United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 11-116**
	)	**Issued: August 18, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 18, 2010 appellant filed a timely appeal from the June 24, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] 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 appellant met her burden of proof to establish that she has more than 20 percent permanent impairment of her right arm, for which she received a schedule award.

FACTUAL HISTORY

On June 12, 2003 appellant, then a 36-year-old mail handler, sustained injury to her right wrist and shoulder when she fell at work. OWCP initially accepted her claim for a right wrist and shoulder strain. Appellant stopped work at the time of the injury and underwent OWCP-

[1] 5 U.S.C. §§ 8101-8193.

authorized right shoulder surgery on May 4, 2004 which consisted of debridement of partial thickness rotator cuff and glenoid labral tears, subacromial decompression including anterior acromioplasty, coracoacromial ligament release and busectomy and partial distal clavical excision.

On March 31, 2005 OWCP advised appellant that her claim was also accepted for right carpal tunnel syndrome. Appellant underwent OWCP-authorized right carpal tunnel release surgery on August 30, 2005.

On August 7, 2008 appellant filed a Form CA-7 claiming a schedule award. In support of her claim, she submitted a May 1, 2008 report of Dr. David Weiss, an attending osteopath, who indicated that she had 36 percent permanent impairment of her right arm under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. Weiss indicated that appellant's total right arm impairment consisted of individual impairments based on range of motion deficit in her right shoulder, right shoulder resection arthoplasty, right lateral pinch strength deficit and sensory deficit involving the right median nerve.

OWCP arranged to have the case record and Dr. Weiss' impairment rating reviewed by Dr. Morley Slutsky, a Board-certified occupational medicine physician, who served as an Office hearing representative. In his January 24, 2009 report, Dr. Slutsky opined that appellant had reached maximum medical improvement, but noted that the case record contained discrepancies over appellant's right arm sensation as Dr. Weiss reported a loss of light touch and total loss of two-point discrimination in the right median nerve distribution while, in a December 26, 2007 report, another attending physician stated that light and sharp touch sensation was full and symmetrical in both upper extremities. He also indicated that pinch strength deficit was not a ratable impairment method for carpal tunnel syndrome according to the fifth edition of the A.M.A., *Guides*. Dr. Slutsky recommended that OWCP obtain a second opinion examination given the noted discrepancies in physical examination findings contained in the case record. However, he opined that, if Dr. Weiss' 10 percent impairment attributable to the sensory deficit of the median nerve was accepted, appellant would have a combined 21 percent permanent impairment of the right upper extremity for both her right shoulder condition and the right carpal tunnel syndrome.

In a February 12, 2009 report, Dr. Weiss stated that he disagreed with Dr. Slutsky over whether the fifth edition of the A.M.A., *Guides* precluded the assignment of impairment for pinch strength in cases involving carpal tunnel syndrome. OWCP referred the case back to Dr. Slutsky to comment on Dr. Weiss' February 12, 2009 report. In a February 25, 2009 report, Dr. Slutsky stated that the fifth edition of the A.M.A., *Guides* indicated that pinch strength should not be used to rate median nerve deficits in carpal tunnel syndrome cases. Therefore, he advised that his prior opinion on appellant's level of impairment had not been changed by Dr. Weiss' February 12, 2009 report.

OWCP found a conflict in the medical opinion between Dr. Weiss and Dr. Slutsky regarding appellant's right arm impairment and referred appellant to Dr. Barry Snyder, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of her right arm impairment. Appellant attended the August 11, 2009 examination but Dr. Snyder

failed to supply OWCP with the requested medical report. Since Dr. Snyder would not supply OWCP with a report and due to the fact that OWCP began utilizing a new edition of the A.M.A., *Guides* effective May 1, 2009, OWCP wrote to Dr. Weiss on November 19, 2009 and requested that he provide OWCP with an impairment based on the sixth edition of the A.M.A., *Guides* in order to adjudicate the claimed schedule award.

Dr. Weiss provided a revised medical report dated January 10, 2010 that included a rating of 20 percent impairment of the right arm based on the sixth edition of the A.M.A., *Guides*. In making reference to Table 15-5 (Shoulder Regional Grid) of the sixth edition of the A.M.A., *Guides*, Dr. Weiss chose a diagnostic category for the right shoulder (class 1 for right shoulder acromioclavicular joint arthropathy with distal clavicular resection) and applied the grade modifiers for functional history, physical examination and clinical studies. He then calculated the net adjustment formula and found 12 percent impairment for the right shoulder. Dr. Weiss also applied Table 15-23 (Entrapment/Compression Neuropathy Impairment) of the sixth edition of the A.M.A., *Guides* and chose grade modifiers from the table for the various categories, including test findings, history, physical findings and functional scale. He found nine percent impairment due to right carpal tunnel syndrome.[2] Dr. Weiss used the Combined Values Chart to combine the 9 and 12 percent values and conclude that appellant had 20 percent impairment of her right arm.

OWCP referred the case record to Dr. Andrew Merola, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, in order to review Dr. Weiss' new impairment rating under the sixth edition of the A.M.A., *Guides*. In a January 31, 2010 report, Dr. Merola agreed with Dr. Weiss' rating of 20 percent impairment of the right arm under the sixth edition. He also indicated that the date of maximum medical improvement was May 1, 2008, the date of Dr. Weiss' original examination and impairment rating.

In a February 12, 2010 decision, OWCP granted appellant a schedule award for 20 percent permanent impairment of her right arm. The award ran for 62.4 weeks from May 1, 2008 to July 11, 2009.

Appellant, through counsel, requested a review of the written record by OWCP's hearing representative. Counsel contended that OWCP failed to make a timely schedule award decision under the fifth edition of the A.M.A., *Guides* and thereby deprived appellant of benefits given that the sixth edition of the A.M.A., *Guides* generally provided lower impairment ratings for the same condition.

In a June 24, 2010 decision, OWCP's hearing representative affirmed OWCP's February 12, 2010 decision.

[2] *See infra* notes 8 and 9.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] 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.[5] For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[6]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, one of the relevant portions of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the Class of Diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[7]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[8] In Table 15-23, grade modifiers levels (ranging from zero to four) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[9]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*. *See W.D.*, Docket No. 10-274 (issued September 3, 2010).

[6] *See* FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

[7] *See* A.M.A., *Guides* 401-11 (6th ed. 2009).

[8] *See id.* at 449, Table 15-23.

[9] A survey completed by a given claimant, known by the name *Quick*DASH, may be used to determine the Function Scale score. *Id.* at 448-49.

In *Harry D. Butler*,[10] the Board noted that Congress delegated authority to the Director of OWCP regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in its adoption.[11] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[12]

ANALYSIS

In the present case, OWCP accepted that appellant sustained a right wrist sprain, right shoulder strain and right carpal tunnel syndrome. On May 4, 2004 appellant underwent right shoulder surgery which consisted of debridement of partial thickness rotator cuff and glenoid labral tears, subacromial decompression including anterior acromioplasty, coracoacromial ligament release and busectomy and partial distal clavical excision. On August 30, 2005 she underwent right carpal tunnel release surgery. These procedures were authorized by OWCP. Appellant filed a claim for schedule award in August 2008 and submitted a May 1, 2008 impairment rating from Dr. Weiss, an attending osteopath.[13]

Dr. Slutsky, a Board-certified occupational medicine physician serving as OWCP's medical adviser, reviewed Dr. Weiss' May 1, 2008 impairment rating and found that some of his findings were inconsistent with other medical reports contained in the case record. After further development of the evidence, a conflict was found in the medical opinion regarding appellant's right arm impairment and in August 2009 appellant was referred to Dr. Snyder, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on right arm impairment.[14] However, Dr. Snyder did not provide the requested evaluation.

For decisions issued on or after May 1, 2009, OWCP began to apply the standards of the sixth edition of the A.M.A., *Guides* and therefore it was appropriate for OWCP to seek further clarification of appellant's right arm impairment under these standards.[15] It requested that Dr. Weiss provide a right arm impairment rating based on the sixth edition of the A.M.A., *Guides.*

[10] 43 ECAB 859 (1992).

[11] *Id.* at 866.

[12] FECA Bulletin No. 09-03 (March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.(6)(a) (January 2010).

[13] Dr. Weiss calculated 36 percent impairment of appellant's right arm under the fifth edition of the A.M.A., *Guides.*

[14] A previous attempt to schedule an impartial medical examination fell through when the selected impartial medical specialist declined to perform the evaluation.

[15] By this point, there no longer was a conflict in the medical opinion as the record did not contain conflicting reports with impairment ratings obtained under the relevant standards, *i.e.*, the standards of the sixth edition of the A.M.A., *Guides*.

The Board finds that, in his January 10, 2010 report, Dr. Weiss correctly determined that appellant had 20 percent impairment of her right arm based on the sixth edition of the A.M.A., *Guides*. Making reference to Table 15-5 (Shoulder Regional Grid) starting on page 401 of the sixth edition of the A.M.A., *Guides*, Dr. Weiss chose an appropriate diagnostic category (class 1 for right shoulder acromioclavicular joint arthropathy with distal clavicular resection) and applied the grade modifiers for functional history, physical examination and clinical studies. He then correctly calculated the Net Adjustment Formula.[16] Dr. Weiss found 12 percent impairment for the right shoulder. He also properly applied Table 15-23 (Entrapment/ Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides* and chose appropriate grade modifiers from the table for the various categories, including test findings, history, physical findings and functional scale. Dr. Weiss found nine percent impairment due to right carpal tunnel syndrome.[17] He properly used the Combined Values Chart beginning on page 604 to combine the 9 and 12 percent values and conclude that appellant had a 20 percent impairment of her right arm.

The Board notes that there is no medical evidence of record showing that appellant has more than 20 percent permanent impairment of her right arm, for which she already received schedule award compensation. Dr. Merola, a Board-certified orthopedic surgeon serving as OWCP's medical adviser, reviewed the relevant evidence of record and indicated that he agreed with Dr. Weiss' impairment rating of 20 percent.

On appeal, counsel asserts that appellant has a property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and that a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance, and in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process.[18] In this case, appellant is simply making a claim for a schedule award. He is not in receipt of schedule award benefits nor is OWCP attempting to terminate any benefits. Appellant has not established a vested right to a schedule award decision under the fifth edition of the A.M.A., *Guides*, nor has he identified any procedural due process which he has been denied. The cases cited by him are not applicable to the present case.[19] For these reasons, OWCP properly declined to award appellant additional schedule award compensation.

[16] *See supra* note 7.

[17] *See supra* notes 8 and 9.

[18] In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient, and due process would not require an evidentiary hearing.

[19] Counsel argued that OWCP unnecessarily delayed in developing appellant's schedule award claim. However, the circumstances described above show that OWCP followed the appropriate procedures in developing appellant's claim.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than 20 percent permanent impairment of her right arm, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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