

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

P.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cherry Hill, NJ, Employer**

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**Docket No. 11-348
Issued: September 15, 2011**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER AFFIRMING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On November 30, 2010 appellant, through her attorney, filed a timely appeal from an August 17, 2010 merit decision of the Office of Workers' Compensation (OWCP) that affirmed a May 18, 2010 schedule award decision.

The Board has duly considered the matter and will affirm OWCP's August 17, 2010 decision. Appellant's attorney expresses no disagreement with the schedule award *per se*. Rather, he asserted only that OWCP delayed its adjudication of appellant's schedule award claim until the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)¹ became applicable on May 1, 2009, and that this delay deprived appellant of due process rights regarding a determination under the fifth edition.² The attorney argued that appellant had a protected property interest that could not be

¹ A.M.A., *Guides* (6th ed. 2008).

² A.M.A., *Guides* (5th edition 2001).

deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976).³

The above-cited cases held that a claimant who was in receipt of benefits (in *Goldberg* welfare benefits and in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process. In this case, appellant had only made a claim for a schedule award. She was not in receipt of schedule award benefits, and OWCP was not attempting to terminate benefits. Appellant had no vested right to a schedule award under the fifth edition of the A.M.A., *Guides*.

In *Harry D. Butler*,⁴ 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.⁵ 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*.⁶ 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. Accordingly, the Board finds that the August 17, 2010 decision will be affirmed.

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.

³ On December 6, 2005 appellant, then a 48-year-old postal clerk, filed an occupational disease claim alleging that work duties caused upper extremity injuries. She had stopped work on September 19, 2005. OWCP accepted as employment-related bilateral brachial neuritis/radiculitis, bilateral radial styloid tenosynovitis and bilateral median nerve lesion. Appellant returned to modified duty on June 23, 2008. On February 2, 2009 she filed a schedule award claim and submitted a November 5, 2008 report from Dr. Nicholas Diamond, in accordance with the fifth edition of the A.M.A., *Guides*. Dr. Diamond revised his report to comport with the sixth edition of the A.M.A., *Guides* and concluded that appellant had an 11 percent impairment of the left upper extremity and a 6 percent right upper extremity impairment. An OWCP medical adviser agreed with Dr. Diamond's revised impairment rating. By decision dated May 18, 2010, appellant was granted a schedule award for an 11 percent impairment of the left upper extremity and a 6 percent impairment on the right.

⁴ 43 ECAB 859 (1992).

⁵ *Id.* at 866.

⁶ FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

IT IS HEREBY ORDERED THAT the August 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board