

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

J.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Eastontown, NJ, Employer**

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**Docket No. 11-1765
Issued: April 12, 2012**

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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2011 appellant, through her attorney, filed a timely appeal from an April 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 11 percent permanent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On June 8, 1999 appellant, then a 47-year-old mail clerk, filed a traumatic injury claim alleging that she fell over a bar onto the ground and injured her right shoulder, arm, knee, leg and left foot. OWCP gave the claim case number xxxxxx608 and accepted the conditions of cervical

¹ 5 U.S.C. § 8101 *et seq.*

strain, lumbar strain, contusion of right shoulder and right supraspinatus tendinopathy with a July 1, 2003 right shoulder surgery.² Benefits were paid and appellant returned to work.³

On September 22, 2006 appellant requested a schedule award. In a May 30, 2006 report, Dr. David Weiss, an osteopath, noted the history of injury and his review of the medical reports. He noted examination findings and diagnosed conditions that included chronic post-traumatic cervical and lumbosacral strain and sprain; history of cervical and lumbar bulging discs; lumbar and cervical radiculopathy; status post lumbar epidural steroid injections; post-traumatic acromioclavicular arthropathy with impingement right shoulder; status post glenoid labral tear right shoulder, status post right shoulder surgery, chronic post-traumatic right carpal tunnel syndrome, and chronic post-traumatic lateral epicondylitis right elbow. Dr. Weiss opined that appellant reached maximum medical improvement on May 30, 2006. Under the fifth edition the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he stated that appellant had 54 percent right upper extremity impairment.

On July 17, 2007 OWCP's medical adviser, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon, reviewed appellant's medical file. Based on Dr. Weiss' reported findings, OWCP's medical adviser noted that appellant had 54 percent permanent impairment of the upper extremity under the fifth edition of the A.M.A., *Guides*. He noted, however, that Dr. Weiss' findings did not correlate well with a 2002 electromyogram/nerve conduction test and a November 23, 2005 treating physician's report.

In a July 31, 2009 letter, OWCP notified appellant that effective May 1, 2009 schedule awards were based on the sixth edition of the A.M.A., *Guides*. Appellant was requested to provide the medical evidence necessary to support a schedule award determination. OWCP received a July 27, 2009 report from Dr. Scott Metzger, a Board-certified pain specialist, who did not provide an impairment assessment.

By decision dated October 19, 2009, OWCP denied a schedule award as there was no medical report rating permanent impairment of the right arm under the sixth edition of the A.M.A., *Guides*.

Appellant requested a hearing on this decision. In a January 12, 2010 decision, an OWCP hearing representative set aside the October 19, 2009 decision and directed OWCP to send appellant for a second opinion impairment examination.

On February 9, 2010 OWCP referred appellant to Dr. Aldo Iulo, a Board-certified orthopedic surgeon, for a second opinion examination. In a February 24, 2010 report, Dr. Iulo noted the history of injury, reviewed the statement of accepted facts and medical records and noted his examination findings. He diagnosed cervical and lumbar sprains, supraspinatus tendinitis with impingement right shoulder and several right knee conditions. Under the sixth edition of the A.M.A., *Guides*, he opined appellant had no impairment of the right wrist based on the absence of objective findings. Appellant had five percent permanent impairment of the right

² The July 1, 2003 surgery was a right subacromial decompression with extensive debridement of a labral tear.

³ Under claim number xxxxxx478, appellant's April 21, 2000 right knee injury was accepted for the condition of right knee sprain with a July 2002 right knee arthroscopic surgery. This claim is doubled into the current claim.

arm due to limited range of motion of the right shoulder secondary to tendinitis with impingement syndrome.⁴ Dr. Iulo also noted impairment findings for the spine and right leg.

In an April 16, 2010 report, Dr. Magliato reviewed appellant's medical record together with Dr. Iulo's February 24, 2010 report. He stated the date of maximum medical improvement was February 24, 2010, but Dr. Iulo's report needed more clarification as the physician did not explain the grade modifiers or whether he applied the net modifier adjustment formula.

On May 3, 2010 OWCP requested that Dr. Iulo provide an addendum report addressing the grade modifiers and the grade modifier adjustment formula. In a May 7, 2010 report, Dr. Iulo advised that, under Table 15-21 (peripheral nerve impairment -- upper extremity), he found no sensory deficits in the physical examination, thus the class was zero and there was no ratable impairment. With regard to right shoulder impairment, he utilized Table 15-34 and found 120 degrees shoulder flexion was three percent; 100 degrees shoulder abduction was three percent; 20 degrees shoulder adduction equaled one percent; 70 degrees external rotation was zero; and 40 degrees internal rotation equaled four percent. Dr. Iulo stated that there was no functional history adjustment or change under Table 15-7 and Table 15-35 and concluded that appellant had 11 percent permanent impairment of the right arm. Appellant reached maximum medical improvement on October 13, 2005 based on the last note from a treating physician.

In an August 12, 2010 report, Dr. Magliato reviewed the addendum report and agreed that October 13, 2005 was the date of maximum medical improvement. He stated Dr. Iulo used the range of motion stand-alone method to evaluate impairment under Table 15-34, page 475 and agreed with the 11 percent impairment rating of the right upper extremity. Dr. Magliato verified that under Table 15-34 shoulder flexion of 120 degrees equaled 3 percent; shoulder abduction of 100 degrees equaled 3 percent; shoulder adduction of 20 degrees equaled 1 percent; external rotation of 70 degrees equaled 0; and internal rotation of 40 degrees equaled 4 percent, which totaled 11 percent for the right upper extremity. Under Table 15-35, page 477 an 11 percent range of motion equaled a grade modifier of 1. Dr. Magliato indicated that Dr. Iulo found no change for functional history modifier under Table 15-7, page 406 and Table 15-35, page 477. Thus, the grade modifier for functional history was 1 and grade modifier range of motion was 1. The medical adviser stated there was no net adjustment under Table 15-36, page 477.

By decision dated October 7, 2010, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity. The period of the award ran from October 13, 2005 to June 10, 2006, a total of 34.32 weeks.

Appellant requested a hearing and subsequently requested a review of the written record.

In a January 11, 2011 report, Dr. Weiss updated his previous evaluation of May 30, 2006 to provide an impairment rating under the sixth edition of the A.M.A., *Guides*. He opined that appellant had a total combined rating of 18 percent impairment of the right upper extremity.

In a February 14, 2011 letter, appellant's counsel contended that a conflict in medical opinion existed between Dr. Iulo and Dr. Weiss regarding the extent of permanent impairment

⁴ Examination findings revealed 120 degrees flexion, 100 degrees abduction; 20 degrees adduction; 70 degrees external rotation and 40 degrees internal rotation for the right shoulder. Motions of the elbows, wrists and joints of the hands were within normal range and sensory and motor reflexes were intact in the upper extremities.

under the sixth edition of the A.M.A., *Guides*. He argued that appellant was entitled to a schedule award for the right lower extremity and left lower extremity.

By decision dated April 14, 2011, an OWCP hearing representative affirmed the October 7, 2010 schedule award decision. The hearing representative found Dr. Weiss' report of diminished probative value upon which to base a current permanent impairment rating as his findings were based on the examination performed in 2006.⁵

On appeal, appellant's representative argues that OWCP's delay in adjudicating the claim deprived appellant of a protected interest in property without due process of law. Appellant's representative further argued that a conflict in medical opinion evidence exists among Dr. Weiss and the second opinion examiner and the OWCP medical adviser regarding the extent of permanent impairment.

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 utilize 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

ANALYSIS

Appellant's representative asserts that there is a medical conflict among Dr. Weiss and Dr. Iulo and OWCP's medical adviser. He does not otherwise contest the percentage of impairment awarded on May 28, 2010. Appellant's representative primarily contests OWCP's delay in issuing a decision and the resulting application of the sixth edition of the A.M.A. *Guides*. OWCP procedures are clear: As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition. OWCP correctly followed its procedures.

Appellant asserts that he has property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and a protected property interest cannot be deprived without due

⁵ The hearing representative specifically noted that a schedule award for the right and left lower extremities were not an issue of this decision and OWCP would further develop those matters separately.

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 *Supra* note 7 at Chapter 3.700, Exhibit 1 (January 2010).

process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathew v. Eldridge*, 424 U.S. 319 (1976). 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 be terminated without due process. Appellant had received no schedule award under the fifth edition.

In *Harry D. Butler*,¹⁰ 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.¹¹ 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*.¹² 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

The Board finds that OWCP, consistent with its procedures, applied the correct edition of the A.M.A., *Guides* in determining appellant right arm impairment.

In a January 11, 2011 report, Dr. Weiss opined that appellant has 18 percent permanent partial impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. OWCP found Dr. Weiss' report of diminished probative value upon which to base a current permanent impairment rating as his findings were based on an examination performed in 2006. In July 2007 an OWCP medical adviser reviewed Dr. Weiss' 2006 examination findings and found that such examination findings did not correlate well with a 2002 electromyogram/nerve conduction test as well as a November 23, 2005 treating physician's report. While Dr. Weiss' most recent report provided an impairment rating under the sixth edition of the A.M.A., *Guides*, the record contained no current or supplemental medical examination from Dr. Weiss with current findings supporting his application of the A.M.A., *Guides*. Dr. Weiss' impairment rating contained in his January 11, 2011 report is thus of diminished probative value and insufficient to create a conflict in medical opinion evidence with Dr. Iulo's impairment rating.

OWCP's medical adviser agreed with Dr. Iulo that an 11 percent permanent impairment of the right arm existed under the range of motion stand-alone method under Table 15-34, page 475. Under Table 15-34 page 475, 120 degrees shoulder flexion equates 3 percent; 100 degrees shoulder abduction equals 3 percent; 20 degrees shoulder adduction equals 1 percent; 70 degrees external rotation equals 0; and 40 degrees internal rotation equals 4 percent, for 11 percent total right upper extremity impairment. Under Table 15-35, page 477 an 11 percent range of motion corresponds to a grade modifier of 1. Dr. Iulo found no change for functional history modifier under Table 15-7, page 406 and Table 15-35, page 477. Thus, the grade modifier for functional history was 1 and grade modifier range of motion was 1. Under Table 15-36, page 477, there is no net adjustment. Thus, the evidence establishes 11 percent permanent impairment of the right

¹⁰ 43 ECAB 859 (1992).

¹¹ *Id.* at 866.

¹² FECA Bulletin No. 09-03 (issued March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

upper extremity under the range of motion stand-alone method. There is no current medical evidence based on current finding supporting any greater impairment.

Appellant may request an increased schedule award based on medical evidence showing progression of an employment-related condition resulting in an increased impairment.

CONCLUSION

The Board finds that the evidence does not establish more than 11 percent impairment of the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2011 decision of the Office of Workers Compensation Programs is affirmed.

Issued: April 12, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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