

right protected by the United States Constitution. He also contends that there is an unresolved conflict in the medical opinion evidence.

FACTUAL HISTORY

On June 13, 2006 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim alleging that on that day he injured his right shoulder when he fell on it after slipping on a step. OWCP accepted the claim for a sprain of the shoulder and upper arm, right shoulder rotator cuff tear, right shoulder impingement syndrome and right shoulder rotator cuff syndrome bursitis. It also accepted appellant's November 14, 2007 recurrence claim and authorized right shoulder arthroscopic surgery.

In a February 5, 2009 report, Dr. Nicholas Diamond, an osteopath, concluded that appellant had a 21 percent right upper extremity impairment using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). A physical examination revealed acromioclavicular joint and anterior cuff tenderness and no winging of the scapula.

On April 9, 2009 appellant filed a claim for a schedule award.

In a September 2, 2009 report, submitted by counsel on September 10, 2009, Dr. Craig Uejo, a Board-certified occupational medicine physician, reviewed Dr. Diamond's February 5, 2009 report. He found that appellant had an 11 percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. Dr. Uejo noted that, based on the diagnosis, an impairment rating could be considered under either loss of range of motion or an evaluation based on postdistal clavicle resection and acromioclavicular joint injury. He noted a class 1 impairment rating for status post clavicle resection using Table 15-5, page 403 resulted in a default impairment rating of 10 percent. Dr. Uejo then referred to the grade modifiers for functional history adjustment under Table 15-7 and section 15.3a on page 406. He assigned a grade 2 modifier for pain and symptoms with normal activity +/- medication for symptom control. For the physical examination adjustment, Dr. Uejo found that, under Table 15-8, page 408 and section 15-3b, page 407, appellant was assigned a grade 1 modifier based on appellant's atrophy and mild motion loss. Under clinical studies adjustment, Dr. Uejo found under Table 15-9, pages 410-11 and section 15-3c, page 407 that appellant had a grade 1 modifier as there are diagnostic studies confirming the diagnosis. He noted the net adjustment of +1 resulting in going from a grade C to a grade D or an 11 percent impairment under the right upper extremity impairment. Dr. Uejo noted that, based on the diagnosis, an impairment rating could be considered under loss of range of motion. Using Table 15-34, page 475 and section 15.7g, page 472, he determined that appellant had an eight percent impairment for loss of range of motion. Dr. Uejo noted that range of motion cannot be combined with diagnosis-based impairments and that the diagnosis-based method yielded the greatest impairment, which was 11 percent.

In a September 4, 2009 report, Dr. David Weiss, an osteopath and associate of Dr. Diamond reviewed the September 2, 2009 report and noted his concurrence with Dr. Uejo's impairment rating.

On April 19, 2010 Dr. Henry J. Magliato, an OWCP medical adviser, reviewed Dr. Uejo's September 2, 2009 report, Dr. Weiss' September 4, 2009 report and Dr. Diamond's February 5, 2009 report. He concurred with Dr. Uejo's finding of an 11 percent right upper extremity impairment.

By decision dated May 6, 2010, OWCP granted appellant a schedule award for an 11 percent impairment of the right upper extremity. The award ran for 34.32 weeks from February 5 to October 3, 2009.

On May 14, 2010 appellant's counsel requested a review of the written record by an OWCP hearing representative.

By decision dated August 25, 2010, OWCP's hearing representative affirmed the May 14, 2010 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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.⁴ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁵

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, Disability and Health (ICF).⁶ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁶ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁷ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).⁸

ANALYSIS

OWCP accepted that appellant sustained a sprain of the shoulder and upper arm, right shoulder rotator cuff tear, right shoulder impingement syndrome and right shoulder rotator cuff syndrome bursitis as a result of his June 13, 2006 employment injury.

In a September 2, 2009 report, Dr. Uejo reviewed the clinical findings of Dr. Diamond, appellant's attending physician, contained in Dr. Diamond's February 5, 2009 report. He found that appellant had a 11 percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. In calculating the percentage of impairment, Dr. Uejo used a diagnosis-based method instead of range of motion as the diagnosis-based method resulted in a higher impairment rating. Using Table 15-5, page 403, he determined that appellant had class 1 impairment rating for his status post clavicle resection, resulting in grade C or 10 percent impairment. Dr. Uejo then referred to the grade modifiers for functional history adjustment under Table 15-7 and section 15.3a on page 406, he assigned a grade 2 modifier for pain and symptoms with normal activity +/- medication for symptom control. For the physical examination adjustment, he found that under Table 15-8, page 408 and section 15-3b, page 407 appellant was assigned a grade modifier 1 based on appellant's atrophy and mild motion loss. Under clinical studies adjustment, Dr. Uejo found under Table 15-9, pages 410-11 and section 15-3c, page 407 that appellant had a grade 1 modifier as there are diagnostic studies confirming the diagnosis. He noted the net adjustment of +1 resulting in going from a grade C to a grade D or an 11 percent impairment right upper extremity impairment.

Dr. Magliato, OWCP's medical adviser, reviewed Dr. Uejo's report and concurred with his finding of a 11 percent right upper extremity impairment. There is no evidence supporting that appellant has a greater right upper extremity impairment. Thus, he has not established entitlement to greater than an 11 percent right upper extremity impairment.

On appeal, appellant asserts that he has property right in a schedule award benefit under the fifth edition and 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), but 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. 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 appellant identified any procedural due process which he has been denied. In *Harry D. Butler*,⁹ the Board noted that Congress delegated authority to the Director

⁷ A.M.A., *Guides* (6th ed. 2009), pp. 383-419.

⁸ *Id.* at page 411.

⁹ 43 ECAB 859 (1992).

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 the adoption.¹⁰ 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*.¹¹ The applicable date of the sixth edition is as of the date the schedule award decision was reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed. Thus, appellant's argument is inapplicable to the present case.

Appellant's counsel on appeal also alleged that there was an unresolved conflict of medical opinion evidence between Dr. Diamond, for appellant, and OWCP's medical adviser, for the government that required resolution by an impartial medical specialist. The Board finds that Dr. Diamond's opinion is insufficient to create a conflict in the medical opinion evidence as he did not utilize the appropriate edition of the A.M.A., *Guides*. Dr. Uejo provided a thorough report correctly applying the sixth edition of the A.M.A., *Guides* based on Dr. Diamond's clinical findings. Both Dr. Weiss, an associate of Dr. Diamond for appellant, and OWCP's medical adviser, Dr. Magliato, reviewed Dr. Uejo's report and concurred with Dr. Uejo's impairment rating. There is no conflict in the medical opinion evidence as Dr. Diamond's opinion was not based on the correct edition of the A.M.A., *Guides*.

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 appellant has no greater than an 11 percent right upper extremity impairment.

¹⁰ *Id.* at 866.

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2010 is affirmed.

Issued: December 5, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board