

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

P.R., claiming as widow of E.R., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Munising, MI, Employer**

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**Docket No. 12-1156
Issued: February 14, 2013**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2012 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) schedule award decision dated April 5, 2012. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 the employee has more than a 10 percent permanent impairment of the right arm, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. On August 14, 1998, the employee, then a 65-year-old groundskeeper, struck his right elbow on the corner of a building while mowing grass.

¹ 5 U.S.C. § 8101 *et seq.*

He filed a claim for benefits on August 17, 1998. OWCP accepted right lateral epicondylitis. It approved surgery for the employee's right elbow which he underwent on February 11, 1999.²

On April 20, 2006 the employee, through his attorney, filed a Form CA-7 claim for a schedule award.

By decision dated October 16, 2006, OWCP found that the employee had no ratable impairment causally related to the accepted condition and was not entitled to a schedule award.

By letter dated October 23, 2006, counsel requested an oral hearing.

In a November 15, 2006 report, Dr. Dee Ann Bialecki-Haase, Board-certified in orthopedic surgery, found that the employee had a 10 percent impairment of the right arm under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*), based on a loss of range of motion in the right elbow. She measured 115 degrees of flexion, a 50 degree extension lag and supination and pronation of the right elbow at 60 degrees. Dr. Bialecki-Haase found that the employee had a 3 percent impairment of the right upper extremity for loss of flexion under Figure 16-34, page 472 of the A.M.A., *Guides*; a 5 percent impairment due to loss of extension under Figure 16-34; a 1 percent impairment due to loss of supination under Figure 16-37, page 474; and a 1 percent impairment for loss of pronation under Figure 16-37 for a total 10 percent impairment.

By decision dated August 28, 2007, OWCP granted the employee a schedule award for 10 percent impairment of the right arm. The award was under the fifth edition of the A.M.A., *Guides* for the period November 15, 2006 to June 21, 2007, for a total of 31.2 weeks of compensation.

By letter dated September 14, 2007, counsel requested an oral hearing, which was held on January 9, 2008.

By decision dated February 15, 2008, OWCP's hearing representative affirmed the August 28, 2007 decision, finding that the employee did not have greater impairment.

On March 26, 2009 the employee, through his attorney, filed a Form CA-7 claim for a schedule award based on additional impairment to his right upper extremity.

By letter dated May 11, 2009, OWCP asked Dr. Bialecki-Haase to provide an impairment rating for the employee's right upper extremity pursuant to the sixth edition of the A.M.A., *Guides*. Dr. Bialecki-Haase did not respond to this request.

On May 29, 2009 the employee died.

On June 15, 2009 appellant, the employee's wife, filed a Form CA-5 claim for death benefits, claiming his death was causally related to his accepted elbow condition.

² In a decision dated September 26, 2006, the Board affirmed OWCP's October 3, 2005 and February 3, 2006 decisions denying the employee's claim for a recurrence of disability. Docket No. 10-1925 (issued June 1, 2011).

By decision dated October 15, 2009, OWCP denied appellant's claim for death benefits.

In a November 13, 2009 report, Dr. Anthony F. Skalak, OWCP's medical adviser, reviewed Dr. Bialecki-Haase's physical examination of the employee on August 25, 2008 and applied Table 15-4, page 399 of the sixth edition of the A.M.A., *Guides*. He found that the employee had a class 1 impairment, which produced a grade modifier of 1, grade C for a seven percent right upper extremity impairment.

By decision dated December 8, 2009, OWCP denied modification of the August 28, 2007 decision, finding that greater permanent impairment was not established.

By letter dated December 15, 2009, counsel requested an oral hearing, which was held on March 19, 2010.

In a report dated May 18, 2010, Dr. William N. Grant, Board-certified in internal medicine, found that the employee had a 13 percent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. He derived this impairment by applying the net adjustment formula at pages 406 and 411 of the A.M.A., *Guides*.³ Dr. Grant found that the employee had a class 2 impairment under the rating utilized at the elbow regional grid at Table 15-4, page 399. He found that the grade at Table 15-7, page 406 for functional history was 3, based on a *QuickDASH* score of 77, for a severe problem which included pain/symptoms with less than normal activity and the ability to perform self-care activities with modification but unassisted; the grade at Table 15-8, page 408 for physical examination was 3, for a severe problem due to loss of range of motion from normal.⁴ Pursuant to the formula set forth at page 411, Dr. Grant found that appellant had a net adjustment of two by subtracting the grade modifier of 2 from functional history and physical examination, for a 13 percent impairment of the right upper extremity under the A.M.A., *Guides*.

By decision dated June 22, 2010, OWCP's hearing representative affirmed the August 28, 2007 decision. She, however, did not consider Dr. Grant's May 18, 2010 report.

In a report dated June 27, 2010, Dr. Grant reiterated his impairment rating of 13 percent.

In a May 25, 2011 order,⁵ the Board set aside the June 22, 2010 OWCP decision. The Board instructed OWCP on remand to consider all the medical evidence of record to determine if the employee had greater impairment.

By decision dated June 8, 2011, OWCP's hearing representative found that Dr. Grant's June 27, 2010 report was sufficient grounds for further development of the evidence. She directed that the case be remanded to OWCP to determine whether Dr. Grant's report provided a sufficient basis for an additional schedule award under the A.M.A., *Guides*.

³ A.M.A., *Guides* 406, 411.

⁴ *Id.* at 406, 408

⁵ Docket No. 10-1963 (issued May 25, 2010).

In a September 1, 2011 report, a second OWCP's medical adviser, found that Dr. Grant's report was of diminished probative value because he did not properly apply the applicable tables or protocols of the A.M.A., *Guides*. Applying the elbow regional grid at Table 15-4, page 399, he rated a default grade C impairment for the employee's right lateral epicondylitis condition, which yielded a five percent impairment for a surgical release procedure. OWCP's medical adviser stated that Dr. Grant's finding of a net adjustment of two would move the default impairment grade from C to E pursuant to the net adjustment formula set forth at page 411. This produced a seven percent right upper extremity impairment. As this amounted to an impairment less than the 10 percent already awarded, the medical adviser concluded that appellant did not have greater impairment under the sixth edition of the A.M.A., *Guides*.

By decision dated September 22, 2011, OWCP found that appellant was not entitled to an additional schedule award.

By letter dated September 30, 2011, counsel requested an oral hearing, which was held on February 16, 2012.

By decision dated April 5, 2012, OWCP's hearing representative affirmed the September 22, 2011 decision, finding that appellant was not entitled to an additional schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁹

ANALYSIS

OWCP accepted the condition of right lateral epicondylitis and authorized right elbow release surgery. On August 28, 2007 it granted the employee a schedule award for a 10 percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides*. Following the employee's death on May 29, 2009, appellant subsequently requested an additional schedule

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁸ *Id.*

⁹ *Veronica Williams*, 56 ECAB 367, 370 (2005).

award under the, sixth edition of the A.M.A., *Guides*. OWCP found that she did not submit medical evidence sufficient to establish greater impairment due to the employee's accepted right lateral epicondylitis condition pursuant to the sixth edition of the A.M.A., *Guides*.

The section of the A.M.A., *Guides* which rates diagnosis-based impairments for the upper extremities is located at Chapter 15, page 387, section 15.2. It provides that impairments are defined by class and grade. This section states:

“The impairment class is determined first, by using the corresponding diagnosis-based regional grid. The grade is then determined using the adjustment grids provided in [s]ection 15.3.

“Once the impairment class has been determined, based on the diagnosis, the grade is initially assigned the default value, ‘C.’ The final impairment grade, within the class, is calculated using the grade modifiers or nonkey factors, as described in [s]ection 15.3. Grade modifiers include functional history, physical examination and clinical studies. The grade modifiers are used on the [n]et [a]djustment [f]ormula described in [s]ection 15.3d to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment. The lowest possible grade is A and adjustments less than [minus] 2 from the default value C will automatically be considered A; the highest possible grade is E and adjustments greater than [plus] 2 will automatically be considered E.”

The regional grid is used for two purposes: (1) to determine the most appropriate class for specific regional diagnosis and (2) to determine the final impairment after appropriate adjustments are made using the grade modifiers.¹⁰ In applying a diagnosis-based impairment, the A.M.A. *Guides* indicate that in most cases, only one diagnosis in a region will be appropriate, and if a patient has two significant diagnoses, the examiner should use the diagnosis with the highest impairment in that region.¹¹

In a September 1, 2011 report, OWCP's medical adviser properly selected the diagnosis with the highest potential impairment rating, the surgical elbow release procedure the employee underwent in February 1999. He applied the proper adjustment factors to determine the degree of impairment of the employee's right upper extremity. Using the formula above and the net adjustment formula outlined at pages 406 and 411 of the A.M.A., *Guides*, the medical adviser found that the employee's accepted condition yielded a default grade of C, which equated to a five percent upper extremity impairment for surgical release. Relying on Dr. Grant's net adjustment figure of 2, he found that this moved the default grade from C to E pursuant to page 411 of the A.M.A., *Guides*. This resulted in a seven percent right upper extremity impairment at Table 15-4, page 399. The Board finds that OWCP properly based its review on the surgical release of the flexor or extensor muscles, due to epicondylitis, pursuant to Table 15-4. The 7 percent rating amounted to less than the 10 percent the employee received in the August 28,

¹⁰ A.M.A., *Guides* 387

¹¹ *Id.*

2007 schedule award. OWCP properly denied appellant an additional award in its September 22, 2011 and April 5, 2012 decisions. The Board finds that the medical adviser properly applied the A.M.A., *Guides* to rate the employee's right upper extremity impairment based on the findings of Dr. Grant, who did not provide adequate medical rationale to support his opinion that appellant had 13 percent impairment of the right arm.¹²

As appellant did not submit medical evidence sufficient to support an additional schedule award greater than the 10 percent the employee received for the right upper extremity, the Board will affirm OWCP's April 5, 2012 decision.

CONCLUSION

The Board finds that the employee had 10 percent permanent impairment of the right upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2013
Washington, DC

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

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

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

¹² *William C. Thomas*, 45 ECAB 591 (1994).