

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

D.W., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
DEPOT, Cherry Point, NC, Employer**

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**Docket No. 10-817
Issued: November 4, 2010**

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, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 1, 2010 appellant, through his attorney, filed a timely appeal from a December 30, 2009 merit decision of the Office of Workers' Compensation Programs denying his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has a permanent impairment of the upper extremities causally related to his employment injury.

FACTUAL HISTORY

On November 20, 2003 appellant, then a 50-year-old machinist, filed an occupational disease claim alleging that he sustained osteoarthritis and bone spurs in his neck due to factors of his federal employment. The Office accepted the claim for an aggravation of cervical degenerative disc disease and an aggravation of cervical osteoarthritis.

On April 6, 2009 appellant filed a claim for a schedule award. He submitted a March 17, 2009 report from Dr. Scot E. Reeg, a Board-certified orthopedic surgeon, who discussed appellant's complaints of neck pain without radiation into his arms and advised that he had a three percent impairment of the spine.

On April 21, 2009 the Office requested that Dr. Reeg provide an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008) (A.M.A., *Guides*).

On June 3, 2009 the Office medical adviser reviewed Dr. Reeg's report and noted that the Office only recognized impairments of the extremities for purposes of a schedule award. He found that Dr. Reeg's finding of a three percent impairment of the cervical spine did not support permanent impairment of either upper extremity.

By decision dated June 30, 2009, the Office denied appellant's claim for a schedule award.

On July 21, 2009 his attorney requested a telephone hearing. At the hearing, held on October 14, 2009 counsel indicated that he would submit a report from a physician familiar with the sixth edition of the A.M.A., *Guides*.

In a report dated October 27, 2009, Dr. Martin Fritzhand, a Board-certified urologist, who specializes in occupational medicine, noted that a magnetic resonance imaging (MRI) scan study showed a disc bulge at C4-5 with eccentricity to the right, degenerative joint disease at C6-7 and posterior spurring and mild stenosis and a disc bulge at C5-6. On examination, he found decreased shoulder motion and muscle strength of 4/5 over the shoulder rotators and abductors bilaterally. Dr. Fritzhand listed findings of decreased pinprick and light touch over the radial aspect of the right upper extremity. He discussed appellant's history of degenerative disc disease due to repetitive work activities and noted that his neck pain radiated into the upper extremities. Dr. Fritzhand opined that appellant had bilateral sensory loss in the upper extremities. Utilizing Tables 15-15, 15-16 and 15-17 of the fifth edition of the A.M.A., *Guides*, Dr. Fritzhand determined that appellant had a 14 percent permanent impairment of each upper extremity due to sensory and motor loss resulting from C6 radiculopathy.

In a decision dated December 30, 2009, an Office hearing representative affirmed the June 30, 2009 decision. She noted that Dr. Fritzhand did not base his opinion on the sixth edition of the A.M.A., *Guides*. The hearing representative further found that he failed to explain the objective evidence relied upon in finding a sensory impairment of the upper extremities.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing federal regulations,² set forth the number of weeks of compensation payable to

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.³ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁴ Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides*⁵ as the appropriate edition for all awards issued after that date.⁶

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.⁷

ANALYSIS

The Office accepted that appellant sustained an aggravation of degenerative disc disease and osteoarthritis of the cervical spine due to factors of his federal employment. On April 6, 2009 appellant filed a claim for a schedule award. In a report dated March 17, 2009, Dr. Reeg diagnosed neck pain without radiculopathy and found that appellant had a three percent permanent impairment of the spine. The Act, however, specifically excludes the back as an organ; therefore, the back or spine does not come under the provisions for payment of a schedule award.⁸

In an October 27, 2009 impairment evaluation, Dr. Fritzhand found diminished range of motion and muscle strength in the shoulders bilaterally and decreased sensation of pinprick and touch of both upper extremities. He used Tables 15-15, 15-16 and 15-17 of the fifth edition of the A.M.A., *Guides* to find that appellant had a 14 percent permanent impairment of each upper extremity due to sensory and motor loss resulting from C6 radiculopathy. Dr. Fritzhand's impairment finding, however, is insufficient to support entitlement to a schedule award as it is based on the fifth edition of the A.M.A., *Guides*. Effective May 1, 2009 the sixth edition of the A.M.A., *Guides* are to be used to determine schedule awards.⁹ Dr. Fritzhand did, however, describe findings of sensory and motor loss on physical examination. Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office

³ *Ausbon N. Johnson*, 50 ECAB 304 (1999).

⁴ *Id.*

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁷ See *id.*, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

⁸ *Francesco C. Veneziani*, 48 ECAB 572 (1997).

⁹ See *supra* note 6.

medical adviser for an opinion concerning the nature and percentage of any impairment in accordance with the A.M.A., *Guides*.¹⁰ The Office did not forward the medical evidence to an Office medical adviser for a determination of whether Dr. Fritzhand's report was sufficient to support any permanent impairment of the upper extremities.

While the claimant has the burden of establishing the extent of impairment due to an accepted injury, the Office shares responsibility in the development of the evidence.¹¹ Dr. Fritzhand provided a description of decreased strength and sensory deficit sufficient to warrant review by the Office medical adviser.¹² The case, consequently, is remanded for the Office to forward Dr. Fritzhand's report to an Office medical adviser to determine if it is adequate to support a schedule award and, if necessary, for review under the sixth edition of the A.M.A., *Guides*. Following such further development as the Office deems necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁰ *Id.* at *B.M.*, 61 ECAB ____ (Docket No. 09-2231, issued May 14, 2010).

¹¹ *D.N.*, 59 ECAB 576 (2008).

¹² See *B.M.*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 4, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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