

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

L.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Milwaukee, WI, Employer**

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**Docket No. 10-1562
Issued: April 4, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2010 appellant filed a timely appeal from an April 19, 2010 merit decision of the Office of Workers' Compensation Programs denying his request for an increased schedule award. 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 more than nine percent permanent impairment of the right upper extremity.

FACTUAL HISTORY

This case has previously been before the Board. In a June 2, 2003 order, the Board granted the Director's motion to set aside an October 29, 2001 decision and remand the case for additional development of the medical evidence on the issue of the extent of appellant's

permanent impairment of the right upper extremity.¹ On August 1, 2003 the Board reversed a January 17, 2002 wage-earning capacity determination.² On appeal for the third time, by decision dated November 22, 2005, the Board set aside February 4 and November 5, 2004 decisions granting appellant a schedule award for a nine percent right upper extremity impairment.³ In a decision dated October 19, 2006, the Board affirmed in part and set aside in part a February 1, 2006 decision finding that he had a 13 percent permanent impairment of the right upper extremity.⁴ The Board noted that the medical evidence addressed appellant's left rather than right upper extremity impairment. The Board found that he had a 13 percent left upper extremity impairment but remanded the case for further development to determine the extent of any permanent impairment of the right upper extremity. On appeal for the fifth time, by order dated December 31, 2007, the Board affirmed in part and set aside in part January 12 and May 23, 2007 decisions granting appellant a schedule award for a 13 percent left upper extremity and offsetting compensation from the schedule award to recover an amount paid to him in error for his right upper extremity.⁵ In a decision dated December 12, 2008, the Board set aside June 25, 2007 and March 14, 2008 decisions finding that he had no more than a nine percent right upper extremity impairment and that he received an overpayment of compensation because it erroneously paid him a schedule award for more than a nine percent permanent impairment of the right upper extremity.⁶ The Board determined that the Office failed to properly adjudicate the extent of appellant's permanent impairment of the right upper extremity and remanded the case for further development of the medical evidence. The facts and circumstances surrounding the prior appeal are hereby incorporated by reference.

On July 1, 2009 the Office referred appellant to Dr. Kenneth H. Yuska, a Board-certified orthopedic surgeon, for a second opinion examination. On July 28, 2009 Dr. Yuska discussed appellant's complaints of right arm weakness, right shoulder posterior pain extending into the shoulder blade and neck pain in the posterior aspect extended into the right trapezius muscle. On examination he found that appellant's neurological examination was abnormal with decreased sensation in all extremities, weakness of the small muscles of the right and "also weakness of the long finger flexors consistent with C6-7 and C7 weakness." Dr. Yuska measured normal range of motion of the shoulders, elbows, wrists and hands. He applied the Table 17-2 on page 645 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), relevant to determining impairments of the cervical

¹ Order Granting Remand and Cancelling Oral Argument, Docket No. 02-1225 (issued June 2, 2003). On March 19, 1999 appellant, then a 48-year-old mail handler, filed an occupational disease claim alleging that he sustained a back condition due to factors of his federal employment. The Office accepted the claim for an acceleration of cervical spine disease. Appellant underwent bilateral posterior foraminotomies at C3-4 and C4-5 on January 27, 1999 and an anterior discectomy and fusion at C6-7 on July 2, 1999. He further underwent bilateral foraminotomies and fusions at C4-5, C5-6 and C6-7 on December 10, 2004.

² Docket No. 02-1072 (issued January 17, 2002).

³ Docket No. 05-1726 (issued November 22, 2005).

⁴ Docket No. 06-122 (issued October 19, 2006).

⁵ Docket No. 07-1753 (issued December 31, 2007).

⁶ Docket No. 08-1247 (issued December 12, 2008).

spine. Dr. Yuska concluded that appellant had a 25 percent permanent whole person impairment due to radiculopathy in upper extremities.

By decision dated August 28, 2009, the Office denied appellant's claim for an increased schedule award. It further denied waiver of the overpayment that existed because it had paid him a schedule award in excess of the nine percent permanent impairment of the right upper extremity. The Office determined that Dr. Yuska found no impairment of the upper extremities under the sixth edition as appellant had normal range of motion.⁷

On September 25, 2009 appellant requested a review of the written record. By decision dated January 14, 2010, the hearing representative set aside the August 29, 2009 decision. She found that Dr. Yuska provided an impairment rating of the whole person rather than the right upper extremity. The hearing representative instructed the Office to obtain an opinion from Dr. Yuska regarding the extent of appellant's right upper extremity impairment.

On February 1, 2010 the Office requested that Dr. Yuska clarify whether appellant had a permanent impairment of the right upper extremity in accordance with the sixth edition of the A.M.A., *Guides*. On February 24, 2010 Dr. Yuska related that appellant had weakness in the right hand but good strength of the shoulders and arm with normal range of motion and low to normal grip strength measurements. He opined that the sensory findings on examination did "not follow an anatomical distribution." Dr. Yuska found that Chapter 15 of the sixth edition of the A.M.A., *Guides* did not provide a rating for radicular pain of the upper extremities. He consequently concluded that "no permanent impairment rating is appropriate for the upper extremity complaints of [appellant]."

On March 31, 2010 an Office medical adviser found that, based on Dr. Yuska's examination, appellant had no more than the previously awarded nine percent permanent impairment of the right upper extremity.

By decision dated April 19, 2010, the Office denied modification of its August 28, 2009 decision after finding that appellant was not entitled to an increased schedule award of the right upper extremity.

On appeal, appellant argues that earlier medical reports find that he has a 25 or 30 percent permanent impairment of the right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁸ and its implementing federal regulations,⁹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or

⁷ The Office inaccurately referred to Dr. Yuska as an impartial medical adviser rather than a second opinion physician.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

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.¹⁰ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹¹

ANALYSIS

The Office accepted that appellant sustained an acceleration of cervical spine disease due to factors of his federal employment. Appellant underwent bilateral posterior foraminotomies at C3-4 and C4-5 on January 17, 1999, an anterior discectomy and fusion at C6-7 on July 2, 1999 and bilateral foraminotomies and fusions at C4-5, C5-6 and C6-7 on December 10, 2004. The Office granted him a schedule award for a nine percent permanent impairment of the right upper extremity. It subsequently determined that appellant had a 13 percent permanent impairment of the right upper extremity. The Board, however, set aside the Office's finding, noting that the medical evidence established a 13 percent impairment left rather than right upper extremity impairment. In its most recent decision, the Board remanded the case for the Office to further development the medical evidence to determine the extent of appellant's right upper extremity impairment.

The Office referred appellant to Dr. Yuska for an impairment evaluation. On July 28, 2009 Dr. Yuska found that he had a 25 percent whole person impairment due to radiculopathy in the upper extremities. He utilized Table 17-2, the cervical spine regional grid, in reaching his impairment determination. The Act, however, does not provide for impairment of the whole person or for the back.¹² Further, the back is specifically excluded from the definition of organ under the Act.¹³ Consequently, Dr. Yuska's July 28, 2009 report is insufficient to establish the extent of appellant's right upper extremity impairment.

In a supplemental report dated February 24, 2010, Dr. Yuska found that appellant had normal range of motion of the shoulders and arms, low normal grip strength and weakness in the right hand. He opined that Chapter 15 of the sixth edition of the A.M.A., *Guides*, relevant to determining impairments of the upper extremities, did not provide a method for rating an impairment due to radicular pain. Dr. Yuska thus concluded that an impairment rating for radicular pain in the right upper extremity was inappropriate. An Office medical adviser concurred with his determination. The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. However, recognizing that certain jurisdictions, such as under the Act, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve

¹⁰ *Id.* at § 10.404(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹² *D.N.*, 59 ECAB 576 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹³ 5 U.S.C. § 8101(20); *see also J.Q.*, 59 ECAB 366 (2008); *Jesse Mendoza*, 54 ECAB 802 (2003).

impairments consistent with sixth edition methodology.¹⁴ The Office has adopted this approach for rating impairments to the upper and lower extremities caused by a spinal injury.¹⁵ Consequently, the Board finds that the opinion of Dr. Yuska requires further clarification to determine the extent of appellant's permanent impairment of the right upper extremity. The case is remanded to the Office for this purpose. After such further development as it deems necessary, it should issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 4, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁴ Rating Spinal Nerve Extremity Impairment using the sixth edition, the A.M.A., *Guides* Newsletter (A.M.A., *Guides*, Chicago, IL), July/August 2009.

¹⁵ Federal (FECA) Procedure Manual, *supra* note 11, Chapter 3.700, Exhibit 4 (January 2010).