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

B.F., Appellant	
and	) <b>Docket No. 12-476</b>
anu	) Issued: July 26, 2012
DEPARTMENT OF JUSTICE,	)
METROPOLITAN CORRECTIONAL	)
CENTER, New York, NY, Employer	)
	)
Appearances:	Case Submitted on the Record
Aaron B. Aumiller, Esq., for the appellant	
Office of Solicitor, for the Director	

## ORDER AFFIRMING CASE

## Before:

RICHARD J. DASCHBACH, Chief Judge PATRICIA HOWARD FITZGERALD, Judge ALEC J. KOROMILAS, Alternate Judge

On January 3, 2012 appellant, through his attorney, filed a timely appeal from the July 5, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed his December 2, 2010 schedule award claim.<sup>1</sup>

The Board has duly considered the matter and will affirm OWCP's July 5, 2011 decision. Appellant's attorney expresses no disagreement with the schedule award *per se*. Rather, he asserts only that OWCP delayed its adjudication of appellant's schedule award claim until the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009) became applicable on May 1, 2009, which deprived him of due process rights regarding a determination under the fifth edition of the A.M.A., *Guides* (2001) and represented an abuse of discretion. Counsel contended that the medical evidence of record was in full concurrence with the fifth edition of the A.M.A., *Guides* and submitted well in

<sup>&</sup>lt;sup>1</sup> OWCP accepted that on November 6, 2003 appellant, then a 41-year-old correctional supervisor, sustained right knee medial and lateral meniscus tears and aggravation of right knee osteoarthritis when he slipped on a staircase and struck his knee on a step while escorting an inmate on a treaty transfer to an airport. He underwent arthroscopic right knee surgery on April 27, 2004 and total right knee replacement on March 9, 2006. In a December 2, 2010 decision, OWCP granted appellant a schedule award for 37 percent impairment to his right lower extremity.

advance of the effective date for the use of the sixth edition. He maintained that OWCP's application of the sixth rather than the fifth edition harmed appellant by diminishing the amount of the schedule award to which he was entitled. The Board has held, however, that a claimant has no vested right to a schedule award when he or she has only made a claim for a schedule award.<sup>2</sup> To the extent that counsel is arguing that appellant was deprived of a protected property interest, the Board notes that such assertions are similar to arguments made in the cases of *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* welfare benefits and in *Mathews* social security benefits) could not have those benefits terminated without procedural due process. In this case, appellant simply made a claim for a schedule award. He was not in receipt of schedule award benefits nor was OWCP attempting to terminate benefits. Appellant had no vested right to a schedule award under the fifth edition of the A.M.A., *Guides*.<sup>3</sup>

In Harry D. Butler, 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.<sup>5</sup> 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. The FECA Bulletin directed that correspondence with treating physicians, consultants and second opinion specialists should reflect use of the new edition for decisions issued on or after May 1, 2009. 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. In this case, OWCP, on August 31, 2009, properly advised appellant, that effective May 1, 2009 all permanent impairment determinations must be made in accordance with the sixth edition and requested a new impairment rating corresponding to this edition. The Board finds that counsel has not established that the Director abused the discretion delegated to him under section 8107 and the implementing federal regulations to make the sixth edition of the A.M.A., Guides applicable to all claimants as of May 1, 2009. The fact that the sixth edition revises the evaluation methods used in previous editions does not establish an abuse of discretion. As noted in FECA Bulletin No. 09-03, the American Medical Association periodically revises the A.M.A., Guides to incorporate current scientific clinical knowledge and judgment and to establish standardized methodologies for calculating permanent impairment. Accordingly, the Board will affirm OWCP's July 5, 2011 decision.

<sup>&</sup>lt;sup>2</sup> See P.V., Order Affirming Case, Docket No. 11-348 (issued September 15, 2011); B.M., Order Affirming Case, Docket No. 11-1468 (issued January 12, 2010).

 $<sup>^3</sup>$  Id.

<sup>&</sup>lt;sup>4</sup> 43 ECAB 859 (1992).

<sup>&</sup>lt;sup>5</sup> *Id*. at 866.

<sup>&</sup>lt;sup>6</sup> FECA Bulletin No. 09-03 (issued March15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

**IT IS HEREBY ORDERED THAT** the July 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2012 Washington, DC

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

> Patricia Howard Fitzgerald, Judge Employees' Compensation Appeals Board

> Alec J. Koromilas, Alternate Judge Employees' Compensation Appeals Board