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

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| **J.C., Appellant** | ) | |
| **and** | ) | **Docket No. 11-586** |
| | ) | **Issued: October 4, 2011** |
| **DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL ACADEMY, IMPERIAL BEACH STATION, San Diego, CA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On January 10, 2011 appellant filed a timely appeal from a December 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his schedule award claim. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

### ***ISSUE***

The issue is whether appellant has more than eight percent total impairment of the left upper extremity, for which he received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

## ***FACTUAL HISTORY***

This case has previously been before the Board. In a June 2, 2011 decision, the Board remanded the case to OWCP for further development regarding appellant's pay rate for compensation purposes.[2] The findings and facts of the Board's prior decision is incorporated herein. The relevant facts are set forth.

On March 12, 2008 appellant, then a 35-year-old border patrol trainee injured his left elbow during a training exercise. He stopped work and received continuation of pay. OWCP accepted a closed fracture of the left radius head and left elbow closed dislocation. Appellant underwent a left radial head replacement and repair of the left elbow lateral collateral ligaments on March 25, 2008. He was released to modified duty with restrictions on April 9, 2008. On September 11, 2008 appellant was terminated from his federal position as he was unable to perform border patrol agent duties. OWCP paid wage-loss compensation beginning September 11, 2008. On September 15, 2009 appellant began private employment as an aircraft mechanic/plane interior technician working eight hours a day, five days a week.

On January 16, 2010 appellant requested a schedule award. In a January 26, 2009 report, Dr. Daniel B. Cullan, II, a Board-certified orthopedic surgeon, found appellant permanent and stationary with restrictions of limited use of the left upper extremity and no lifting greater than 10 pounds. Under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), Dr. Cullan opined that appellant had eight percent impairment of the left upper extremity based on range of motion limitations and radial head implant/arthroplasty.

In an April 26, 2010 report, an OWCP medical adviser opined that appellant reached maximum medical improvement on January 26, 2009. Utilizing Dr. Cullen's findings, the medical adviser opined that appellant had eight percent left upper extremity impairment based on the sixth edition of the A.M.A., *Guides*. Under Table 15-4, page 400, the medical adviser stated a class 1 radial head arthroplasty equaled eight percent impairment. Under Table 16-9, page 410, she assigned a grade modifier one for clinical studies. Under Table 15-8, page 408, a grade modifier one was assigned for physical examination. Under Table 15-7, page 406, a grade modifier one was assigned for functional history. Utilizing the net adjustment formula, the medical adviser found a modification factor of zero. Thus, she opined that appellant had eight percent left upper extremity impairment. The medical adviser noted that the sixth edition of the A.M.A., *Guides* excludes a diagnosed-based estimate and range of motion percentage in calculating appellant's impairment, upon which Dr. Cullen had based his determination.

On April 28, 2010 appellant filed another claim for schedule award compensation.

By decision dated May 12, 2010, OWCP awarded appellant eight percent impairment of the left upper extremity. The period of the award ran from May 9 to October 30, 2010 for 24.96 weeks.

[2] Docket No. 10-1855 (issued June 2, 2011).

In a May 24, 2010 letter, appellant, through his attorney, requested a telephonic hearing before an OWCP hearing representative, which was held September 28, 2010. Appellant testified why he believed he was entitled to an increased schedule award. No additional medical evidence was received into the record.

By decision dated December 7, 2010, an OWCP hearing representative affirmed the May 12, 2010 decision.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[3] and its implementing regulations[4] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[5] 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

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).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[9]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[10]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[6] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] 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).

[8] A.M.A., *Guides* 494-531.

[9] *Id.* at 521.

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

## ***ANALYSIS***

OWCP accepted that appellant sustained a closed fracture of the left radius head and left elbow closed dislocation and authorized left radial head replacement and repair of the left elbow lateral collateral ligaments. He subsequently claimed a schedule award and submitted a January 26, 2009 report from Dr. Cullan who opined that appellant had eight percent impairment of the left upper extremity based on the fifth edition of the A.M.A., *Guides.* It is well established that, when the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by a medical adviser.[11]

The sixth edition of the A.M.A., *Guides* provides that upper extremity impairments be classified by diagnosis and then adjusted by grade modifiers according to the above-noted formula. The medical adviser used Dr. Cullan's findings and opined that appellant had eight percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides.* The medical adviser determined that appellant was class 1 under Table 15-4, page 400 for radial head arthroplasty, which equaled eight percent impairment. She properly applied the grade modifiers of one for clinical studies[12]; one for physical examination[13] and one for functional history.[14] She applied the applicable formula to determine that appellant had a net adjustment of zero.[15] The medical adviser properly found that, as the default value was eight percent and, as there was zero net adjustment, appellant had eight percent left arm impairment. The medical adviser also properly noted that while appellant had loss of range of motion findings, an impairment due to loss of range of motion stands alone and is not combined with a diagnosis-based impairment.[16] The Board notes that diagnosis-based impairments are the method of choice for calculating upper extremity impairments and an impairment rating based on range of motion findings is only used when no other diagnosis-based sections of Chapter 15 are applicable for impairment rating of a condition.[17]

The medical evidence of record does not establish greater impairment in accordance with the sixth edition of the A.M.A., *Guides*. Appellant has not established more than the eight percent left upper extremity impairment previously awarded. He asserts on appeal that the schedule award is contrary to "fact and law." As noted, the report of Dr. Cullan was found insufficient to establish any greater impairment as he did not evaluate appellant in accordance

[11] *See J.Q.*, 59 ECAB 366 (2008).

[12] A.M.A., *Guides* 410, Table 15-9.

[13] *Id*. at 408, Table 15-8.

[14] *Id.* at 406, Table 15-7.

[15] GMFH - CDX (1-1=0). GMPE-CDX (1-1=0). GMCS-CDX (1-1=0). Adding zero plus zero plus zero yielded a net adjustment of zero.

[16] A.M.A., *Guides* 461.

[17] *Id.*

with the sixth edition of the A.M.A., *Guides*. There is no medical evidence of record supporting greater 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.

## ***CONCLUSION***

The Board finds that appellant has no more than eight percent total permanent impairment of the left upper extremity, which was previously awarded.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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