



Lastly, appellant contends that OWCP should have used her rate of pay as of December 15, 2009 rather than February 27, 2009 to calculate her schedule award.

### **FACTUAL HISTORY**

On October 12, 2008 appellant, then a 44-year-old rehabilitation carrier, filed an occupational disease claim alleging that she hurt her shoulders as a result of casing mail continuously four to five hours per day at work. OWCP accepted her claim for bilateral disorder of the bursae and shoulder tendons and strain of the bilateral shoulder, upper arm and rotator cuff.

In a February 25, 2009 medical report, Dr. Ellis K. Nam, an attending Board-certified orthopedic surgeon, advised that appellant had a right shoulder rotator cuff tear and was totally incapacitated for work. Appellant was scheduled to undergo surgery on March 21, 2009. On February 27, 2009 she stopped work and filed a claim for compensation through March 13, 2009 (Form CA-7). On the reverse of the claim form, the employing establishment indicated that appellant was paid \$53,684.00 per year.

On March 15, 2010 OWCP authorized appellant's March 28, 2009 arthroscopic surgery with rotator cuff repair, subacromial decompression and debridement of a labral tear of the right shoulder. Appellant returned to full-time modified work as a rehabilitation carrier on June 1, 2009.

Appellant filed a claim for a schedule award on May 6, 2010.<sup>2</sup> In a January 22, 2010 medical report, Dr. Nam conducted a physical examination of appellant's right shoulder. He reported full range of motion, negative impingement signs and 5/5 rotator cuff strength. The shoulder was neurovascularly intact. Dr. Nam reviewed the results of a December 15, 2009 functional capacity evaluation (FCE) which stated that appellant safely met the sedentary physical demand level. He noted that she was 10 months status post arthroscopic, decompression, rotator cuff repair and debridement of the right shoulder. Dr. Nam advised that appellant had reached maximum medical improvement. He concluded that she was able to return to work based on the December 15, 2009 FCE.

By letter dated June 7, 2010, OWCP requested from appellant a medical report from an attending physician as to when she had attained maximum medical improvement and a detailed description of the impairment and a schedule award rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Appellant did not respond.

In an August 6, 2010 decision, OWCP denied appellant's schedule award claim. It found that she failed to submit sufficient medical evidence establishing that she sustained any

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<sup>2</sup> In a September 23, 2009 decision, OWCP reduced appellant's compensation benefits to zero finding that her actual earnings as a modified rehabilitation carrier effective June 1, 2009 with a salary of \$1,032.38 per week, which was effective the date disability began on February 27, 2009, fairly and reasonably represented her wage-earning capacity.

permanent impairment to a function or member of the body due to her accepted employment-related conditions.

By letter dated August 11, 2010, appellant requested reconsideration.

On November 1, 2010 Dr. David H. Garelick, an OWCP medical adviser, reviewed appellant's medical records, including the reports of Dr. Nam and appellant's physical therapists. Based on these records, he advised that she was doing relatively well following her March 28, 2009 right shoulder surgery, noting that she continued to have subjective complaints of difficulty with overhead lifting. Appellant had no residual subjective complaints of left shoulder pain. Physical examination demonstrated all arthroscopic portals had healed. The left shoulder examination was normal. However, rotator cuff strength was mildly diminished on the right side and graded as 5/5. The impingement sign was negative on the right. Active range of motion in flexion, abduction and internal and external rotation was only mildly diminished as noted on page 14 of the December 15, 2009 FCE. The remainder of the examination was unremarkable.

With regard to the right upper extremity, Dr. Garelick utilized the sixth edition of the A.M.A., *Guides* and determined that, under Table 15-6 on page 406, appellant had a grade 2 modifier (moderate problem) for her subjective complaints of pain. He assessed a grade 1 modifier (mild loss of motion and weakness) for physical examination as documented in the December 15, 2009 FCE. Dr. Garelick stated that preoperative imaging confirmed the surgical findings which also qualified for a grade 1 modifier. Under Table 15-5 on page 403, he determined that appellant had five percent impairment of the right upper extremity for a rotator cuff tear with some residual loss of function. Dr. Garelick determined that the net adjustment for the above modifiers equaled +1. He moved one place to the right for an overall award of six percent impairment of the right arm. Dr. Garelick advised that appellant reached maximum medical improvement on December 15, 2009. He concluded that she had no impairment of the left upper extremity.

By decision dated November 12, 2010, OWCP vacated the August 6, 2010 schedule award decision based on Dr. Garelick's November 1, 2010 medical opinion. It issued a decision granting appellant a schedule award for six percent impairment of the right upper extremity and zero percent impairment of the left upper extremity. The period of the schedule award was from December 15, 2009 to April 25, 2010 for a total of 18.72 weeks of compensation based on her weekly pay rate of \$688.25 effective February 27, 2009, the date her disability began. OWCP noted that the weekly pay rate was calculated at \$1,032.38 a week multiplied by the augmented, two-thirds compensation rate for a weekly pay rate of \$688.25.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>3</sup> and its implementing federal regulations,<sup>4</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body.

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

FECA, 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>5</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup> Effective May 1, 2009, FECA adopted the sixth edition of the A.M.A., *Guides*<sup>7</sup> as the appropriate edition for all awards issued after that date.<sup>8</sup>

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>9</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>10</sup>

### ANALYSIS

OWCP accepted appellant's claim for disorder of the bursae and tendons in her bilateral shoulders and bilateral shoulder, upper arm and rotator cuff strain and authorized arthroscopic surgery with rotator cuff repair, subacromial decompression and debridement of the labral tear of the right shoulder. On November 12, 2010 appellant received a schedule award for six percent impairment of the right upper extremity and was denied a schedule award for the left upper extremity. The Board finds that she did not meet her burden of proof to establish that she sustained greater impairment.

On May 6, 2010 appellant's attending physician, Dr. Nam, opined that appellant had reached maximum medical improvement. He based his opinion on findings of full range of motion, negative impingement signs, mildly diminished rotator cuff strength and a neurovascularly intact of the right shoulder. Dr. Nam reviewed the results of the December 15, 2009 FCE and concluded that appellant could perform sedentary-type work. The Board finds that this report is not sufficient to constitute the weight of the medical opinion evidence for schedule award purposes as he did not provide an impairment rating of a scheduled member based on the A.M.A., *Guides*.

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its an OWCP medical adviser to apply the A.M.A., *Guides* to the findings of the attending

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<sup>5</sup> *Ausbon N. Johnson*, 50 ECAB 304 (1999).

<sup>6</sup> *See supra* note 4; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>9</sup> A.M.A., *Guides* 494-531.

<sup>10</sup> *Id.* at 521.

physician.<sup>11</sup> Dr. Garelick, the medical adviser, reviewed the medical record and found that appellant had six percent impairment of the right upper extremity and no impairment of the left upper extremity.<sup>12</sup> He also found that she reached maximum medical improvement on December 15, 2009. Dr. Garelick stated that appellant was doing relatively well following her March 28, 2009 right shoulder surgery with the exception of continued subjective complaints of difficulty with overhead lifting. He stated that she had no residual subjective complaints related to her left shoulder. Dr. Garelick advised that physical examination of the left shoulder was normal. He stated that physical examination of the right shoulder was essentially normal with the exception of mildly diminished rotator cuff strength which was rated as grade 5/5 and range of motion on the right side based on the December 15, 2009 FCE.

Dr. Garelick utilized the Shoulder Regional Grid, Table 15-5, A.M.A., *Guides* 404 and determined that appellant had five percent upper extremity impairment based on the accepted right shoulder rotator cuff tear with residual loss of function (class 1 impairment, default grade C). Under Table 15-6, A.M.A., *Guides* 406, he assigned a grade modifier 2 based on appellant's subjective complaints of pain (GMFH). Dr. Garelick next assigned a grade 1 modifier for her right shoulder physical examination findings (GMPE). Lastly, he assigned a grade 1 modifier for preoperative imaging findings (GMCS). Applying the net adjustment formula resulted in a modifier of 1 resulting in six percent, which resulted in a grade adjustment from C to D. The corresponding upper extremity impairment for a class 1, grade D rotator cuff tear is six percent.<sup>13</sup> Dr. Garelick concluded that the medical record did not indicate any left upper extremity findings and hence no impairment.

The Board finds that Dr. Garelick properly applied the sixth edition of the A.M.A., *Guides* to the clinical findings of Dr. Nam, to rate impairment of appellant's right and left upper extremities. The weight of medical evidence rests with his opinion and establishes the extent of permanent impairment in this case.

On appeal, appellant asserted that she is entitled to greater than six percent impairment of her right upper extremity and to a schedule award for her left upper extremity; but the issue in this case is medical in nature and must be resolved by the submission of probative medical evidence.<sup>14</sup> She did not submit any medical evidence addressing the extent of her permanent impairment. Dr. Nam's report noted appellant's status and examination, but the physician did not provide any impairment rating pursuant to the A.M.A., *Guides*. Dr. Garelick provided upper extremity impairment ratings in conformance with the A.M.A., *Guides* and based on Dr. Nam's findings. His report is sufficient to establish that appellant had no more than six percent impairment of the right upper extremity and no impairment of the left upper extremity.

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<sup>11</sup> A.M.A., *Guides* 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>12</sup> The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. See Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 3.700.3 (January 2010).

<sup>13</sup> A.M.A., *Guides* 403, Table 15-5.

<sup>14</sup> See *Jaja K. Asaramo*, 55 ECAB 200, 206 (2004).

Appellant further asserted that her schedule award should have extended beyond April 25, 2010. When loss of use of a scheduled member or function of the body is less than 100 percent, the amount of compensation paid is in proportion to the percentage of loss of use.<sup>15</sup> Under FECA, the maximum award for total loss of use of an arm is 312 weeks of compensation.<sup>16</sup> Since appellant's loss was six percent, she was entitled to six percent of 312 weeks of compensation, which amounted to 18.72 weeks of compensation. Her schedule award ran from December 15, 2009, the date of maximum medical improvement, through April 25, 2010, which equates to 18.72 weeks. Regarding the time at which a schedule award begins to run, it is well established that the period commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. The determination of whether maximum medical improvement has been reached is based on the medical evidence of record. The date is usually the date of the medical examination which determined the extent of the impairment.<sup>17</sup> In this case, the date of the examination on which the schedule award was based is the December 15, 2009 FCE which found that appellant could return to sedentary work.<sup>18</sup> The Board finds that OWCP properly determined that she was entitled to a schedule award for six percent impairment of the right upper extremity for 18.72 weeks from December 15, 2009 to April 25, 2010.

Appellant contended that her schedule award should have been based on her pay rate when she reached maximum medical improvement on December 15, 2009. The Board has rejected the contention that a schedule award should be computed on the basis of the employee's pay rate as of the date of maximum medical improvement.<sup>19</sup> In the November 12, 2010 schedule award decision, OWCP calculated appellant's compensation based on her weekly pay rate effective February 27, 2009, the date her disability began. The Board notes that the rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8104(4) of FECA, *i.e.*, the date of injury, the date disability begins or the date of recurrent disability, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States.<sup>20</sup> In an occupational disease claim, as in this case, the date of injury is generally the date the employee was last exposed to the injurious employment factors.<sup>21</sup> Where exposure to work factors continues, as in this case, the date of injury is the date of the relevant medical examination, *i.e.*, the date of the medical examination upon which the

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<sup>15</sup> 5 U.S.C. § 8107(c)(19).

<sup>16</sup> *Id.* at § 8107(c)(1).

<sup>17</sup> See *Holloway*, *supra* note 7; *Richard Larry Enders*, 48 ECAB 184 (1996). See also *P.C.*, 58 ECAB 539 (2007).

<sup>18</sup> The Board notes that if January 22, 2010, the date on which Dr. Nam found that appellant had reached maximum medical improvement, had been utilized by OWCP to calculate her schedule award compensation, she would have received less compensation than she already received.

<sup>19</sup> *Russell E. Wageneck*, 46 ECAB 653 (1995); *Clarence D. Glenn*, 29 ECAB 779 (1978).

<sup>20</sup> 5 U.S.C. §§ 8101(4), 8114; see also 20 C.F.R. § 10.5(s); *Patricia K. Cummings*, 53 ECAB 623 (2002).

<sup>21</sup> See *Patricia K. Cummings*, *supra* note 20.

extent of permanent impairment has been determined.<sup>22</sup> As appellant continued to be exposed to factors of employment when she returned to full-time work in the modified rehabilitation carrier position on June 1, 2009, the date of injury would be January 22, 2010 the date of Dr. Nam's report which found that she had reached maximum medical improvement. The Board finds that OWCP improperly determined her pay rate based upon her weekly pay on the date disability began without evaluation of weekly pay on the date of injury as described above.<sup>23</sup> The case will, therefore, be remanded for OWCP to further develop the record as to appellant's pay rate and issue an appropriate merit decision.

### CONCLUSION

The Board finds that appellant has failed to establish that she has more than a six percent impairment of the right upper extremity for which she received a schedule award and no impairment of the left upper extremity entitling her to a schedule award. The Board finds, however, that the case is not in posture for decision and is remanded for further development of the evidence relating to her pay rate for the right upper extremity schedule award.

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<sup>22</sup> *Id.*; see also *Barbara A. Dunnivant*, 48 ECAB 517 (1997) in which the Board held that the proper pay rate for the claimant's schedule award was the pay rate on the date of maximum medical improvement. *Dunnivant* involved continuing exposure to injurious work factors which did not cause further injury after the permanent impairment was stabilized; therefore, the date of injury was the date of last exposure, which was, for purposes of the schedule award issued, the date she was found to have reached maximum medical improvement. The Board explained: "[W]here exposure to work factors continues, the date of injury is the date of the relevant medical evaluation, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined." *Id.* at 520.

<sup>23</sup> *Barbara A. Dunnivant*, *supra* note 22.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part with regard to the percentage of impairment of appellant's right upper extremity and finding of no impairment for her left upper extremity. The case is remanded in part with regard to the rate of pay upon which the right upper extremity schedule award is based.

Issued: January 11, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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