

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

T.B., Appellant)
and) Docket No. 09-1903
U.S. POSTAL SERVICE, LANCASTER) Issued: April 15, 2010
PROCESSING & DISTRIBUTION CENTER,)
Lancaster, PA, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 20, 2009 appellant filed a timely appeal from schedule award decisions of the Office of Workers' Compensation Programs dated December 12, 2008 and May 28, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than 14 percent impairment of his right upper extremity.

On appeal, appellant contends that his condition has continued to deteriorate and that the report of Dr. Neil Novin represents the weight of medical opinion.¹

¹ The Board notes that both appellant and the Office hearing representative in the May 28, 2009 decision misidentified the report as being from Dr. Jeffrey Gaber when it was prepared by Dr. Neil Novin, an associate of Dr. Gaber.

FACTUAL HISTORY

On October 13, 1999 appellant, then a 42-year-old distribution clerk, sustained a right wrist sprain/strain while lifting a tray of mail. Dr. J. Paul Lyet, a Board-certified orthopedic surgeon, performed corrective surgery on January 17, 2001. Appellant sustained additional injuries to his right upper extremity on August 22 and October 25, 2002. The claims were accepted for closed dislocation of the wrist, arthrosis of the distal radioulnar joint and localized primary osteoarthritis of the right forearm and hand.² On December 4, 2006 Dr. Raymond Part, Board-certified in orthopedic and hand surgery, performed distal radioulnar joint arthroplasty of the right wrist. Appellant returned to modified duty on January 29, 2007.

Appellant filed a schedule award claim on August 12, 2008 and submitted medical reports from November 12, 1999 to July 10, 2007. A right wrist x-ray dated August 1, 2008 revealed the previous surgery and was interpreted as otherwise normal. In an August 7, 2008 report, Dr. Allan H. Macht, a Board-certified surgeon, noted the history of injury and that an electromyographic (EMG) study in January 2006 was unremarkable. He advised that maximum medical improvement was reached by July 2007 and provided an impairment analysis of the right wrist under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ Dr. Macht found that, under Figure 16-28, appellant had a 4 percent impairment of the right upper extremity due to loss of right wrist flexion and extension and that, under Table 16-27, he had a 10 percent impairment due to the resection arthroplasty of the ulnar head, which combined to yield 14 percent permanent impairment of the right upper extremity.⁴ An Office medical adviser reviewed the medical record and agreed with Dr. Macht's impairment rating. He noted a date of maximum medical improvement as August 7, 2008.

By decision dated December 12, 2008, appellant was granted a schedule award for 14 percent impairment of the right arm, for 43.68 weeks, to run from August 7, 2008 to June 8, 2009.

On December 19, 2008 appellant, through his attorney, requested a hearing. In a March 19, 2009 report, Dr. Neil Novin, Board-certified in surgery, reviewed the history of appellant's employment injuries and complaints of numbness of the dorsum of the right hand and all fingers, throbbing pain in the wrist with diminished grip strength, and difficulty with rotary motions and fine manipulative activities. He provided upper extremity examination findings, noting a positive Tinel's sign in Guyon's canal on the right hand and wrist and absent Phalen's sign. Opposition of thumb to fingers of both hands was normal with diminished pinch and grip

² Although initially adjudicated separately, the Office doubled the claims on February 10, 2006.

³ A.M.A., *Guides* (5th ed. 2001).

⁴ Dr. Macht advised that on physical examination right wrist flexion was limited to 50 degrees, extension to 50 degrees, radial deviation to 20 degrees and ulnar deviation to 30 degrees with slight pain with wrist motion and squeezing. There was no weakness of hand grip and mild weakness noted in the intrinsic muscles of the right hand. Sensation to light touch and two-point discrimination were intact. Tinel's sign was positive in the medial nerve distribution. Dr. Macht advised that right wrist x-ray revealed changes in contour about the distal ulnar suggesting an osteotomy about its radial aspect and diagnosed postoperative state of right wrist.

strength on the right. The dorsum of the right wrist was tender, and right wrist range of motion demonstrated 40 degrees of palmar flexion, 45 degrees of extension, 20 degrees of radial deviation and 15 degrees of ulnar deviation. Proprioception and sensation were intact. Under the sixth edition of the A.M.A., *Guides*,⁵ Dr. Novin found that, under Table 15-3, appellant had a Class 1 impairment, with Grade E on Table 15-6 which warranted a grade modifier of 3 which, under Table 15-7, warranted a dash score of 75, and that under Table 15-8 appellant had a moderate problem grade modifier of 2. He then followed example 15-7 and, taking into account the above analysis, concluded that, under Table 15-10, appellant had a Class 3 Grade C impairment warranting 30 percent impairment of the right upper extremity.

At the hearing, held telephonically on April 8, 2009, appellant described his work injuries and duties, testifying that he returned to full duty in June 2007. He stated that his right wrist ached and throbbed and occasionally woke him at night. Appellant had grip problems and diminished strength but had not seen a physician since June 2007.

By decision dated May 28, 2009, an Office hearing representative affirmed the December 12, 2008 decision, finding that there was no explanation regarding the significant disparity in impairment ratings by Dr. Macht and Dr. Novin.⁶

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,⁷ and its implementing federal regulations,⁸ 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, the Act 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰ For decisions issued after May 1, 2009, the sixth edition will be used.¹¹

ANALYSIS

The Board finds this case is not in posture for decision. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the

⁵ A.M.A., *Guides* (6th ed. 2008).

⁶ *Supra* note 1.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹¹ FECA Bulletin No. 09-03 (issued March 15, 2009).

progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.¹² The December 12, 2008 schedule award granted appellant compensation for 14 percent permanent impairment of the right upper extremity. Appellant submitted a March 19, 2009 medical report from Dr. Novin who utilized the sixth edition of the A.M.A., *Guides* to determine that appellant had 30 percent right upper extremity impairment.

The sixth edition of the A.M.A., *Guides* became effective May 1, 2009. FECA Bulletin No. 09-3 (issued March 15, 2009) provides that any initial schedule award decision issued on or after May 1, 2009 will be based on the sixth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date. The bulletin also explains that, as with previous revisions to the A.M.A., *Guides*, awards made prior to May 1, 2009 should not be recalculated merely because a new edition of the A.M.A., *Guides* is in use. However, a claimant who has received a schedule award under a previous edition may make a claim for an increased award, which should be calculated according to the sixth edition.¹³ Appellant submitted Dr. Novin's report which demonstrated an increased impairment under the sixth edition of the A.M.A., *Guides*.

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹⁴ Dr. Novin's report was not forwarded to an Office medical adviser for review. The Office hearing representative did not comply with the Office's procedures. For this reason, the May 28, 2009 decision will be vacated and the case remanded to the Office. The Office should forward Dr. Novin's report to an Office medical adviser for review under the sixth edition of the A.M.A., *Guides*. Following such further development as it deems necessary, the Office shall issue an appropriate decision on appellant's claim of greater impairment.

CONCLUSION

The Board finds this case is not in posture for decision.

¹² *Rose V. Ford*, 55 ECAB 449 (2004).

¹³ *Supra* note 11.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: April 15, 2010
Washington, DC

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

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

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