

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant sustained a triangular fibrocartilage complex (TFCC) tear of the left wrist in the performance of duty on February 19, 1988.² Appellant underwent left wrist surgery on April 15, 1988.

On November 6, 2009 OWCP received a report dated January 23, 2003 from Dr. David Weiss, a Board-certified orthopedic surgeon. The report included a handwritten heading, "revised sixth edition." Dr. Weiss provided a history of lifting heavy sacks on February 19, 1988, noting that an arthrogram revealed a TFCC tear. He also noted a July 11, 1995 right wrist injury. Dr. Weiss provided results on examination, noting focal point tenderness over the TFCC on the left wrist. With respect to a permanent impairment, he indicated that under Table 15-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) appellant had a class 1 impairment, with a default impairment of eight percent to the left arm. Dr. Weiss found that grade modifiers for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS) were a two (moderate problem) and concluded that appellant had a 10 percent impairment. He also referred to an entrapment neuropathy at the left median wrist and found appellant had a three percent impairment under Table 15-23.

The case was referred to OWCP's medical adviser for evaluation. In a report dated June 8, 2010, the medical adviser concurred that Table 15-3 provided an eight percent impairment for a class 1 impairment due to an TFCC tear. OWCP's medical adviser explained, however, that the findings of Dr. Weiss did not support his use of grade modifier 2 for GMPE and GMCS. The medical adviser noted that the examination findings reported only some tenderness over TFCC and Extensor Carpi Ulnar tendon, which constituted minimal palpatory findings that result in a grade modifier of one under Table 15-8. For GMCS, the arthrogram confirmed the mild pathology of a TFCC tear and OWCP's medical adviser found this also resulted in one for a grade modifier. OWCP's medical adviser concluded that appellant had a nine percent left arm impairment. The date of maximum medical improvement was reported as January 23, 2003.

By decision dated June 16, 2010, OWCP issued a schedule award for a nine percent permanent impairment to the left arm. The period of the award was 28.08 weeks of compensation from January 23, 2003.

Appellant requested a review of the written record. By decision dated October 19, 2010, OWCP's hearing representative affirmed the June 16, 2010 decision.

² OWCP form CA-800 (nonfatal summary) also indicated a left wrist sprain was an accepted condition.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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.⁵ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.⁷

With respect to a wrist impairment, the A.M.A., *Guides* provides a regional grid at Table 15-3.⁸ The class of impairment Diagnosed Condition (CDX) is determined based on specific diagnosis and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for GMFH, Table 15-7, GMPE, Table 15-8 and GMCS, Table 15-9. The adjustment formula is GMFH - CDX + GMPE - CDX + GMCS - CDX.⁹

ANALYSIS

In this case, appellant submitted a report dated January 23, 2003 from Dr. Weiss. It appears that this was a “revised” report with an impairment calculation under the sixth edition of the A.M.A., *Guides*, although the revision date is not provided. The Board notes that while Dr. Weiss referred to entrapment neuropathy impairment, the accepted condition for the February 18, 1988 injury in this case was a TFCC tear. OWCP has not accepted an entrapment neuropathy, nor was any evidence submitted on causal relationship with employment.

As to the accepted TFCC tear of the left wrist, both Dr. Weiss and OWCP’s medical adviser applied Table 15-3. The default value (grade C) for a TFCC tear with residual findings is eight percent.¹⁰

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ See Ronald R. Kraynak, 53 ECAB 130 (2001); August M. Buffa, 12 ECAB 324 (1961).

⁶ 20 C.F.R. § 10.404.

⁷ FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁸ A.M.A., *Guides* 391-94, Table 15-3.

⁹ The net adjustment is up to +2 (grade E) or -2 (grade A).

¹⁰ A.M.A., *Guides* 396, Table 15-3.

There was, however, a disagreement between Dr. Weiss and OWCP's medical adviser as to how the grade modifiers should be applied. Dr. Weiss found a grade modifier of two for GMPE under Table 15-8, stating "observed and palpatory." A grade modifier two is for moderate palpatory findings.¹¹ OWCP's medical adviser disagreed, opining that the physical findings reported would constitute minimal palpatory findings, which under Table 15-8 is classified as a grade modifier 1. For GMCS, Dr. Weiss also found a grade modifier two pursuant to Table 15-9, stating "arthrogram." Under Table 15-9, GMCS that confirm a moderate pathology is a grade modifier two. OWCP's medical adviser indicated that the arthrogram simply confirmed the diagnosis of a mild pathology, which is a grade modifier one under Table 15-9.¹²

Since there is a disagreement between the attending physician and OWCP's medical adviser, the Board finds a conflict under 5 U.S.C. § 8123(a) has occurred.¹³ The case will be remanded to OWCP for proper resolution of the conflict. After such development as is deemed necessary, OWCP should issue an appropriate decision.

On appeal, appellant argues she was deprived of a property right as OWCP failed to issue a decision under the fifth edition of the A.M.A., *Guides*. The Board notes that appellant did not submit Dr. Weiss' report until after May 1, 2009, when all schedule award decisions must be based on the sixth edition.

In *Harry D. Butler*,¹⁴ 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.¹⁵ 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*.¹⁶ 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.

¹¹ *Id.* at 408, Table 15-8.

¹² Grade modifier one is described as "GMCS confirm diagnosis, mild pathology."

¹³ FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

¹⁴ 43 ECAB 859 (1992).

¹⁵ *Id.* at 866.

¹⁶ FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 7, Chapter 2.808.6(a) (January 2010).

CONCLUSION

The Board finds there is an unresolved conflict and the case is remanded for referral to a referee physician.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 19, 2010 is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: October 17, 2011
Washington, DC

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

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

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