

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

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**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, AIRPORT STATION,  
Mobile, AL, Employer**

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**Docket No. 10-2252  
Issued: June 15, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 8, 2010 appellant, through her attorney, filed a timely appeal from an August 11, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

**ISSUE**

The issue is whether appellant is entitled to a schedule award for permanent impairment of the upper extremities.

**FACTUAL HISTORY**

This case was previously before the Board. On December 30, 2002 appellant, then a 39-year-old rural carrier, filed a claim alleging that she sustained an injury to her left elbow and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

forearm on that date when she slammed it into a door while loading a tray of flats. OWCP accepted the claim for a contusion of the left elbow and bilateral lateral epicondylitis. On December 23, 2003 appellant underwent a Boyd-McLeod procedure on the left elbow and on July 5, 2005 she underwent a Boyd-McLeod procedure on the right elbow.

On December 19, 2005 Dr. William A. Crotwell, III, a Board-certified orthopedic surgeon, found that appellant had a 10 percent right upper extremity impairment according to fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). On December 29, 2004 OWCP's medical adviser reviewed the report and noted that she had essentially normal range of motion and no objective evidence of a loss of grip strength. Dr. Crotwell found that appellant had no impairment of the right or left upper extremity.

By decision dated January 12, 2006, OWCP denied appellant's claim for a schedule award. On March 14, 2006 appellant requested reconsideration and submitted the results of a December 15, 2005 functional capacity evaluation. OWCP's medical adviser reviewed the functional capacity evaluation on May 18, 2006 and asserted that she had a two percent impairment of the right upper extremity due to loss of strength and no impairment of the left upper extremity.

By decision dated June 2, 2006, OWCP vacated its January 12, 2006 decision after finding a conflict between Dr. Crotwell and OWCP's medical adviser. In a report dated July 14, 2006, Dr. Christo W. Koullisis, a Board-certified orthopedic surgeon and impartial medical examiner, found that appellant had no impairment of the left upper extremity and a two percent whole person impairment based on her right upper extremity impairment. On October 18, 2006 OWCP requested that he clarify how he applied the fifth edition of the A.M.A., *Guides* in reaching his impairment determination.

On January 27, 2007 appellant filed a claim for a schedule award. On April 23, 2007 OWCP's medical adviser reviewed the evidence and found that she had no impairment of either upper extremity.

By decision dated May 1, 2007, OWCP denied appellant's claim for a schedule award based on the findings of OWCP's medical adviser.<sup>2</sup>

In a report dated December 17, 2008, Dr. Crotwell determined that appellant had a 10 percent impairment to each upper extremity according to the fifth edition of the A.M.A., *Guides*. OWCP's medical adviser reviewed the evidence on April 30, 2009 and found that appellant had no upper extremity impairment.

On May 13, 2009 OWCP informed appellant's attorney that it had referred Dr. Crotwell's report to OWCP's medical adviser, who found no impairment of either upper extremity.

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<sup>2</sup> By decision dated August 31, 2007, OWCP denied appellant's claim for compensation from November 30 to December 5, 2006, as the medical evidence failed to show that she was disabled from employment.

In a May 20, 2010 order remanding case, the Board found that OWCP's May 13, 2009 correspondence constituted a decision denying appellant's schedule award claim.<sup>3</sup> The Board remanded the case for OWCP to provide an appropriate decision containing adequate factual findings and explaining the basis for its denial.

On remand OWCP determined that a conflict existed between Dr. Crotwell and OWCP's medical adviser. It referred appellant to Dr. Raymond Fletcher, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an impairment evaluation dated July 7, 2010, Dr. Fletcher reviewed the medical evidence of record and discussed appellant's complaints of bilateral elbow pain which increased with activity. On examination he found no atrophy and measured grip strength on the right as 15, 15 and 10 and the left as 10, 10 and 8. Dr. Fletcher found "moderate subacromial tenderness with impingement" on the right and bilateral tenderness at the joint line with "mild crepitus at the radiohumeral joint during passive forearm rotation." He found normal range of motion of the bilateral elbows with a "positive long arm extension test referring pain to lateral epicondyle and dorsal forearm muscle compartments." Dr. Fletcher determined that appellant had good results from her bilateral lateral epicondyle debridement with residual impairment. He asserted that her subjective complaints correlated with "several abnormal musculoskeletal findings" and found that she provided good effort and cooperation on examination. Dr. Fletcher diagnosed right and left lateral epicondylitis and a bilateral permanent aggravation of elbow arthrosis. He opined that appellant reached maximum medical improvement on the right side in December 2004 and for the left side in July 2006. Citing the sixth edition of the A.M.A., *Guides*, Dr. Fletcher concluded that she had a six percent permanent impairment of each elbow according to Table 15-4 on page 399 of the A.M.A., *Guides*.

On July 20, 2010 OWCP's medical adviser discussed Dr. Fletcher's finding that appellant had a good result from her bilateral lateral elbow releases with full range of motion. He determined that she had a Class 0 permanent impairment of each upper extremity due to lateral epicondylitis as there were no objective findings of impairment on examination. The medical adviser noted that appellant also had no impairment based on loss of range of motion.

By letter dated July 22, 2010, OWCP requested that Dr. Fletcher review OWCP's medical adviser's report and provide the objective findings he relied upon in reaching his impairment determination. It also requested that he cite to the tables used.

In a supplemental report dated July 27, 2010, Dr. Fletcher diagnosed as employment related right and left elbow lateral epicondylitis and a permanent aggravation of arthrosis. He listed the objective findings that he relied upon in reaching his impairment rating as surgical scars over the lateral epicondyle, tenderness at the joint line, radiohumeral crepitus during passive forearm rotation, a positive extension test of the long arm with pain referred to the lateral epicondyle and dorsal forearm and grip strength weakness with good effort. Dr. Fletcher reaffirmed the impairment determination from his July 7, 2010 report.

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<sup>3</sup> Order Remanding Case, Docket No. 09-1847 (issued May 20, 2010).

On July 28, 2010 OWCP's medical adviser related that Dr. Fletcher merely repeated his opinion from his prior report and also included in his diagnoses a condition not accepted as employment related, an aggravation of arthrosis. Dr. Fletcher concurred with the findings of the medical adviser on July 20, 2010.

By decision dated August 11, 2010, OWCP denied modification of its May 13, 2009 decision. It found that OWCP's medical adviser's opinion constituted the weight of the evidence and established that appellant had no impairment of the right or left upper extremity.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing federal regulations,<sup>5</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, 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>8</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>9</sup> When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.<sup>10</sup> OWCP procedures indicate that referral to OWCP's medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained. Where a medical conflict is present, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> A.M.A., *Guides* at 494-531.

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

accordance with the A.M.A., *Guides*.<sup>11</sup> OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical examiner.<sup>12</sup>

### ANALYSIS

OWCP accepted that appellant sustained a left elbow contusion and bilateral lateral epicondylitis due to factors of her federal employment. The appellant underwent left elbow surgery on December 23, 2003 and right elbow surgery on July 5, 2005.

OWCP determined that a conflict existed between Dr. Crotwell, appellant's attending physician and OWCP's medical adviser regarding whether appellant had a permanent impairment of the upper extremities. It referred her to Dr. Fletcher for an impartial medical examination.<sup>13</sup> On July 7, 2010 Dr. Fletcher found subacromial tenderness on the right and at the joint line bilaterally with some creptus at the radiohumeral joint. He further found a positive long arm extension test. Dr. Fletcher opined that appellant had a good result from her bilateral lateral epicondyle debridement surgery but had a resulting impairment. He diagnosed right and left lateral epicondylitis and a permanent bilateral aggravation of arthrosis. Citing Table 15-4 of the sixth edition of the A.M.A., *Guides*, Dr. Fletcher found that appellant had a six percent permanent impairment of each elbow.

On July 20, 2010 OWCP's medical adviser found that appellant had no upper extremity impairment based on Dr. Fletcher's finding that she had a good result from her bilateral lateral releases of the elbows. At OWCP's request, Dr. Fletcher described the objective findings that he relied upon in reaching his impairment determination. On July 28, 2010 OWCP's medical adviser concurred with the findings by OWCP's medical adviser on July 20, 2010 that appellant had no permanent impairment.<sup>14</sup>

The Board finds that OWCP's medical adviser improperly substituted his own judgment for that of the impartial medical examiner. The role of the medical adviser is to verify the correct application of the A.M.A., *Guides*. It is the impartial medical specialist, however, who must resolve the conflict on the degree of permanent impairment in accordance with the A.M.A., *Guides*.<sup>15</sup> Although Dr. Fletcher provided a thorough examination and cited to the sixth edition of the A.M.A., *Guides*, he did not apply the grade modifiers required to determine the extent of permanent impairment when using Table 15-4. Consequently, the conflict in medical evidence is unresolved and the case will be remanded to OWCP to secure a supplemental report from him

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<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 7, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

<sup>12</sup> See *Thomas J. Fragale*, 55 ECAB 619 (2004).

<sup>13</sup> OWCP initially referred appellant to Dr. Koullis for an impartial medical examination; however, Dr. Koullis did not respond to its request for clarification.

<sup>14</sup> OWCP medical adviser further found that Dr. Fletcher improperly included a nonaccepted condition, that of an aggravation of arthrosis. However, Dr. Fletcher, the impartial medical examiner, found that the condition was related to appellant's work injury.

<sup>15</sup> See *Richard R. LeMay*, 56 ECAB 341 (2005); Federal (FECA) Procedure Manual, *supra* note 7, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

further explaining his impairment rating consistent with the A.M.A., *Guides*.<sup>16</sup> If Dr. Fletcher is unable to provide an appropriate opinion, OWCP should refer the case to another impartial medical examiner.<sup>17</sup> After such further development as OWCP deems necessary, it should issue a *de novo* decision on the extent of appellant's permanent impairment.

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 11, 2010 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 15, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> In its July 22, 2010 request for clarification, OWCP primarily asked Dr. Fletcher to provide the objective findings that he relied upon in reaching his impairment determination.

<sup>17</sup> See *Nancy Keenan*, 56 ECAB 687 (2005).