

wrist sprain, neck strain and lumbar strain. On August 22, 2008 OWCP accepted the claim for lumbar radiculopathy and ulnar neuropathy.

In an April 1, 2008 report, Dr. David Weiss, an osteopath, opined that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) appellant had a 47 percent right arm impairment due to sensory deficit and pinch strength deficit. He found 12 percent impairment to the left leg for sensory deficit from the lumbar nerve roots.

In a report dated November 1, 2008, OWCP's medical adviser opined that appellant had a 20 percent right arm impairment due to pinch deficit and a 12 percent left leg impairment for sensory deficit. OWCP found a conflict in the medical evidence arose between Dr. Weiss and the medical adviser. It referred appellant for a referee examination pursuant to 5 U.S.C. § 8123(a).²

By report dated March 16, 2009, Dr. Ronald Gerson a Board-certified orthopedic surgeon selected as a referee physician, opined that appellant had a four percent right arm impairment for median nerve sensory deficit. He found no ratable impairment to the left leg related to the employment injury.

In a report dated September 24, 2009, Dr. Weiss provided a "revised" opinion as to permanent impairment based on the April 1, 2008 examination, using the sixth edition of the A.M.A., *Guides*. He identified Table 15-23 and found that, for the right median nerve and the right ulnar nerve, there was a five percent arm impairment for each nerve. Dr. Weiss indicated that the grade modifier was 2, with a default value of five percent. The DASH (Disabilities of the Arm, Shoulder and Hand) score was 52, resulting in no additional modification. For the left leg, Dr. Weiss opined there was a nine percent impairment under Table 16-12 for the sciatic nerve.

OWCP referred the case to its medical adviser for review. In a report dated March 29, 2010, the medical adviser concurred with Dr. Weiss regarding a 10 percent right arm and 9 percent left leg permanent impairment. The date of maximum medical improvement was reported as April 1, 2008, the date of examination by Dr. Weiss.

By decision dated May 28, 2010, OWCP issued a schedule award for a 10 percent right arm and 9 percent left leg permanent impairments. The period of the award was 57.12 weeks commencing April 1, 2008.

² 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).

In a letter dated June 7, 2010, appellant requested a review of the written record. He argued that OWCP failed to make a timely schedule award determination under the fifth edition of the A.M.A., *Guides* that deprived him of due process rights.

By decision dated November 19, 2010, OWCP's hearing representative affirmed the May 28, 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.³ 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.⁴ 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*.⁵

ANALYSIS

In the present case, OWCP's decision was dated May 28, 2010, and therefore the schedule award determination must be based on the sixth edition of the A.M.A., *Guides*. The medical evidence applying the sixth edition was from Dr. Weiss and OWCP's medical adviser, both of whom concurred as to the impairment. For the right arm, Table 15-23 provides grade modifiers (from zero to four) for test findings, history and physical findings.⁶ The grade modifiers are determined and then averaged for a final rating category. Within the final category, the default value may be modified based on the *QuickDASH* functional scale.⁷ In this case, Dr. Weiss found a grade modifier of one for test findings (sensory conduction delay), three for history (constant symptoms) and three for physical findings (atrophy or weakness). The average (seven divided by three) is grade modifier two, which as a default leg impairment of five percent. There is no adjustment for the functional scale as the grade is moderate (*QuickDASH* score of 52). For both the median and ulnar nerves, the impairment is five percent, or a 10 percent total right arm impairment.

³ 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).

⁴ A. George Lampo, 45 ECAB 441 (1994).

⁵ FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁶ A.M.A., *Guides* 449, Table 15-23.

⁷ The *QuickDASH* is a questionnaire containing 11 questions that is used for a functional assessment of the impairment. A.M.A., *Guides* 482.

As to the left leg, Table 16-12 provides that a mild-to-moderate sensory deficit of the sciatic nerve is a class of diagnosis (CDX) one impairment, with a default impairment (grade C) of four percent.⁸ The default may be adjusted, however, for Functional History (GMFH) (Table 16-6) and Clinical Studies (GMCS) (Table 16-8).⁹ Dr. Weiss and the medical adviser found a grade modifier two for GMFH and GMCS. Applying the formula of (GMFH-CDX) + (GMCS-CDX) results in (2-1) + (2-1), or a net adjustment of +2 for a grade E impairment.¹⁰ Under Table 16-12 this is a nine percent leg impairment.

Therefore based on the probative evidence of record under the sixth edition, appellant has a 10 percent right arm and 9 percent left leg permanent impairment. He is therefore entitled to 10 percent of the maximum 312 weeks of compensation for loss of arm (31.20 weeks), plus 9 percent of the 288 weeks maximum for loss of use of the leg, or 25.92 weeks. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹¹ In this case OWCP's medical adviser properly concluded that the date of maximum medical improvement was the date of examination by Dr. Weiss, or April 1, 2008. The award therefore properly runs for 57.12 weeks commencing on April 1, 2008.

On appeal, appellant asserts that he has 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). 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.¹² In this case, appellant had received no schedule award under the fifth edition.

Appellant further stated that there was a delay in the adjudication of the claim for a schedule award that deprived him of due process. 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, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.¹⁵ The

⁸ A.M.A., *Guides* 535, Table 16-12.

⁹ *Id.* at 533.

¹⁰ *Id.* 521 provides the net adjustment formula.

¹¹ *Albert Valverde*, 36 ECAB 233, 237 (1984).

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; 20 C.F.R. § 10.404.

¹⁵ *Supra* note 5.

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. The final OWCP decision was not issued until after May 1, 2009 and all decisions issued after May 1, 2009 are to be based on the sixth edition. The decision on appeal was properly based on the sixth edition of the A.M.A., *Guides*.

CONCLUSION

The Board finds the evidence does not establish more than a 10 percent right arm or 9 percent left leg permanent impairment.

ORDER

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

Issued: October 17, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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