

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Elmer, NJ, Employer**

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**Docket No. 10-2177
Issued: June 17, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from a May 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 has more than an eight percent right arm permanent impairment.

FACTUAL HISTORY

On June 15, 2007 appellant, then a 53-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a right shoulder injury causally related to

¹ 5 U.S.C. § 8101 *et seq.*

lifting and casing mail as part of her employment duties. OWCP accepted the claim for a right rotator cuff tear. Appellant underwent right shoulder surgery on September 10, 2007.

In a report dated August 5, 2008, Dr. Steven Allon, an orthopedic surgeon, provided a history and results on examination. He opined that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), appellant had a 20 percent permanent impairment to the right arm. Dr. Allon found 8 percent impairment for loss of shoulder range of motion, 10 percent for resection arthroplasty (combined for a 17 percent impairment) and 3 percent for pain. By report dated November 13, 2008, OWCP's medical adviser opined that appellant had a 20 percent right arm permanent impairment, applying the fifth edition of the A.M.A., *Guides* in a similar manner as Dr. Allon.

On March 3, 2009 appellant submitted a February 27, 2009 claim for a schedule award. By letter dated August 20, 2009, OWCP advised her that as of May 1, 2009 schedule awards must be based on the sixth edition of the A.M.A., *Guides*.

In a report again dated August 5, 2008, Dr. Allon repeated appellant's history and results on examination, with an opinion as to permanent impairment under the sixth edition of the A.M.A., *Guides*. He referred to Table 15-5 for class 1 impairment for full-thickness tear of the rotator cuff, with residual loss, resulting in a default impairment of five percent. Dr. Allon then adjusted the impairment to seven percent, based on grade modifiers for functional history, physical examination and clinical studies. In addition, he found one percent impairment for right lateral epicondylitis under Table 15-4, with no net adjustment based on the specified grade modifiers. Dr. Allon concluded that appellant had an eight percent right arm permanent impairment.

In a report dated January 18, 2010, OWCP's medical adviser concurred that appellant had an eight percent right arm permanent impairment. The date of maximum medical improvement was August 5, 2008.

By decision dated February 5, 2010, OWCP granted a schedule award for an eight percent permanent impairment to the right arm. The period of the award was 24.96 weeks from August 5, 2008.

In a letter dated February 12, 2010, appellant requested a review of the written record by an OWCP hearing representative.

By decision dated May 13, 2010, the hearing representative affirmed the February 5, 2010 schedule award decision. The hearing representative noted that the decision was issued after OWCP adopted the sixth edition of the A.M.A., *Guides* and was properly based on that edition.

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.⁴ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

OWCP procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.⁶ Any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. A claimant who has received a schedule award calculated under a previous edition and who claims an increased award will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.⁷

ANALYSIS

The attending physician, Dr. Allon, provided an opinion that appellant had an eight percent right arm permanent impairment under the sixth edition of the A.M.A., *Guides*. Pursuant to Table 15-5, a full thickness rotator cuff tear, with “residual loss, functional with normal motion” has a default (grade C) arm impairment of five percent.⁸ The grade C may be adjusted based on grade modifiers for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁹ Dr. Allon assigned a grade modifier of one for function history (mild problem), two for physical examination (moderate problem) and four based on clinical studies (very severe problem). Applying the net adjustment formula resulted in a +4, which required an adjustment to grade E, or 7 percent arm impairment for the rotator cuff tear. Dr. Allon also identified Table 15-4, for elbow impairments and class 1, impairment for lateral epicondylitis.¹⁰

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ See *Ronald R. Kraynak*, 53 ECAB 130 (2001); *August M. Buffa*, 12 ECAB 324 (1961).

⁵ 20 C.F.R. § 10.404 (1999).

⁶ FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁷ *Id.*

⁸ A.M.A., *Guides* 403, Table 15-5. The Class of Diagnosis (CDX) is a class 1.

⁹ *Id.* at 405-411. The formula is (GMFH) – CDX) + (GMPE – CDX) + (GMCS – CDX).

¹⁰ *Id.* at 399, Table 15-4.

The grade C impairment is one percent impairment, and with a GMFH of one, a GMPE of two, and a zero for GMCS, there is no net adjustment from the grade C default value.

OWCP's medical adviser concurred with Dr. Allon that there was eight percent impairment, based on seven percent for the rotator cuff tear and one percent for lateral epicondylitis. The Board finds that the medical evidence from Dr. Allon and OWCP's medical adviser represents the weight of the evidence in this case.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete hearing loss, the maximum number of weeks of compensation is 312 weeks. Since appellant's impairment was eight percent, he is entitled to eight percent of 312 weeks, or 24.96 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹¹ In this case, OWCP's medical adviser properly concluded that the date of maximum medical improvement was the date of examination by Dr. Allon. The award therefore properly runs for 24.96 weeks commencing on August 5, 2008.

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.¹² In this case, appellant made a claim for a schedule award. In *Harry D. Butler*,¹³ the Board noted that Congress delegated authority to the Director 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.¹⁴ 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*.¹⁵ The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

OWCP has adopted the standards of the sixth edition of the A.M.A., *Guides* effective May 1, 2009 for evaluating permanent impairment and the Board has concurred in this

¹¹ *Albert Valverde*, 36 ECAB 233, 237 (1984).

¹² 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.

¹³ 43 ECAB 859 (1992).

¹⁴ *Id.* at 866.

¹⁵ 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 and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

adoption.¹⁶ The schedule award decision in this case was dated February 5, 2010 and was based on the sixth edition. Even if there was a delay from the time OWCP's medical adviser initially reviewed the schedule award issue and the issuance of a final decision, the Board's jurisdiction is limited to the final decisions of OWCP.¹⁷ The decision on appeal was issued after May 1, 2009 and properly determined appellant's right arm permanent impairment under the sixth edition.

CONCLUSION

The Board finds the evidence does not establish more than an eight percent right arm permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2010 is affirmed.

Issued: June 17, 2011
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁶ *G.M.*, Docket No. 10-1424 (issued April 19, 2011).

¹⁷ 20 C.F.R. § 10.501.2(c).