

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

J.T., Appellant

and

**U.S. POSTAL SERVICE, SOUTH JERSERY
PERFORMANCE & DISTRIBUTION CENTER,
Bellmawr, NJ, Employer**

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) **Docket No. 11-183**
) **Issued: September 7, 2011**
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Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 29, 2010 appellant filed a timely appeal from a July 28, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his 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 the case.

ISSUE

The issue is whether appellant has more than seven percent right upper extremity impairment, for which he received a schedule award.

FACTUAL HISTORY

On May 16, 2007 appellant, then a 58-year-old mail handler, filed an occupational disease claim alleging that he developed a right arm condition due to the repetitive nature of his

¹ 5 U.S.C. §§ 8101-8193.

work duties. OWCP accepted the claim for a right rotator cuff sprain. It paid compensation, including an August 1, 2007 recurrence of disability and a right shoulder rotator cuff repair surgery of August 30, 2007.

On July 10, 2008 appellant requested a schedule award. In a March 26, 2008 report, Dr. David Weiss, an osteopath, noted the history of injury, his review of available medical records and presented findings on examination. He diagnosed cumulative and repetitive trauma disorder; rotator cuff tear to the right shoulder; status post glenoid labral tear involving the superior labrum to the right shoulder; acromioclavicular arthropathy with impingement to right shoulder; status post arthroscopic surgery with repair to the right shoulder; status post subacromial decompression of the right shoulder and status post repair of superior labrum to the right shoulder, August 30, 2007. Dr. Weiss opined that appellant reached maximum medical improvement on March 26, 2008 and had 14 percent right upper extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² On August 17, 2009 appellant's attorney inquired about the status of the schedule award claim.

In an October 13, 2009 letter, OWCP requested Dr. Weiss provide an updated report recommending a percentage of impairment in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP received a copy of Dr. Weiss' March 26, 2008 report revised under the sixth edition of the A.M.A., *Guides*. Dr. Weiss opined that appellant reached maximum medical improvement on March 26, 2008 and had seven percent right upper extremity impairment. He stated that the right shoulder full-thickness rotator cuff tear with residual loss was a class 1 or six percent impairment under Table 15-5, page 403. Dr. Weiss indicated that appellant's grade modifier Functional History (GMFH) with a *QuickDASH* score of 20 percent was 0;³ grade modifier Physical Examination (GMPE) of 2;⁴ and grade modifier clinical studies of 4.⁵ He applied the net adjustment formula and found the net adjustment of three. Thus Dr. Weiss found the right upper extremity impairment after net adjustment equaled seven percent.

On March 10, 2010 OWCP's medical adviser reviewed Dr. Weiss' revised report under the sixth edition of the A.M.A., *Guides* and concurred with his impairment rating. He concurred that appellant reached maximum medical improvement on March 26, 2008, the date of the evaluation by Dr. Weiss.

By decision dated March 16, 2010, OWCP awarded appellant a schedule award for seven percent right upper extremity impairment. The award ran for 21.64 weeks during the period March 26 to August 25, 2008.

² A.M.A., *Guides* (5th ed. 2001).

³ *Id.* at 406, Table 15-7.

⁴ *Id.* at 408, Table 15-8.

⁵ *Id.* at 410, Table 15-9.

In a March 25, 2010 letter, appellant's attorney requested a review of the written record. He argued that OWCP failed to make a timely schedule award determination under the fifth edition of the A.M.A., *Guides* thereby depriving appellant of her due process rights and benefits under FECA.

By decision dated July 28, 2010, OWCP's hearing representative affirmed the March 16, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of FECA provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶ Schedule award decisions issued between February 1, 2001 and April 30, 2009 utilized the fifth edition of the A.M.A., *Guides*.⁷ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides*,⁸ published in 2008, as the appropriate edition for all awards issued after that date.⁹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹⁰ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and Clinical Studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹²

⁶ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

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

¹⁰ A.M.A., *Guides* (6th ed. 2008), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹¹ A.M.A., *Guides* 494-531 (6th ed. 2008).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

ANALYSIS

The Board finds that OWCP properly applied the sixth edition of the A.M.A., *Guides* to determine the extent of appellant's impairment. Effective May 1, 2009 OWCP applied the sixth edition of the A.M.A., *Guides* to calculate awards.¹³ On appeal, appellant asserts that he has a 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). These cases held 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.¹⁴

In *Harry D. Butler*,¹⁵ 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.¹⁶ 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*.¹⁷ 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.

Under the sixth edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15. Section 15-2, entitled Diagnosis-Based Impairment, indicates that diagnosis-based impairment is the primary method of evaluation of the upper limb. Dr. Weiss determined that appellant was class 1 for the right full thickness tear of the rotator cuff pursuant to Table 15-5 of the A.M.A., *Guides*, which was five percent. He applied the grade modifiers of zero for functional history based on *QuickDASH* score of 20 percent¹⁸; a modifier of two for physical examination¹⁹ and a modifier of four for clinical studies.²⁰ Dr. Weiss applied the applicable formula to determine that appellant had a net adjustment of three. He next calculated

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁴ In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits would likely be less in a disabled worker than a welfare recipient, and due process would not require an evidentiary hearing.

¹⁵ 43 ECAB 859 (1992).

¹⁶ *Id.* at 866.

¹⁷ FECA Bulletin No. 09-03 (issued March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claim, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

¹⁸ A.M.A., *Guides* 406, Table 15-7.

¹⁹ *Id.* at 408, Table 15-9.

²⁰ *Id.* at 410, Table 15-9.

appellant's impairment to his right upper extremity by using the net adjustment of three to determine that appellant had an impairment of seven percent of his right upper extremity.²¹ OWCP's medical adviser reviewed Dr. Weiss' findings under the A.M.A., *Guides* and agreed with his calculations.

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 seven percent impairment to his right arm. 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 not established that he has more than seven percent right upper extremity impairment.

²¹ GMFH-CDX (0-1=-1) + GMPE-CDX (4-1=3) + GMCS-CDX (2-1=1) yields a net adjustment of three (3). The Board notes that the A.M.A., *Guides*, provides that, if functional history differs by two or more grades from physical examination or clinical studies, it should be assumed to be unreliable and should be excluded from the grading process. *Id.* at 406-07. Excluding functional history, from the calculation yields a net adjustment of four. The failure of Dr. Weiss to exclude functional history is harmless error as it does not affect his impairment calculation since the maximum impairment for appellant's class 1 diagnosis is seven percent. A.M.A., *Guides* 403.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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