



developed stiffness in her neck. The Office accepted this claim on October 31, 2006 and authorized compensation benefits.

In a report dated March 7, 2007, Dr. Irving D. Strouse, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant had reached maximum medical improvement (MMI) due to her accepted employment injury. He opined that her degenerative condition was not related to her employment, but to the aggravation of a preexisting condition. Dr. Strouse opined that appellant could perform light duty, but could not return to her date-of-injury position due to her preexisting condition. Appellant's attending physician, Dr. Hoan Nguyen, a Board-certified orthopedic surgeon, recommended surgical intervention on March 27, 2007. The Office found a conflict of medical opinion evidence and referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated September 19, 2007, Dr. Fries opined that appellant's condition was a combination of preexisting cervical disc degeneration, her accepted employment injury as well as her recurrence in 2006. He recommended surgery.

Dr. Nguyen performed an anterior cervical discectomy C5-6 and C6-7, a cervical arthrodesis and allograft on November 15, 2007. He released appellant to return to full duty on April 29, 2008. Dr. Nguyen completed a report on May 27, 2008 and opined that she had not yet reached MMI. He stated that further treatment was indicated and recommended medications and diagnostic x-rays. Dr. Nguyen examined appellant again on June 24, 2008 and opined that further medical treatment was necessary but that her fusion was healing well based on x-rays. He recommended additional x-rays. Dr. Nguyen examined appellant on July 29, 2009 and again recommended additional x-rays and found that she required further treatment.

Dr. Arthur Becan, an orthopedic surgeon, examined appellant on July 16, 2008 and provided a report noting her history of injury. He found that she reached MMI on July 16, 2008. Dr. Becan found paravertebral muscle spasm and tenderness in the cervical spine with limited range of motion (ROM). He found a perceived sensory deficit of the C6 and C7 nerve roots of the right hand with 4/5 manual muscle strength testing on the right in the deltoid and loss of grip strength and pinch strength on the right. Dr. Becan concluded that appellant had a Grade 2 sensory deficit of the right C6 nerve root for six percent impairment.<sup>1</sup> He found Grade 2 sensory deficit of the right C7 nerve root for four percent impairment.<sup>2</sup> Dr. Becan found nine percent impairment of the right deltoid due to motor strength deficit.<sup>3</sup> He determined that appellant's right upper extremity impairment was 17 percent. Appellant requested a schedule award on December 26, 2008.

Dr. Nguyen examined appellant on August 5 and 26, 2008 and continued to recommend further treatment including x-rays. He found that she reached MMI on November 25, 2008. Dr. Nguyen found positive muscle spasm in appellant's neck with limited ROM, normal strength

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<sup>1</sup> Dr. Becan cited to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* 424, Table 15-15 and Table 15-17. These provisions are found in the fifth edition of the A.M.A., *Guides*.

<sup>2</sup> *Id.*

<sup>3</sup> A.M.A., *Guides* 484, Table 16-11, 492, Table 16-15. These provisions are found in the fifth edition of the A.M.A., *Guides*.

and sensory examination intact to light touch with reflexes normal, reactive and symmetric. He found a negative Hoffman's test. In regards to appellant's right shoulder, Dr. Nguyen found good ROM. He stated, "External rotation, she is able to go to 45 degrees at the side and 90 degrees in the scarecrow position." Dr. Nguyen found tenderness over the acromioclavicular joint. He diagnosed displacement of cervical intervertebral disc without myelopathy, degenerative disc disease, cervical radiculopathy and sprain and acromioclavicular joint. Dr. Nguyen discharged appellant from his care.

The district medical adviser reviewed appellant's claim on January 30, 2009 and recommended a second opinion evaluation as Dr. Nguyen found no evidence of objective cervical nerve root deficits in the upper extremity while Dr. Becan found significantly different findings including sensory deficit and muscle strength deficit.

The Office referred appellant, a statement of accepted facts and list of questions for a second opinion evaluation with Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, on April 20, 2009. The statement of accepted facts listed her accepted conditions as sprain of neck, sprain of right shoulder and displacement of cervical discs as well as anterior cervical discectomy on November 15, 2007. Dr. Hutter examined appellant on May 7, 2009 and noted her history of injury. He found no tenderness to palpation of the cervical paraspinal musculature and full ROM of the cervical spine. Dr. Hutter found the right shoulder demonstrated limited manual motor testing due to pain, symmetrical reflexes and sensory examination intact to light touch in both upper extremities. He found that appellant had reached MMI in her neck injury as of the date of his report, but that she had an unrelated right shoulder injury occurring in March 2009 and was currently receiving treatment of rotator cuff problem of her right shoulder. In an addendum dated May 19, 2009, Dr. Hutter stated that based on the sixth edition of the A.M.A., *Guides* she had a 15 percent disability of the cervical spine as she had herniated discs at two levels that required surgery, but had no current objective abnormalities.<sup>4</sup> He also noted limited ROM of the right shoulder due to pain which he attributed to appellant's 2009 employment injury.

The district medical adviser reviewed this report on May 27, 2009 and stated that there was no ratable impairment related to appellant's accepted cervical condition and zero percent impairment of the right shoulder. He stated that he was utilizing Dr. Nguyen's November 25, 2008 report as the date of MMI and relying on this report to calculate her final impairment rating. The district medical adviser applied the sixth edition of the A.M.A., *Guides* and noted that appellant's right shoulder sprain should be rated using the shoulder grid of the A.M.A., *Guides*.<sup>5</sup> He stated:

"The Diagnosis would be shoulder pain and the claimant is placed into Class 0 which equals [zero percent] impairment. Dr. Nguyen provided a thorough examination of the right shoulder and did not note finding any objective physical issues. To be placed into Class 1, there would have to be some objective findings (which were not there on a consistent basis). Dr. Hutter indicated that the

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<sup>4</sup> A.M.A., *Guides*, 6<sup>th</sup> ed. (2007), Table 17-2.

<sup>5</sup> *Id.* at 401-05, Table 15-5.

claimant had reduced ROM secondary to pain (the ROM measurements were not documented and as such cannot be considered objective per section 15.7 of the [A.M.A., *Guides*] and limitation secondary to pain as opposed to an anatomical defect is not objective). Dr. Becan provided ROM measurements<sup>6</sup> but again these were not compliance with section 15.7 and are not considered objective. Neither Dr. Hutter nor Dr. Nguyen identified any other shoulder issues (such as the deltoid weakness discussed by Dr. Becan) related to the right shoulder. As such the Class of impairment is 0.”

The Office requested a supplemental report from Dr. Hutter on June 1, 2009. Dr. Hutter responded on June 18, 2009 and stated that appellant had no impairment based on cervical disc herniation as she had no objective abnormalities and no permanent orthopedic disability in regards to the injury sustained. The district medical adviser reviewed the medical evidence on June 24, 2009 and concluded that there was no ratable impairment due to appellant’s accepted cervical condition and that the rating of her right shoulder was zero percent based on the sixth edition of the A.M.A., *Guides*.

By decision dated June 29, 2009, the Office denied appellant’s claim for a schedule award finding that the medical evidence failed to demonstrate a measurable impairment. Appellant, through her attorney, requested an oral hearing. On October 13, 2009 counsel changed this request to a request for a review of the written record. He alleged deficiencies in Dr. Hutter’s reports and stated that these reports could not carry the weight of the evidence in regards to appellant’s right upper extremity. Counsel stated that she had undergone right shoulder surgery under a separate claim and was receiving disability benefits under that claim.

By decision dated December 9, 2009, the Branch of Hearings and Review noted that appellant sustained a traumatic right shoulder injury on February 26, 2009 which was accepted for right shoulder rotator cuff strain under a separate claim.<sup>7</sup> The hearing representative found that Dr. Becan’s report was of limited probative value because he did not appropriately apply the fifth edition of the A.M.A., *Guides* and because his findings were not consistent with those of Dr. Nguyen. She concluded that Dr. Hutter’s report was entitled to the weight of the medical evidence and established that appellant did not have permanent impairment due to her accepted May 15, 2000 employment injury. The hearing representative affirmed the Office’s June 26, 2009 decision.

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<sup>6</sup> The Board notes that Dr. Becan’s ROM figures related to appellant’s cervical spine, rather than to her upper extremity.

<sup>7</sup> Claim number xxxxxx471 is appellant’s right shoulder claim and is not currently before the Board. 20 C.F.R. § 501.2.

## LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act<sup>8</sup> and its implementing regulations<sup>9</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition of the A.M.A., *Guides*.<sup>10</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>11</sup> Initial schedule award decisions issued on or after May 1, 2009 will be based on the sixth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date. A claimant who has received a schedule award under a previous edition may make a claim for an increased award, which should be calculated according to the sixth edition of the A.M.A., *Guides*.<sup>12</sup>

The Act does not authorize the payment of schedule awards for the permanent impairment of the whole person.<sup>13</sup> Payment is authorized only for the permanent impairment of specified members, organs or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.<sup>14</sup> Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,<sup>15</sup> no claimant is entitled to such an award.<sup>16</sup> Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a

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<sup>8</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Id.* For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition of the A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *W.D.*, 61 ECAB \_\_\_\_ (Docket No. 10-274, issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).

<sup>14</sup> *W.D.*, *supra* note 13; *William Edwin Muir*, 27 ECAB 579 (1976).

<sup>15</sup> The Act itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

<sup>16</sup> *W.D.*, *supra* note 13. *Timothy J. McGuire*, 34 ECAB 189 (1982).

schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.<sup>17</sup>

In the case of *James Kennedy, Jr.*,<sup>18</sup> the Board found that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of her employment injury. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of MMI is not to be based on surmise or prediction of what may happen in the future. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.<sup>19</sup> The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record and the determination of such date is made in each case upon the basis of submitted medical evidence.<sup>20</sup>

### ANALYSIS

Appellant has requested a schedule award based on her May 15, 2000 employment injury which was accepted for the right shoulder strain, cervical strain and displacement of cervical discs as well as anterior cervical discectomy. As noted above she is only entitled to a schedule award for her accepted cervical injury to the extent that this injury impacts an accepted member, such as an upper extremity.

Appellant submitted a report dated July 16, 2008 from Dr. Becan finding that she had reached MMI on that date and providing an impairment rating of 17 percent of the right upper extremity including impairments for loss of strength and sensory deficits. Her attending physician, Dr. Nguyen, continued to opine that appellant required additional medical treatment and did not find that she had reached MMI until November 25, 2008. The Board finds that Dr. Becan's report is not sufficient to constitute the weight of the medical opinion evidence as he did not provide any medical reasoning explaining why he believed that appellant had reached MMI in July 2008, when appellant's surgeon, Dr. Nguyen, continued to indicate that she required additional medical treatment until November 2008. The Board further notes that at the time appellant's schedule award decision was issued the appropriate edition of the A.M.A., *Guides* was the sixth edition, rather than the fifth edition relied upon by Dr. Becan. As Dr. Becan's report does not comport with the appropriate edition of the A.M.A., *Guides*, it cannot constitute the weight of the medical evidence.

In his November 25, 2008 report, agreeing that appellant had reached MMI, Dr. Nguyen found loss of external rotation as appellant was able to reach to 45 degrees.<sup>21</sup> He found

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<sup>17</sup> *W.D., supra* note 13. *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>18</sup> 40 ECAB 620, 626 (1989).

<sup>19</sup> *Id.*

<sup>20</sup> *Eugenia L. Smith*, 41 ECAB 409, 413 (1990).

<sup>21</sup> A.M.A., *Guides*, 475, Table 15-34. This table provides that external rotation of 50 to 30 degrees is a mild shoulder impairment.

tenderness over the acromioclavicular joint. Dr. Nguyen found positive muscle spasm in appellant's neck with limited ROM, normal strength and sensory examination intact to light touch with reflexes normal, reactive and symmetric. He found a negative Hoffman's test. Dr. Nguyen diagnosed displacement of cervical intervertebral disc without myelopathy, degenerative disc disease, cervical radiculopathy and sprain and acromioclavicular joint.

The district medical adviser noted the divergent physical findings between Drs. Becan and Nguyen regarding appellant's impairment, but did not discuss the date of MMI. The Office referred appellant for a second opinion evaluation with Dr. Hutter on April 20, 2009 and he examined her on May 7, 2009. However, the record establishes that appellant had sustained a subsequent right shoulder injury on February 26, 2009 accepted by the Office as work related. Dr. Hutter noted that she had limited strength and ROM in her right shoulder due to pain and that she had an unrelated right shoulder injury occurring in March 2009. In examining appellant's upper extremities, he found symmetrical reflexes and sensory examination intact to light touch in both upper extremities. Dr. Hutter found that she had reached MMI in regards to her neck injury. However, as appellant's schedule award is dependent upon findings extending from her cervical spine to her upper extremities, Dr. Hutter's report cannot constitute the weight of the evidence. While Dr. Hutter found that her pain and loss of ROM in the right shoulder were due to her 2009 injury, he did not explain how he could separate these findings and attribute these findings to shoulder pain rather than to her accepted cervical condition. At the time of this report, appellant sustained a new shoulder injury and was not at MMI in regards to the scheduled member. Therefore Dr. Hutter's report is of limited probative value and cannot establish the extent of her permanent impairment for schedule award purposes.

In evaluating appellant's permanent impairment for schedule award purposes, the district medical adviser relied on Dr. Nguyen's report and finding of MMI in November 2008. The Board finds that he did not provide sufficient medical reasoning for reaching his conclusions and that the case is not in posture for a decision. The Board notes that the district medical adviser utilized the shoulder regional grid of the A.M.A., *Guides* and stated that appellant's condition was shoulder pain.<sup>22</sup> The Board notes that the Office accepted appellant's claim for a shoulder strain, a separate diagnosis class. The district medical adviser did not explain why he felt that shoulder pain was the appropriate diagnosis class. He also placed appellant in Class 0 stating that Dr. Nguyen did not note any objective physical issues. Dr. Nguyen provided loss of ROM on external rotation which the district medical adviser did not consider or evaluate, instead addressing only Dr. Hutter's findings on this impairment. Without a detailed report comporting with the standards of the sixth edition of the A.M.A., *Guides*, the Board is unable to determine whether appellant has any permanent impairment due to her accepted employment injuries entitling her to a schedule award.

On appeal, counsel argued that there was a conflict of medical opinion between Drs. Hutter and Becan regarding the extent of appellant's permanent impairment. The Board disagrees for the reasons listed above and finds that the case is not in posture for decision requiring additional development of the medical evidence and a detailed and well-reasoned report complying with the standards of the sixth edition of the A.M.A., *Guides*.

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<sup>22</sup> *Id.* at 401, Table 15-5.

**CONCLUSION**

The Board finds that this case is not in posture for a decision and must be remanded for additional development of the medical evidence including a comprehensive medical examination and findings which are then properly evaluated under the standards of the sixth edition of the A.M.A., *Guides*.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 9, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further development consistent with this decision of the Board.

Issued: February 18, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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