

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

J.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wilmington, DE, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 11-427
Issued: November 14, 2011**

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

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2010 appellant filed a timely appeal from the September 14, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding schedule award compensation. 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 met her burden of proof to establish that she has more than a five percent permanent impairment of her right arm, for which she received a schedule award.

FACTUAL HISTORY

On February 1, 1996 appellant, then a 52-year-old clerk, filed an occupational disease claim asserting that as of November 4, 1988 she developed carpal tunnel syndrome due to repetitive work tasks. OWCP accepted the claim for right carpal tunnel syndrome. Appellant

¹ 20 C.F.R. § 8101 *et seq.*

did not stop work. A diagnostic testing report of the right upper extremity dated November 7, 1988 was positive for right carpal tunnel syndrome. In May 1996 appellant underwent right carpal tunnel release.

In a separate claim, OWCP accepted that as of October 1, 1995 appellant developed left carpal tunnel syndrome. On January 17, 2008 it awarded a schedule award for a 10 percent impairment of the left upper extremity in connection with this claim. Appellant also sustained a subsequent right elbow contusion and OWCP denied two claims filed for a subsequent right shoulder condition.

In September 2009 Dr. Nicholas P. Diamond, an attending osteopath, applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) to his findings from July 2007. He stated that findings of negative right Tinel's and Phalen's tests, negative carpal compression, right 4/5 grip strength and diminished hand/wrist range of motion and light-touch sensation. Dr. Diamond calculated a six percent impairment referable to right carpal tunnel syndrome and a five percent impairment for a right rotator cuff tear. For carpal tunnel syndrome, he cited the sixth edition of the A.M.A., *Guides* at Table 15-23. Dr. Diamond calculated grade modifiers of one for testing, three for functional history and two for physical examination, for a total rating of six percent. He placed appellant at maximum medical improvement as of June 19, 2007.

OWCP referred the file to Dr. Craig Uejo, a Board-certified occupational medicine physician serving as an OWCP consulting physician. In a June 3, 2010 report, Dr. Uejo calculated a five percent permanent impairment of the right arm. He noted that Dr. Diamond calculated grade modifiers of one for test findings, three for functional history based on complaints of right hand numbness and weakness and two for physical examination referable to diminished sensation, for a total of six points based on such grade modifiers. Divided by three the final grade modifier was two. Dr. Uejo noted that while Dr. Diamond calculated a modifier of three for functional history, such a modifier required evidence that the patient required assistance to perform self-care activities. He opined that as there was no indication that appellant required assistance to perform self-care, the appropriate modifier for functional history was two, not three. Dr. Uejo noted that the functional history was the same grade modifier as Table 15-23 and as a result there was no adjustment to the default rating of five percent.

On June 7, 2010 OWCP awarded a schedule award for a five impairment of the right arm based on Dr. Uejo's opinion. In June 16, 2010 letter, counsel argued that it should have issued a schedule award as calculated under the fifth edition of the A.M.A., *Guides*.

Appellant requested a review of the written record by OWCP's hearing representative. In a September 14, 2010 decision, OWCP's hearing representative affirmed its June 7, 2010 decision finding that Dr. Diamond had not justified his higher impairment rating under the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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. In *Harry D. Bulter*,⁴ the Board noted that Congress delegated authority to the Director of OWCP 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.⁵ 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*.⁶

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.⁷ In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.⁸ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.⁹

ANALYSIS

The Board finds that OWCP properly accorded weight to the opinion of Dr. Uejo, a Board-certified occupational medicine physician who served as its consulting physician to find that appellant had a five percent permanent impairment of her right arm.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ 43 ECAB 859 (1992).

⁵ *Id.* at 866.

⁶ FECA Bulletin No. 09-03 (March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 1 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.(6)(a) (January 2010).

⁷ See A.M.A., *Guides* 449, Table 15-23 (6th ed. 2009).

⁸ A survey completed by a given claimant, known by the name *QuickDASH*, may be used to determine the function scale score. *Id.* at 448-49.

⁹ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 1993). This portion of OWCP procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

Dr. Uejo properly made reference to Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides*.¹⁰ He provided reasoning for his choice of grade modifiers from the table for the various categories, including test findings, history, physical findings and functional scale, based on the findings of Dr. Diamond, an attending osteopath. Dr. Uejo then correctly averaged the grade modifiers and applied the appropriate formulas and calculations. He explained that Dr. Diamond's findings supported only two and not three as the grade modifier for functional history. Dr. Diamond erroneously included a rating for a nonoccupational right shoulder condition. OWCP was not required to include such shoulder injury in the impairment rating.¹¹

There is no evidence that Dr. Uejo erred in his determination that there was a five percent impairment of the right upper extremity referable to carpal tunnel syndrome. Dr. Uejo's impairment rating provided the only impairment rating of record consistent with the sixth edition of the A.M.A., *Guides* and constitutes the weight of the medical opinion evidence.

On appeal, counsel argues that OWCP unnecessarily delayed the development of appellant's case such that the assessment of his permanent impairment was made under the sixth edition of the A.M.A., *Guides* rather than the fifth edition, hence resulting in a lower impairment rating. OWCP received a September 2009 impairment evaluation of Dr. Diamond and appropriately evaluated it under the standards of the sixth edition of the A.M.A., *Guides* which became effective May 1, 2009. Counsel has not shown that an unnecessary delay in the development of appellant's case occurred.

Counsel asserts that appellant has a 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).¹² In this case, appellant is simply making a claim for a schedule award. She 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*. In recent schedule award cases, it has been argued on appeal that the fifth edition should be used based on the date of maximum medical improvement or as of the date the schedule award claim was filed. The following may be used as a standard response. In *Harry D. Butler*,¹³ 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.¹⁴ On March 15, 2009 the Director exercised authority to advise that as of May 1,

¹⁰ *Supra* note 7.

¹¹ *See supra* note 9. There is no indication in the record that this was a preexisting or work-related condition.

¹² 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.

¹³ 43 ECAB 859 (1992).

¹⁴ *Id.* at 866

2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.¹⁵ 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, nor has appellant identified any procedural due process which he has been denied. The cases cited by appellant are not applicable to the present case.

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 did not meet her burden of proof to establish that she has more than a five percent permanent impairment of her right arm, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁵ FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claim*, Chapter 2.808.6(a) (January 2010).