



## **FACTUAL HISTORY**

This case has previously been before the Board. On June 5, 1998 appellant, then a 41-year-old mail handler, filed a traumatic injury claim alleging that she sustained a left shoulder strain due to lifting a heavy mailbag.<sup>2</sup> The Office accepted the claim for left shoulder and neck sprains. On August 14, 1999 appellant filed a traumatic injury claim alleging that on that day she strained her left shoulder and neck when she was hit by a plastic squirt bottling falling on her.<sup>3</sup> The Office accepted the claim for aggravation of neck sprain and left shoulder sprain.

On February 6, 2001 the Office terminated appellant's compensation benefits effective February 25, 2001 on the grounds that she no longer had any disability or residuals due to her accepted employment injuries. It denied modification on November 27, 2001.

By decision dated August 16, 2002, the Board affirmed the November 27, 2001 decision denying modification of the termination of her compensation.<sup>4</sup>

On February 14, 2005 appellant filed a claim for a schedule award.

In a July 22, 2003 report, Dr. David Weiss, a Board-certified orthopedist, concluded that appellant had a 38 percent left 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 tenderness of the left shoulder acromion tip, restricted left shoulder range of motion and sensory deficit in the C5 and C6 dermatomes.

In a September 2, 2009 report, Dr. Craig Uejo, a Board-certified occupational medicine physician, reviewed Dr. Weiss' July 22, 2003 report. He found that appellant had a six percent permanent impairment of the left 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 impingement syndrome. Using Table 15-34, page 475 and section 15.7g, page 472, he determined that appellant had a three percent impairment for loss of flexion and three percent impairment for loss of abduction resulting in a total six percent left shoulder impairment. Dr. Uejo noted an impairment determination for an impingement syndrome using Table 15-5, page 403, Table 15-7, page 406, Table 15-8, page 408 and Table 15-9, pages 410-11 and sections 15.3a, b and c on pages 406-07, resulted in five percent impairment. He concluded that appellant had six percent left upper extremity impairment based on loss of range of motion, which resulted from the method yielding the higher impairment rating. Next, Dr. Uejo determined that appellant had a zero percent impairment due to sensory loss in the left upper extremity. According to Table 15-18, page 429, the section on Impairment for Sensory Only Nerve Injury, the sensory deficits for the C5 and C6 sensory deficits would be characterized as mild based on some pain and retained protective sensation. Dr. Uejo noted that, based on the diagnosis, an impairment rating could be considered under loss

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<sup>2</sup> This was assigned claim number xxxxxx423

<sup>3</sup> This was assigned claim number xxxxxx176.

<sup>4</sup> Docket No. 02-946 (issued August 16, 2002).

of range of motion. Using Table 15-34, page 475 and section 15.7g, page 472, he determined that appellant had a three percent impairment for loss of flexion and three percent impairment for loss of abduction resulting in a total six percent left shoulder impairment. Using Table 15-21, page 436-44, Peripheral Nerve Impairment: Upper Extremity Impairments, appellant's condition was a class 1 rating. This resulted in one percent upper extremity 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 one modifier for pain and symptoms with strenuous/vigorous 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 not assigned a grade modifier as examination findings are used to select the impairment class. 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 zero modifier as there are no electrodiagnostic studies showing any pathology. He noted that the net adjustment of -1 resulting in a grade B or zero percent impairment for sensory loss. Dr. Uejo combined the zero percent impairment for sensory loss and the six percent for left shoulder impairment, resulting in a six percent left upper extremity impairment.

In a September 4, 2009 addendum, Dr. Weiss reviewed and noted his concurrence with Dr. Uejo's impairment.

On October 14 and November 14, 2009 Dr. Henry J. Magliato, an Office medical adviser, reviewed Dr. Uejo's September 2, 2009 report and Dr. Weiss' July 22, 2003 and September 4, 2009 reports. He concurred with Dr. Uejo's finding of a six percent left upper extremity impairment. Dr. Magliato noted July 22, 2003 as the correct date of medical maximum improvement in his November 14, 2009 report.

By decision dated December 8, 2009, the Office granted appellant a schedule award for six percent impairment of the left upper extremity. The award ran for 18.72 weeks from July 22 to November 30, 2003.

On December 15, 2009 appellant's counsel requested a review of the written record by an Office hearing representative.

By decision dated March 15, 2010, the Office hearing representative affirmed the December 8, 2009 schedule award decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Act<sup>5</sup> and its implementing regulations<sup>6</sup> 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, 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 to all claimants, good administrative practice

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

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.<sup>7</sup> Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>8</sup>

### ANALYSIS

The Office accepted that appellant sustained left shoulder and neck sprains, aggravation of neck sprain and left shoulder sprain.

In a January 15, 2010 report, Dr. Uejo, a Board-certified occupational medicine physician, reviewed Dr. Weiss' July 22, 2003 report. He found that appellant had a six percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. Dr. Uejo used range of motion instead of diagnosis based as the range of motion method resulted in a higher impairment rating. Using Table 15-35 and section 15.7g, page 472, he concluded that appellant had a three percent impairment for loss of flexion and three percent impairment for loss of abduction resulting in a total six percent left shoulder impairment. Next, Dr. Uejo referred to grade modifiers for a final determination of appellant's impairment rating. Under functional history adjustment using Table 15-7 and section 15.3a on page 406, he assigned a grade one modifier for pain and symptoms with strenuous/vigorous activity +/- medication for symptom control. For the physical examination adjustment grade modifier, Dr. Uejo found that under Table 15-8, page 408 and section 15-3b, page 407 appellant was not assigned a grade modifier as examination findings are used to select the impairment class. Under clinical studies adjustment, he found under Table 15-9, pages 410-11 and section 15-3c, page 407 that appellant had a grade 0 modifier as there are no electrodiagnostic studies showing any pathology. Dr. Uejo noted that the net adjustment of -1 resulting in a grade B or zero percent impairment for sensory loss. He combined the zero percent impairment for sensory loss and the six percent for left shoulder impairment, resulting in a six percent left upper extremity impairment.

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

On appeal, appellant asserts that he has property rights 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). 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

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<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

due process.<sup>9</sup> In this case, appellant is simply making a claim for a schedule award. He is not in receipt of schedule award benefits nor is the Office 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 appellant are not applicable to the present case.

**CONCLUSION**

The Board finds that appellant has no greater than six percent left upper extremity impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 15, 2010 is affirmed.

Issued: June 17, 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

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<sup>9</sup> 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.