

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

V.T., Appellant)

and)

U.S. POSTAL SERVICE, NORTH METRO)
PROCESSING & DISTRIBUTION CENTER,)
Duluth, GA, Employer)

**Docket No. 10-1008
Issued: December 13, 2010**

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 March 1, 2010 appellant filed a timely appeal from an October 19, 2009 schedule award decision of the Office of Workers' Compensation Programs and a December 17, 2009 decision that denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has more than a three percent impairment of the right arm for which she received schedule awards; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 18, 2006 the Office accepted that appellant, then a 47-year-old mail handler, sustained employment-related lateral epicondylitis of the right arm. It granted her a schedule

award for a one percent impairment of the right upper extremity on April 26, 2007. By decision dated April 19, 2007, the Office determined that appellant's actual earnings as a modified mail handler fairly and reasonably represented her wage-earning capacity, with a zero loss.¹

On November 10, 2008 Dr. Brian Morgan performed arthroscopic rotator cuff repair, debridement of degenerative labral tears, debridement of partial biceps tendon tear and subacromial decompression of the right shoulder. Appellant returned to modified duty on January 9, 2009.

A functional capacity evaluation was performed on May 27, 2009 by Kevin Roulhac, an occupational therapist. In a May 31, 2009 report, he advised that it was difficult to obtain appellant's work tolerances due to inconsistent effort and evidence of symptom magnification.

On May 30, 2009 appellant filed a schedule award claim.

In a May 29, 2009 report, Dr. Morgan noted appellant's complaint of bilateral shoulder pain. He provided range of motion measurements. On the right Dr. Morgan found normal extension and external rotation, abduction of 120 degrees, forward flexion of 160 degrees and internal rotation of 60 degrees. He diagnosed sprains and strains of shoulder and upper arm with rotator cuff tear and acromioclavicular arthritis and advised that appellant could return to full duty with no restrictions.

In a June 15, 2009 report, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon and Office medical adviser, determined that maximum medical improvement was reached on May 29, 2009. He advised that, under Table 15-5, Shoulder Regional Grid, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),² appellant had a Class 1 impairment due to a full thickness cuff tear of the right shoulder with a default Grade C that yielded a three percent impairment. Dr. Hogshead found zero adjustments, noting that the functional capacity evaluation was invalid due to excessive illness behavior and that her physician had returned her to full duty. He concluded that appellant had a total three percent right upper extremity impairment.

By decision dated June 30, 2009, the Office noted that appellant had previously received a schedule award for a one percent right upper extremity impairment. It granted her a schedule award for an additional two percent impairment of the right upper extremity. The Office relied on the opinion of the Office medical adviser, based on Dr. Morgan's physical findings.

On July 19, 2009 appellant requested a review of the written record. In a June 9, 2009 report, Dr. Morgan diagnosed right rotator cuff sprain with a date of maximum medical improvement of May 29, 2009. He advised that, under the fifth edition of the A.M.A., *Guides*, appellant had 13 percent right upper extremity impairment. On July 31, 2009 Dr. Morgan reiterated the findings of his May 29, 2009 report. By report dated July 20, 2009, he stated that,

¹ The right upper extremity injury was adjudicated by the Office under file number xxxxxx861 and the left upper extremity under file numbers xxxxxx069 and xxxxxx009. The latter two claims were doubled on March 3, 2008.

² A.M.A., *Guides* (6th ed. 2008).

in accordance with the sixth edition of the A.M.A., *Guides*, appellant had seven percent right upper extremity impairment.

In an October 19, 2009 decision, an Office hearing representative affirmed the June 30, 2009 schedule award on the grounds that the medical evidence of record did not establish that appellant had greater impairment.

Appellant requested reconsideration on November 2, 2009, contending that she was entitled to an increased schedule award. She submitted Dr. Morgan's reports previously of record.³ By decision dated December 17, 2009, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing federal regulations⁵ 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.⁶ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷ For decisions issued after May 1, 2009, the sixth edition will be used.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning (ICF), Disability and Health.⁹ Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical

³ Appellant also submitted reports from Dr. David Kunz, Board-certified in family medicine, regarding a possible seizure on October 30, 2009. On October 30, 2009 she filed a claim for compensation for the period October 30 to November 9, 2009. In a January 4, 2010 decision, the Office denied the claim. Appellant did not file an appeal of this decision with the Board.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ A.M.A., *Guides*, *supra* note 2 at 3, section 1.3, "The [ICF], Disability and Health: A Contemporary Model of Disablement."

studies (GMCS).¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS-CDX).¹¹

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.¹²

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision as to the extent of appellant's right upper extremity impairment. The case will be remanded to the Office for further development.

Chapter 15 of the sixth edition of the A.M.A., *Guides* describes the procedures to be followed in rating upper extremity impairments and advises that most impairment values are calculated using the diagnosis-based impairment (DBI) method.¹³ However, the A.M.A., *Guides* provides that range of motion may, under specific circumstances, be selected as an alternative approach to rating impairment.¹⁴ A full-thickness rotator cuff tear is identified as one of the exceptions.¹⁵ In this case, Dr. Morgan, the attending orthopedic surgeon, provided right shoulder range of motion measurements; but he did not provide any analysis or reference to specific figures or tables of the sixth edition of the A.M.A., *Guides*. He merely advised that appellant had a seven percent right upper extremity impairment. Dr. Morgan provided physical examination findings that the Office medical adviser, Dr. Hogshead, reviewed.¹⁶ Dr. Hogshead based his rating on Table 15-5, Shoulder Regional Grid and did not explain why he used this analysis and did not consider Dr. Morgan's range of motion measurements, which could yield a higher impairment rating under the A.M.A., *Guides*. It was incumbent upon the medical adviser to fully explain why he chose to rate appellant under Table 15-5 without discussing

¹⁰ A.M.A., *Guides*, *supra* note 2 at 385-419.

¹¹ *Id.* at 411.

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹³ A.M.A., *Guides*, *supra* note 2 at 385, 461.

¹⁴ *Id.* at 390.

¹⁵ *Id.* at 403.

¹⁶ Before the A.M.A., *Guides*, can be utilized, a description of impairment must be obtained from the claimant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

Dr. Morgan's right shoulder range of motion measurements.¹⁷ Accordingly, the case will be remanded to the Office for further development regarding the extent of appellant's right upper extremity impairment in accordance with the sixth edition of the A.M.A., *Guides*. Given the disposition of issue one, the second issue is moot.

CONCLUSION

The Board finds that the case is not in posture for decision as to the extent of appellant's right arm impairment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 17 and October 19, 2009 are set aside and the case remanded to the Office.

Issued: December 13, 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

¹⁷ The Board also notes that, in his analysis under Table 15-5, Dr. Hogshead found that appellant was not entitled to a modifier for GMPE or physical examination findings, because the functional capacity evaluation was considered invalid. The functional capacity evaluation, however, was rendered by an occupational therapist who is considered a lay person under the Act. *See David P. Sawchuk*, 57 ECAB 316 (2006). This report would not constitute competent medical evidence. *See Sedi L. Graham*, 57 ECAB 494 (2006).