



performance of duty. OWCP accepted his claim for an aggravation of bilateral tendinitis, bursitis and arthritis and bilateral Dupuytren's contractures.

On December 29, 2008 appellant filed a claim for schedule award compensation. In an October 30, 2008 impairment rating, Dr. Nicholas Diamond, an attending osteopath, found that he had a 17 percent impairment of the right upper extremity and 9 percent of the left upper extremity. This rating was based on range of motion deficits, along with pain, and was calculated using the fifth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001).

OWCP forwarded Dr. Diamond's report to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, for review and calculation of impairment. In a January 30, 2009 report, Dr. Slutsky calculated a 10 percent right upper extremity impairment and a 3 percent left upper extremity impairment. No further action was taken until August 10, 2009 when Dr. Diamond was asked to provide a new impairment rating under the sixth edition of the A.M.A., *Guides* that became effective on May 1, 2009.

In a September 2, 2009 report, Dr. Craig Uejo, an attending Board-certified occupational medicine physician, determined that appellant had a 7 percent right arm impairment and a 16 percent left arm impairment. He did not examine appellant, but, rather reviewed Dr. Diamond's report under the standards of the sixth edition of the A.M.A., *Guides*. Dr. Uejo stated that the impairment in this case was calculated through the use of section 15.7d Finger Motion on pages 468 through 469 for the motion deficits of the distal interphalangeal (DIP) joint and proximal interphalangeal (PIP) joint and the metacarpophalangeal (MCP) joint. Section 15.7 Range of Motion Impairment, beginning on page 459, explains, "This section is to be used as a stand-alone rating." Dr. Uejo stated that the right arm rating was 7 percent and the left arm rating was 16 percent based on range-of-motion deficits. On September 4, 2009 Dr. David Weiss, an attending osteopath, stated he had reviewed this report and agreed with the rating.

In November 2009 Dr. Diamond provided an amended report based on the sixth edition of the A.M.A., *Guides*. He calculated a 39 percent impairment rating for the right index finger based on range-of-motion deficits of the DIP, PIP and MP joints. Dr. Diamond stated that a 39 percent digit impairment equated to an 8 percent hand impairment. For the right small finger, he stated the range-of-motion deficits for the three joints resulted in a 79 percent digit impairment that equated to 8 percent hand impairment. Dr. Diamond explained the final right hand impairment, "The values are added and there is 16 percent hand impairment. Using Table 15-11 on page 420 this converts to 7 percent upper extremity impairment." For the left hand, Dr. Diamond stated that appellant had an 87 percent digit impairment using the combined values of the three joints. This converted to a 17 percent hand or 16 percent upper extremity impairment.

On December 13, 2009 Dr. Henry Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed the medical record and stated that using the range-of-motion rating method resulted in combined values of the left arm of eight percent impairment and a seven percent impairment of the right arm. Concerning Dr. Diamond's rating of the left hand, Dr. Magliato stated, "The combined values, 87 percent of the digit or 9 percent of the hand or 8 percent of the left upper extremity. See page 423 [T]able 15-12. The doctor made an error

and probably used the index finger and not the 5<sup>th</sup> digit and got 16 percent for the left upper extremity.” He stated that Dr. Diamond correctly calculated the seven percent right upper extremity impairment.

In a February 25, 2010 decision, OWCP granted appellant awards of compensation for a seven percent permanent impairment of his right arm and an eight percent permanent impairment of his left arm.

Appellant disagreed with this decision and, through counsel, requested a hearing before an OWCP hearing representative. On June 17, 2010 a video hearing was held. Appellant was not present but was represented by his counsel, who asserted that three physicians had all agreed that the 16 percent rating of appellant’s left arm was correct. He stated that the disagreement of Dr. Magliato constituted a conflict. Appellant indicated that he was attempting to have Dr. Weiss or Dr. Diamond review the calculations and requested that the file be held open for 30 days to allow for a supplemental report. The request was granted but no additional medical evidence was submitted within the allotted time.

In an August 10, 2010 decision, OWCP’s hearing representative affirmed its February 25, 2010 decision.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>2</sup> and its implementing regulations<sup>3</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 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. In *Harry D. Butler*,<sup>4</sup> the Board noted that Congress delegated authority to the Director of OWCP 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.<sup>5</sup> 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*.<sup>6</sup>

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<sup>2</sup> *Id.* at § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (1999).

<sup>4</sup> 43 ECAB 859 (1992).

<sup>5</sup> *Id.* at 866.

<sup>6</sup> FECA Bulletin No. 09-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5<sup>th</sup> ed. 2001) is used. The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 1 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.(6)(a) (January 2010).

When a medical report is received from the attending physician, the examining physician is not responsible for calculation of the percentage of impairment.<sup>7</sup> OWCP's medical adviser is responsible for taking the calculations provided by the examining physician and arriving at an overall impairment percentage rating.<sup>8</sup>

### ANALYSIS

In this case, Dr. Uejo, an attending Board-certified occupational medicine physician, calculated a left upper extremity impairment rating that was reviewed by Drs. Weiss and Diamond, both attending osteopaths. There is no evidence that these two doctors rechecked Dr. Uejo's calculations. In a December 13, 2009 report, Dr. Magliato, a Board-certified orthopedic surgeon serving as OWCP's medical adviser, reviewed the calculations and stated that Dr. Diamond had erroneously calculated the impairment of the small finger using the table for the index finger. He used the table for the small finger and calculated eight percent impairment based on Table 15-12 on page 423 of the sixth edition.

The Board finds that Dr. Magliato has provided sufficient explanation to carry the weight of the evidence in that he noted an error on the part of the Dr. Diamond in using an incorrect table in his impairment rating. There is no conflict in medical opinion between Dr. Magliato and appellant's attending physicians. OWCP properly determined that appellant has not established more than a seven percent permanent impairment of his right arm and an eight percent permanent impairment of his left arm.

On appeal, counsel argues that OWCP unnecessarily delayed the development of appellant's case such that the assessment of his permanent impairment was made under the sixth edition of the A.M.A., *Guides* rather than the fifth edition, hence resulting in a lower impairment rating. He has not shown that an unnecessary delay in the development of appellant's case occurred. Counsel also asserts that appellant 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); but 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.<sup>9</sup> In *Harry D. Butler*,<sup>10</sup> 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.<sup>11</sup> On March 15, 2009

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<sup>7</sup> A. *George Lampo*, 45 ECAB 441 (1994).

<sup>8</sup> FECA Bulletin 09-03 (issued March 15, 2009).

<sup>9</sup> 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.

<sup>10</sup> 43 ECAB 859 (1992).

<sup>11</sup> *Id.* at 866.

the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.<sup>12</sup> 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.

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 did not meet his burden of proof to establish that he has more than a seven percent permanent impairment of his right arm and an eight percent permanent impairment of his left arm, for which he received a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 10, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>12</sup> FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).