motion of the elbow.

[4] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[5] *A. George Lampo*, 45 ECAB 441 (1994).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

[7] *Id.*

On February 9, 2009 appellant filed a claim for a schedule award. On August 12, 2009 OWCP advised him that he should submit an impairment evaluation from Dr. Weiss using the sixth edition of the A.M.A., *Guides*. In a report dated September 28, 2009, Dr. Weiss properly utilized the sixth edition of the A.M.A., *Guides* and identified the applicable diagnosis as a class 1 right elbow radial fracture according to Table 15-4, which yielded a default impairment of three percent. He applied grade modifiers of 3 for GMFH and GMPE and a grade modifier of 2 for GMCS, which a net adjustment of five under the Net Adjustment Formula, (3-1) + (3-1) + (2-3) = 5. Dr. Weiss concluded that appellant had five percent right upper extremity impairment. On February 6, 2010 OWCP's medical adviser concurred with Dr. Weiss' findings. The Board found that there is no evidence conforming to the sixth edition of the A.M.A., *Guides* showing a greater impairment.

On appeal, counsel asserted that appellant has property right in a schedule award benefit under the fifth edition 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.[8] In *Harry D. Butler*,[9] 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.[10] 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*.[11] 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.

CONCLUSION

The Board finds that appellant has no more than five percent right upper extremity impairment.

[8] 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.

[9] 43 ECAB 859 (1992).

[10] *Id*. at 866.

[11] FECA Bulletin No. 09-03 (March 15, 2009). FECA Bulletin was incorporated in the federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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