

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Red Bank, NJ, Employer**

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**Docket No. 11-709
Issued: October 7, 2011**

Appearances:
Thomas R. Uliase, 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 21, 2011 appellant's counsel timely appealed the October 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed a prior schedule award. 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 this case.

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, then a 49-year-old clerk, has an accepted claim for left carpal tunnel syndrome, which arose on or about June 21, 2005.² She underwent OWCP-approved left carpal tunnel release on July 26, 2006. On March 31, 2008 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted an October 31, 2007 impairment rating from Dr. David Weiss, a Board-certified orthopedic surgeon, who diagnoses included status post left carpal tunnel release and chronic left lateral epicondylitis. Dr. Weiss found 23 percent impairment of the left upper extremity due to sensory deficit involving the median nerve. He applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001).

In May 2008, OWCP combined appellant's left and right upper extremity claims. In a letter dated June 20, 2008, it documented an earlier conversation with appellant's counsel wherein he agreed to obtain another report from Dr. Weiss that addressed appellant's impairment of both upper extremities. This was done in an attempt to avoid piecemeal litigation. OWCP also preauthorized additional diagnostic studies electromyography and nerve conduction velocity if Dr. Weiss deemed them necessary. For some unexplained reason, appellant's counsel did not submit another report from Dr. Weiss prior to May 1, 2009, when OWCP adopted the sixth edition of the A.M.A., *Guides* (2008).

Dr. Weiss provided a supplemental report dated February 5, 2010, wherein he applied the latest edition of the A.M.A., *Guides* (6th ed. 2008) and found eight percent impairment of the left upper extremity. The overall rating included impairments for appellant's left elbow (two percent) and her left wrist (six percent).

On May 15, 2010 the district medical adviser (DMA) reviewed the record and concurred with Dr. Weiss' finding of eight percent impairment of the left upper extremity.

By decision dated June 28, 2010, OWCP granted a schedule award for eight percent impairment of the left upper extremity. The award covered a period of 24.96 weeks, from October 31, 2007 to April 22, 2008.

Counsel requested a review of the written record.³ In a decision dated October 19, 2010, the Branch of Hearings and Review affirmed the June 28, 2010 schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ FECA,

² Appellant has two other accepted claims for cervical and right upper extremity injuries that have been combined with the current claim.

³ Counsel argued that OWCP should have applied the fifth edition of the A.M.A., *Guides* rather than the sixth edition.

⁴ For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁵ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁶

ANALYSIS

OWCP based the June 28, 2010 schedule award on Dr. Weiss' February 5, 2010 impairment rating under the sixth edition of the A.M.A., *Guides* (2008). The DMA concurred with Dr. Weiss' eight percent left upper extremity rating. Appellant's counsel did not specifically challenge the validity of Dr. Weiss' latest rating, but instead argued that appellant should have received a schedule award for 23 percent impairment under the fifth edition of the A.M.A., *Guides* (2001) as Dr. Weiss initially calculated in October 2007.

Counsel accused OWCP of unreasonable delay in processing appellant's claim for a schedule award. He characterized the delay as a violation of appellant's constitutional rights. It appears that some of the responsibility for the prolonged adjudication of the claim rests with counsel, who informed OWCP on June 20, 2008 that he would submit a new report from Dr. Weiss that addressed both of appellant's upper extremities.

Notwithstanding his role in prolonging this matter, counsel argued that OWCP's delay in issuing a decision constituted a denial of due process. He asserted that appellant has a property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides*, and that a protected property interest cannot be deprived without due process. In support of this contention, counsel cited *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). However, 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.⁷ In this case, appellant is simply making a claim for a schedule award. She is not in receipt of schedule award benefits nor is OWCP attempting to terminate any benefits. Appellant has not established a vested right to a schedule award under the fifth edition of the A.M.A., *Guides* nor has she identified any due process rights that were purportedly infringed upon. The cases cited by counsel are inapplicable.

⁵ 20 C.F.R. § 10.404.

⁶ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

⁷ 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.

In *Harry D. Butler*,⁸ 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.⁹ 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*.¹⁰ 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.

As noted, both Dr. Weiss and the DMA applied the sixth edition of the A.M.A., *Guides* (2008) and agreed that appellant had eight percent impairment of the left upper extremity due to a combination of impairments involving the left wrist (six percent) and left elbow (two percent).¹¹ Counsel has not specifically challenged this finding, nor has he presented evidence indicating a greater impairment under the sixth edition of the A.M.A., *Guides* (2008). The Board finds that the above-noted reports from Dr. Weiss and the DMA conform to the A.M.A., *Guides* (6th ed. 2008), and thus, represent the weight of the medical evidence regarding the extent of appellant's left upper extremity impairment. Appellant has not submitted any credible medical evidence indicating she has greater than eight percent impairment of the left upper extremity.

CONCLUSION

Appellant has not established that she has greater than eight percent impairment of the left upper extremity.

⁸ 43 ECAB 859 (1992).

⁹ *Id.* at 866.

¹⁰ FECA Bulletin No. 09-03 (issued March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 3, Chapter 2.808.6(a) (January 2010).

¹¹ See Table 15-4 and Table 15-23, A.M.A., *Guides* 399, 449.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 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