

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

C.M., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Akron, OH, Employer

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**Docket No. 11-1235
Issued: January 11, 2012**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 26, 2011 appellant's counsel timely appealed the March 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether appellant has greater than 13 percent impairment of the right upper extremity.

FACTUAL HISTORY

Appellant, a 49-year-old letter carrier, sustained multiple injuries in a work-related fall on January 5, 2002. OWCP accepted his claim for fractured rib, thoracic strain/sprain, brachial neuritis/radiculitis, aggravation of cervical spinal stenosis, aggravation of cervical disc

¹ 5 U.S.C. §§ 8101-8193.

degeneration and aggravation of displaced cervical intervertebral disc (xxxxxx941). Appellant fell again on February 23, 2004. This latter injury OWCP accepted for chest wall contusion, right shoulder/scapular sprain and aggravation of displaced cervical intervertebral discs at C4-5 and C5-6 (xxxxxx076). OWCP combined the two files under claim number xxxxxx941. On February 15, 2006 appellant underwent a cervical discectomy and fusion at C4-5 and C5-6. He received appropriate wage-loss compensation and ultimately resumed full-time employment.

On September 21, 2010 OWCP granted a schedule award under claim number xxxxxx076. The award was for 13 percent impairment of the right upper extremity (RUE). It covered a period of 40.56 weeks from February 1 through November 11, 2007. OWCP based the award on the August 13, 2010 report of Dr. Robert J. Nickodem, Jr., a Board-certified orthopedic surgeon and OWCP referral physician.

Dr. Nickodem found 13 percent upper extremity impairment for brachial plexus (C5-C8, T1), with a mild motor deficit. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).² The district medical adviser (DMA), Dr. Nabil F. Angley, concurred with Dr. Nickodem's 13 percent RUE impairment rating.³

Dr. William N. Grant, a Board-certified internist, had previously examined appellant on October 2, 2009. He too rated appellant's RUE impairment under the sixth edition of the A.M.A., *Guides* (2008). Dr. Grant found 16 percent impairment due to loss of shoulder range of motion.⁴ However, the DMA dismissed Dr. Grant's right shoulder impairment rating because OWCP had reportedly requested a rating secondary to appellant's cervical herniated disc and not the right shoulder.

When the case was pending before the Branch of Hearings and Review, counsel argued that appellant's right shoulder impairment should be included in the schedule award. By decision dated March 28, 2011, the Branch of Hearings and Review affirmed the September 21, 2010 schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁵ FECA,

² As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008). See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

³ Dr. Angley is a Board-certified orthopedic surgeon who reviewed Dr. Nickodem's findings on September 9, 2010.

⁴ Dr. Grant also provided a separate whole person impairment rating for loss of range of motion in the cervical spine. For this rating, he applied the fifth edition of the A.M.A., *Guides* (2001). See Table 15-12, Table 15-13 and Table 15-14, A.M.A., *Guides* 418, 420, 421 (5th ed. 2001).

⁵ For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁷

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.⁸ Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.⁹

ANALYSIS

Appellant's accepted conditions include brachial neuritis and right shoulder/scapular sprain, as well as several other cervical conditions. Dr. Nickodem based his rating on conditions that did not include a shoulder condition. The statement of accepted facts, however, included a right shoulder sprain. The DMA also neglected to include a shoulder condition in his impairment rating.

While appellant bears the burden of establishing his entitlement to FECA benefits, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁰ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹¹ As both the DMA and Dr. Nickodem did not include appellant's accepted right shoulder injury, in this impairment rating the case will be remanded to OWCP for further development. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

⁶ 20 C.F.R. § 10.404.

⁷ See *supra* note 2.

⁸ *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

⁹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁰ *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹¹ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2011 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this order of the Board.

Issued: January 11, 2012
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