

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

V.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southeastern, PA, Employer**

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**Docket No. 11-1341
Issued: January 9, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 12, 2011 appellant, through his attorney, filed a timely appeal from a December 29, 2010 decision of the Office of Workers' Compensation Programs (OWCP) which denied his claim for an additional 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 three percent permanent impairment of the right arm for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. On May 14, 2009 the Board set aside OWCP decisions dated October 2, 2007 and May 6, 2008 which found that appellant had three

¹ 5 U.S.C. §§ 8101-8193.

percent permanent impairment of his right arm for which he received a schedule award.² The Board found that appellant's treating physician, Dr. David Weiss and an OWCP medical adviser failed to properly apply the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). The Board instructed OWCP to further develop the evidence regarding the extent of permanent impairment.³ The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On October 2, 2009 OWCP requested that appellant's treating physician, Dr. Weiss, submit an addendum report addressing his June 4, 2007 impairment rating. It advised Dr. Weiss that the sixth edition of the A.M.A., *Guides* was to be used beginning May 1, 2009.⁴ No response was received.

In a decision dated December 1, 2009, OWCP denied appellant's claim for a schedule award. It advised that Dr. Weiss failed to submit a supplemental report in support of appellant's schedule award claim. OWCP noted that the October 2, 2007 schedule award would be vacated and the amount of \$7,087.86 would be processed as an overpayment.

On December 4, 2009 appellant requested an oral hearing. In a February 22, 2010 decision, an OWCP hearing representative vacated the December 1, 2009 decision and remanded the case for further medical development. As Dr. Weiss failed to respond to the request for an addendum report, OWCP was directed to refer appellant to a second opinion physician for an impairment evaluation.

On April 14, 2010 OWCP referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion regarding permanent impairment. On May 6, 2010 Dr. Didizian reviewed appellant's history and provided findings on examination. He diagnosed right lateral epicondylitis. Dr. Didizian discussed appellant's complaints of right elbow pain at the radial head which ranged 5 out of a scale of 10, he noted strength was good with no crepitation or swelling. Examination revealed no obvious abnormality or deformity of the elbows, no synovitis or tenosynovitis in either elbow, localized tenderness over the radial head on the right elbow only, negative laxity and full function of the flexors and extensors. Dr. Didizian noted Tinel's, Phalen's compression tests were negative for carpal tunnel syndrome and radial tunnel compression test was negative. He advised that an electromyogram (EMG) dated June 26, 2001 revealed bilateral radial nerve compartment neuropathies at the dorsal elbow levels and right median neuropathy at the wrist level. Dr. Didizian noted that appellant did not have any complaints upon examination of the radial nerve and advised that EMG studies carried

² In a decision dated October 2, 2007, OWCP granted appellant a schedule award for three percent impairment of the right upper extremity. In a decision dated May 6, 2008, an OWCP hearing representative affirmed the October 2, 2007 decision.

³ Docket No. 08-2198 (issued May 14, 2009). On March 6, 2000 appellant filed an occupational disease claim alleging that he developed a right elbow condition as a result of performing his work duties. OWCP accepted appellant's claim for right lateral epicondylitis.

⁴ A.M.A., *Guides* (6th ed. 2009).

a high percentage of false positives and should be clinically correlated. He further opined that in appellant's case there was no clinical correlation supporting radial nerve involvement or median nerve involvement. Dr. Didizian opined that appellant reached maximum medical improvement on March 16, 2009. Applying the sixth edition of the A.M.A., *Guides*, he determined that, based on the accepted condition of right lateral epicondylitis, appellant was a class 1, history of painful injury, residuals symptoms without consistent objective findings, under Table 15-4 on page 399, which has a default value of one percent. Dr. Didizian found a grade modifier of 1 for functional history for appellant's complaints of mild pain. With regard to physical examination, he noted a grade modifier of 1 for minimal palpatory findings, consistently documented without observed abnormalities. Dr. Didizian noted that the modifier for clinical studies was 1, in which an MRI scan confirmed the diagnosis with mild pathology. He applied the net adjustment formula to the grade modifiers to arrive at a net adjustment of 0. Dr. Didizian noted that, since there was no adjustment, the impairment rating remained class 1, default grade C for a one percent impairment of the right upper extremity.⁵

In a June 17, 2010 report, an OWCP medical adviser reviewed Dr. Didizian's report and agreed with his conclusion that appellant had one percent right arm impairment.

In a decision dated June 18, 2010, OWCP denied appellant's claim for an additional schedule award. It noted that a referral physician determined that appellant had one percent impairment of the right arm and the medical adviser concurred in this finding. OWCP noted that the award of October 2, 2007 was vacated and the paid amount of \$7,087.86 would be considered an overpayment.

On June 30, 2010 OWCP issued a corrected decision noting that appellant was entitled to one percent impairment of the right upper extremity based on the report of the referral physician and the medical adviser. As a result \$4,725.28 would be processed as an overpayment.

On July 6, 2010 appellant requested an oral hearing which was held on October 27, 2010. He submitted reports from Dr. Scott M. Fried, an osteopath, dated January 5 and March 16, 2009. Dr. Fried noted that appellant's right elbow remained symptomatic with tightness and stiffness but noted that he was making good progress in physical therapy. In an October 21, 2010 report, he noted appellant's complaints of intermittent pain in the elbow and right radial forearm. Dr. Fried noted that Phalen's test was negative bilaterally, Tinel's sign was positive at the ulnar nerve at the right wrist, right and left elbows at the cubital tunnel and at the radial nerve at the right elbow. He diagnosed tendinitis, right lateral epicondylitis, bilateral median neuropathy, right radial neuropathy and carpal tunnel median neuropathy of the bilateral upper extremities secondary to work activities.

In a decision dated December 29, 2010, an OWCP hearing representative affirmed the June 30, 2010 OWCP decision.

⁵ *Id.* at 399, Table 15-4.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.¹⁰ It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹² Under the sixth edition of the A.M.A., *Guides*, for upper extremity impairments the evaluator identifies 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).¹³ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁴

ANALYSIS

OWCP accepted that appellant sustained right lateral epicondylitis due to his employment. Appellant was granted a schedule award for three percent right arm impairment,

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹⁰ A.M.A., *Guides* (6th ed. 2009).

¹¹ *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹² A.M.A., *Guides*, *supra* note 1 at 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹³ *Id.* at 385-419.

¹⁴ *Id.* at 411.

under the fifth edition of the A.M.A., *Guides* on October 2, 2007. Following the prior appeal, OWCP eventually referred him to Dr. Didizian for a second opinion impairment evaluation.

The Board notes that counsel asserts that OWCP should have referred appellant for an impartial medical examination to resolve a medical conflict as the hearing representative, in her February 22, 2010 decision, stated that OWCP should have referred appellant to a referee physician. The Board finds that no medical conflict existed under 5 U.S.C. § 8123(a) at the time of the hearing representative's February 22, 2010 decision. OWCP properly referred appellant for a second opinion examination with Dr. Didizian. In the prior decision, the Board remanded the case for further development, noting deficiencies in the reports of both Dr. Weiss and OWCP's medical adviser. The Board did not find that a medical conflict existed.¹⁵ The hearing representative's February 22, 2010 decision was inconsistent on this point as OWCP directed to refer appellant for a second opinion as well as for a referee evaluation regarding permanent impairment. The hearing representative did not make any finding regarding the purported medical conflict. Under these circumstances, there was no medical conflict necessitating appellant's referral to an impartial specialist under 5 U.S.C. § 8123(a).

In a May 6, 2010 report, Dr. Didizian reviewed the medical evidence and properly applied the sixth edition of the A.M.A., *Guides*. For the right elbow, he determined that appellant had a class 1 impairment due to epicondylitis of the elbow, under Table 15-4 on page 399 of the A.M.A., *Guides*, which correlated with findings of a history of painful injury, residual symptoms without consistent objective findings with a default value of one percent impairment. After considering grade modifiers for functional history of 1 for mild pain, physical examination of 1 for minimal palpatory findings which were consistently documented without observed abnormalities and clinical studies revealing mild pathology, for a modifier of 1, he noted a net adjustment of 0 from the default grade C for a one percent impairment of the right upper extremity.¹⁶ He found a total right upper extremity impairment of one percent. The Board notes that Dr. Didizian's rating conforms to the sixth edition of the A.M.A., *Guides*.

An OWCP medical adviser reviewed Dr. Didizian's report and applied the sixth edition of the A.M.A., *Guides* to the clinical findings. He identified a class 1 impairment due to lateral epicondylitis using the elbow regional grid set forth in Table 15-4, which yielded a default value of one percent.¹⁷ After determining the impairment class and default grade, the OWCP medical adviser considered whether there were any applicable grade adjustments for GMFH, GMPE and GMCS. He found a grade modifier of 1 for functional history, physical examination and clinical studies. Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or $(1-1) + (1-1) + (1-1) = 0$, yielded a 0 adjustment. OWCP medical adviser,

¹⁵ See *Robert D. Reynolds*, 49 ECAB 561 (1998) (the Board has interpreted 5 U.S.C. § 8123(a) to require more than a simple disagreement between two physicians).

¹⁶ *Id.* at 399, Table 15-4. The Board notes that applying the net adjustment formula would yield $(1-1) + (1-1) + (1-1) = 0$.

¹⁷ *Id.*

consequently, determined that appellant had a one percent permanent impairment of the right upper extremity.

Appellant submitted reports from Dr. Fried dated January 5, 2009 to October 21, 2010 who noted findings upon physical examination and diagnosed tendinitis, right lateral epicondylitis, bilateral median neuropathy, right radial neuropathy and carpal tunnel median neuropathy of the bilateral upper extremities secondary to work activities. However, Dr. Fried failed to address whether appellant sustained permanent impairment under the sixth edition of the A.M.A., *Guides*. Thus, his reports do not establish any greater impairment than that for which appellant has already received a schedule award.

The Board finds that appellant has not established that he has more than three percent permanent impairment of the right arm for which he has received a schedule award.

On appeal counsel also asserts that OWCP failed to properly develop whether his diagnosed carpal tunnel syndrome was work related. The Board notes that for conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.¹⁸ The record does not reflect that appellant submitted rationalized medical evidence addressing how his carpal tunnel syndrome is employment related.¹⁹ Counsel also asserts on appeal that it was error for OWCP to find an overpayment of compensation where the original schedule award was developed under the fifth edition of the A.M.A., *Guides* while the subsequent lower determination under the sixth edition resulted in lesser impairment.²⁰ The Board notes that any overpayment question is not presently on appeal as OWCP has not issued a final overpayment decision.

CONCLUSION

The Board finds that appellant has no more than three percent permanent impairment of the right upper extremity.

¹⁸ *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁹ *See S.S.*, 59 ECAB 315 (2008) (medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof).

²⁰ Counsel cites to FECA Bulletin 09-03 (issued March 15, 2009). Paragraph three of this bulletin provides that, where a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides*, claims an increased award, the claimant will receive a calculation according to the sixth edition beginning May 1, 2009 but that, should the later calculation result in a percentage impairment lower than the original award, there will be no basis for declaring an overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2012
Washington, DC

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

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

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