

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

D.O., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Union, NJ, Employer**

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**Docket No. 11-383
Issued: November 8, 2011**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2010 appellant, through her attorney, filed a timely appeal of the October 27, 2010 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than eight percent impairment of each upper extremity, for which she received schedule awards.

On appeal, counsel contends that OWCP erred in applying the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) rather than the fifth edition. He stated that the fifth edition was in effect at the time

¹ 5 U.S.C. § 8101 *et seq.*

appellant filed her schedule award claim. Counsel claimed that appellant's schedule award under the sixth edition was less than what she would receive under the fifth edition.

FACTUAL HISTORY

On December 23, 2003 appellant, then a 55-year-old distribution clerk, filed an occupational disease claim alleging that her bilateral carpal tunnel syndrome was caused by repetitive work duties she performed for 22 years at the employing establishment.² She underwent right carpal tunnel release in February 2004, left carpal tunnel release in March 2004 and revision left carpal tunnel release and decompression of the distal ulnar nerve on March 25, 2005. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. In a September 15, 2006 decision and September 27, 2007 letter, it accepted that she sustained a recurrence of disability on June 15, 2004 and January 31, 2005, respectively, due to her accepted injury.

On December 5, 2007 appellant filed a claim for a schedule award. In a September 19, 2007 medical report, Dr. David Weiss, an attending osteopath, found that appellant had reached maximum medical improvement. He determined that she had 45 percent impairment of each upper extremity based on the fifth edition of the A.M.A., *Guides*.

On March 28, 2008 Dr. Arnold T. Berman, an OWCP medical adviser, reviewed appellant's medical records, including Dr. Weiss' September 19, 2007 findings. He recommended that appellant's claim be accepted for left ulnar nerve compression of the wrist based on her left carpal tunnel revision with decompression. Dr. Berman found that she reached maximum medical improvement on September 19, 2007. He determined that appellant had 23 percent impairment of the right upper extremity and 27 percent impairment of the left upper extremity based on the fifth edition of the A.M.A., *Guides*.

On May 12, 2008 OWCP accepted appellant's claim for a lesion of the left wrist ulnar nerve.

On July 30, 2008 OWCP determined that there was a conflict in the medical opinion evidence between Dr. Weiss and Dr. Berman regarding the extent of appellant's permanent impairment. By letter dated July 31, 2008, it referred appellant, together with the medical record and a statement of accepted facts, to Dr. Marc W. Urquhart, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an August 25, 2008 report, Dr. Urquhart reviewed a history of the accepted employment injuries and appellant's medical treatment, family and social background. He listed his findings on physical examination and diagnosed repetitive and cumulative traumatic right and left carpal tunnel syndrome, recurrent left carpal tunnel syndrome and left ulnar nerve compression neuropathy at the wrist. Dr. Urquhart advised that appellant was status post the February 2004 right carpal tunnel release, March 2004 left carpal tunnel release and March 25,

² In a prior claim filed under OWCP File No. xxxxxx456, the Board, in a March 23, 2009 decision, affirmed OWCP decisions dated August 14, 2007 and April 24, 2008, finding that appellant did not sustain bilateral shoulder and neck injuries while in the performance of duty. Docket No. 08-2003 (issued March 23, 2009).

2005 revision left carpal tunnel release and decompression of the distal ulnar nerve. He concluded that she had reached maximum medical improvement and was permanently disabled from performing repetitive activities with her bilateral upper extremities.

On November 7, 2008 OWCP requested that Dr. Urquhart provide whether appellant sustained any permanent impairment. In a March 10, 2009 report, he stated that appellant had 23 percent impairment of the right upper extremity and 28 percent impairment of the left upper extremity based on the fifth edition of the A.M.A., *Guides*.

On April 29, 2009 Dr. Henry J. Magliato, an OWCP medical adviser, reviewed appellant's medical record and agreed with Dr. Urquhart's March 10, 2009 finding that appellant had 23 percent impairment of the right upper extremity and 28 percent impairment of the left upper extremity based on the fifth edition of the A.M.A., *Guides*.

On August 6 and December 30, 2009 and March 16, 2010 OWCP advised Dr. Urquhart that effective May 1, 2009 all permanent impairment determinations must be made in accordance with the sixth edition of the A.M.A., *Guides*.³ It requested that he submit a medical report that included a finding that appellant had attained maximum medical improvement, and provide a detailed description of the impairment and a schedule award rating according to this edition. Dr. Urquhart did not respond.

In an April 21, 2010 letter, appellant contended that her schedule award claim should be adjudicated under the fifth rather than the sixth edition of the A.M.A., *Guides*.

On June 24, 2010 OWCP referred appellant, together with the medical record, to Dr. Jerome D. Rosman, a Board-certified orthopedic surgeon, for an impartial medical examination. In a July 15, 2010 report, Dr. Rosman reviewed a history of the employment injuries and appellant's medical treatment and employment background. He also reviewed the medical record. Appellant's current complaints included pain in her hands and shoulders, and numbness in her arms and hands. She had difficulty lifting and moving her arms, shoulders and hands. Appellant did not experience any blurred or double vision. She denied nausea, vomiting, dizziness, fainting and nervousness. Appellant's condition was somewhat better when she was at rest and unchanged when she was moving her arms, wrists, hands and fingers. On physical examination, Dr. Rosman reported normal range of motion of the right and left shoulder, elbow, wrist and fingers. He also reported normal motor strength and equal deep tendon reflexes in the upper extremities. Dr. Rosman found decreased sensation to light touch of the thumb, index and middle fingers on both hands. He diagnosed bilateral carpal tunnel syndrome for which appellant was status post surgery. Dr. Rosman also diagnosed left ulnar nerve lesion at the wrist level due to the accepted employment injuries. He advised that appellant reached maximum medical improvement in 2005, six months after her third surgical procedure.

Dr. Rosman then applied the standards of the sixth edition of the A.M.A., *Guides* to his findings, including Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449. With respect to the right arm, he assessed a grade 4 modifier for test findings. Dr. Rosman

³ On March 15, 2009 the Director issued FECA Bulletin No. 09-03 advising that the sixth edition of the A.M.A., *Guides* would be made applicable to rating impairment effective May 1, 2009.

assessed a grade 3 modifier for history findings. For physical examination findings, he assessed a grade 2 modifier. The values of the grade modifiers averaged three. With respect to the left arm, Dr. Rosman stated that for test findings appellant had a grade 3 modifier; that for history she had a grade 3 modifier; and that for physical findings she had a grade 2 modifier. The values of the grade modifiers averaged 2.7 which rounded up to 3. Dr. Rosman found that the grade modifiers for the left ulnar nerve lesion were zero. He stated that appellant had a *QuickDASH* score of 77 for each arm which represented a grade modifier of three. Dr. Rosman concluded that appellant had eight percent impairment of each upper extremity.

On September 2, 2010 Dr. Henry J. Magliato, an OWCP medical adviser, reviewed appellant's medical records, including Dr. Rosman's July 15, 2010 findings. He advised that appellant had reached maximum medical improvement on September 19, 2007. Dr. Magliato stated that Dr. Rosman provided eight percent impairment for each upper extremity. He concluded that these impairment ratings, derived under the sixth edition of the A.M.A., *Guides*, were acceptable. Dr. Magliato explained that, using Table 15-23, p. 449, the average totals for the left upper extremity was three, resulting in a final rating category of grade modifier three. The default value was 8(c). The *QuickDASH* score was 77, resulting in a grade modifier functional scale of 3. Dr. Magliato noted that since this was the same as grade modifier 3, the default value remained at eight percent for the left upper extremity. Additionally, all modifiers for the ulnar nerve lesion for the left upper extremity were zero, resulting in a class 0 and a default value of 0. For the right upper extremity, Dr. Magliato stated that Dr. Rosman again used Table 15-23, p. 449. The average of the grade modifiers was three resulting in a grade modifier of three and a default value of eight percent. Since the functional scale was three, the default value remained at eight percent for the right upper extremity.

In an October 27, 2010 decision, OWCP granted appellant a schedule award for eight percent impairment of each upper extremity.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁶ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009,

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Ausbon N. Johnson*, 50 ECAB 304 (1999).

⁷ *Supra* note 4.

OWCP adopted the sixth edition of the A.M.A., *Guides*⁸ as the appropriate edition for all awards issued after that date.⁹

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.¹⁰ In Table 15-23, grade modifier levels (ranging from 0 to 4) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.¹¹

Section 8123(a) of FECA provides in pertinent part: “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.”¹² When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹³

ANALYSIS

OWCP accepted appellant’s claim for bilateral carpal tunnel syndrome and a lesion of the left wrist ulnar nerve. She underwent right carpal tunnel release in February 2004, left carpal tunnel release in March 2004 and revision left carpal tunnel release and decompression of the distal ulnar nerve on March 25, 2005. Due to a conflict between appellant’s physician, Dr. Weiss, who found that appellant had 45 percent impairment of each upper extremity, and Dr. Berman, an OWCP medical adviser, who found that appellant had 23 percent impairment of the right upper extremity and 27 percent impairment of the left upper extremity, OWCP referred appellant to Dr. Urquhart, as the impartial medical specialist to resolve the conflict in medical opinion.

In an August 25, 2008 report, Dr. Urquhart found that appellant had bilateral carpal tunnel syndrome and left ulnar nerve compression for which she was status post several surgeries. He further that she had reached maximum medical improvement and was permanently disabled from performing repetitive activities with her bilateral upper extremities. In a March 10, 2009 report, Dr. Urquhart advised that appellant had 23 percent impairment of the right upper extremity and 28 percent impairment of the left upper extremity based on the fifth

⁸ A.M.A., *Guides* (6th ed. 2009).

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

¹⁰ See A.M.A., *Guides* 449, Table 15-23.

¹¹ *Id.* at 448-50.

¹² 5 U.S.C. § 8123(a).

¹³ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

edition of the A.M.A., *Guides*. Dr. Magliato, an OWCP medical adviser, agreed with Dr. Urquhart's findings.

OWCP correctly requested that Dr. Urquhart provide an impairment rating under the standards of the sixth edition of the A.M.A., *Guides*.¹⁴ Dr. Urquhart did not respond. Board precedent and OWCP's procedure manual provides that, if the selected impartial medical examiner failed to provide an adequate clear response after a specific request for clarification, OWCP may then seek a second impartial medical examiners opinion.¹⁵

Accordingly, OWCP properly referred appellant to Dr. Rosman, as an impartial medical specialist, to determine the extent of her permanent impairment for schedule award purposes. Dr. Rosman based his report on a proper factual background and provided physical findings in support of his determination that appellant had eight percent impairment of each upper extremity.

In his July 15, 2010 report, Dr. Rosman discussed appellant's medical history, including pain in her hands, shoulders, arms and hands and essentially normal findings on examination. He reviewed her medical records, including diagnostic testing of the right and left shoulders. Dr. Rosman found that the date of maximum medical improvement was in September 2005, six months after her March 25, 2005 revision left carpal tunnel release and decompression of the distal ulnar nerve. He evaluated appellant's arm impairment under Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449. For the right arm appellant fell under grade modifier 4 for test findings (almost dead nerve), grade modifier 3 for history (constant symptoms) and grade modifier 2 for physical findings (decreased sensation). Dr. Rosman averaged these grade modifier values to 3 which meant that appellant fell under grade modifier 3. The default value under grade modifier 3 is eight percent. For the left arm, Dr. Rosman stated that appellant fell under a grade modifier 3 for test findings (axon loss), grade modifier 3 for history (constant symptoms) and grade modifier 2 for physical findings (decreased sensation). These grade modifiers were averaged to 2.7 and rounded up to 3 which meant that overall appellant fell under a grade modifier 3 with a default rating value of eight percent. Dr. Rosman stated that the grade modifiers for the left ulnar nerve lesion were zero. He indicated that appellant's functional scale for both arms fell under grade modifier 3 (severe) and therefore there was no change from the default value of eight percent in each arm. Dr. Rosman properly concluded that she had eight percent permanent impairment of her right arm and eight percent permanent impairment of her left arm. Dr. Magliato, an OWCP medical adviser, agreed with Dr. Rosman's findings and conclusions and the Board finds that these impairment ratings comport with the A.M.A., *Guides*.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper

¹⁴ OWCP's decision regarding impairment was not issued until after May 1, 2009 and, therefore, its use of the sixth edition of the A.M.A., *Guides* was appropriate. *See supra* note 8.

¹⁵ *James P. Roberts*, 31 ECAB 1010 (1980); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6.b (May 2003).

factual background, must be given special weight.¹⁶ The Board finds that Dr. Rosman, the impartial medical examiner, properly applied the A.M.A., *Guides* to appellant's findings on physical examination and diagnostic testing. His report was sufficiently detailed and well reasoned to resolve the conflict of medical opinion evidence and establish appellant's permanent impairment for schedule award purposes. The Board finds that Dr. Rosman's report is entitled to the special weight of the medical evidence, afforded an impartial medical examiner, with regard to appellant's employment-related permanent impairment.

The record does not contain any medical evidence that establishes greater impairment in accordance with the sixth edition of the A.M.A., *Guides*. The Board finds that appellant has not established more than eight percent impairment of each upper extremity.

On appeal, counsel contends that OWCP abused its discretion by issuing a decision under the sixth edition of the A.M.A., *Guides* rather than the fifth edition. He stated that appellant would have received a greater schedule award under the fifth edition.

As noted, OWCP issued FECA Bulletin No. 09-03 on March 15, 2009 directing claims examiners and other reviewing personnel to apply the sixth edition of the A.M.A., *Guides* as of May 1, 2009. The FECA Bulletin directed that correspondence with treating physicians, consultants and second opinion specialists should reflect use of the new edition for decisions issued on or after May 1, 2009. In this case, OWCP, on three occasions from August 6 through March 16, 2010, properly advised Dr. Urquhart, the first impartial medical examiner, that effective May 1, 2009 all permanent impairment determinations must be made in accordance with the sixth edition and requested a new impairment rating corresponding to this edition.

The Board has recognized that the method used in rating impairment for purposes of a schedule award is a matter, which rests in the sound discretion of the Director. In *Harry D. Butler*,¹⁷ the Board addressed OWCP's use of the A.M.A., *Guides* to evaluate impairment since the first edition single volume published in 1971. The Director has since adopted subsequent editions of the A.M.A., *Guides* and has stated the date specific when use of each edition should be made applicable to claims under FECA. Counsel has not established that the Director abused the discretion delegated to him under section 8107 and the implementing federal regulations to make the sixth edition of the A.M.A., *Guides* applicable to all claimants as of May 1, 2009. The fact that the sixth edition revises the evaluation methods used in previous editions does not establish an abuse of discretion. As noted in FECA Bulletin No. 09-03, the American Medical Association periodically revises the A.M.A., *Guides* to incorporate current scientific clinical knowledge and judgment and to establish standardized methodologies for calculating permanent impairment.

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.

¹⁶ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

¹⁷ 43 ECAB 859 (1992).

CONCLUSION

The Board finds that appellant has failed to establish that she has more than eight percent impairment of each upper extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 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