

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

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K.C., Appellant )  
and ) Docket No. 11-1259  
U.S. POSTAL SERVICE, BULK MAIL ) Issued: June 25, 2012  
CENTER, Des Moines, IA, Employer )  
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*Appearances:*

*Phillip Vonderhaar, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 27, 2011 appellant, through counsel, appealed the April 4, 2011 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly determined the date of maximum medical improvement.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The record on appeal contains evidence received after the April 4, 2011 OWCP decision. The Board's review is limited to the evidence of record at the time OWCP issued its decision. Accordingly, this new evidence may not be considered for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## **FACTUAL HISTORY**

Appellant's March 1, 2007 claim for a cervical injury was accepted by OWCP for permanent aggravation of preexisting displacement of a cervical intervertebral disc without myelopathy.<sup>3</sup> He underwent authorized surgery on May 25, 2007 for a right C6-7 foraminotomy and laminectomy by Dr. Thomas A. Carlstrom, a Board-certified neurosurgeon.

On January 21, 2010 appellant filed a claim for a schedule award. In a May 28, 2009 report, Dr. Carlstrom noted that appellant experienced pain in his neck, radiating to his right arm with numbness and tingling. He advised that the anterior cervical fusion had healed well and stated that appellant had reached maximum benefit from the 2008 surgery. Pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Carlstrom estimated an 18 to 24 percent impairment to the body as a whole. He recommended 12 percent impairment for the surgical procedure and noted that appellant had residual impairment to the arms of about 15 to 20 percent.

On February 15, 2010 an OWCP's medical adviser reviewed the report of Dr. Carlstrom and noted that the impairment rating was under the fifth edition of the A.M.A., *Guides* that was no longer in use. He noted that the whole body impairment ratings provided by Dr. Carlstrom could not be utilized to rate impairment to the upper extremities. Further, Dr. Carlstrom did not provide specific findings from appellant's physical examination to allow a rating of impairment. For this reason, the medical adviser recommended that appellant be examined by a physician more experienced under the sixth edition.

Appellant was referred for examination and an impairment rating to Dr. Charles F. Denhart, a Board-certified orthopedic surgeon, using the sixth edition of the A.M.A., *Guides*. In an April 23, 2010 report, Dr. Denhart reviewed a history of injury, medical treatment, C6-7 herniated disc for which anterior fusion surgery was performed in 2002 and 2007. He noted that diagnostic testing on September 5, 2008 was consistent with C7 radiculopathy and a magnetic resonance imaging scan of May 16, 2008 showed a solid fusion with some spondylosis. Appellant's current symptoms on examination were of right upper arm paresthesias and numbness. Dr. Denhart provided findings on physical examination and stated that based on Table 15-20 (Brachial Plexus Impairment) appellant was class 1 as demonstrated by the September 5, 2008 electromyogram (EMG) for mild motor and sensory symptoms. Mild motor deficit had a default impairment of 5. Appellant's functional history was consistent with significant problems but he was able to handle his personal activities of daily living. Based on a QuickDASH score of 62.5, appellant was in the grade modifier three category. Dr. Denhart noted that appellant's loss of sensation was in a somewhat inappropriate distribution as it involved the entire right upper extremity; but appeared to be worse in the distribution appropriate for the C7 nerve root. He placed this in the grade modifier two category. Dr. Denhart characterized the EMG study as not demonstrating ongoing motor denervation and of the grade modifier one category. Appellant's right arm impairment was class 1, with an adjustment for functional history of +2, net adjustment for physical examination of +1, and the net adjustment

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<sup>3</sup> Appellant's claim was combined with prior claims for lumbar injuries in 1993 and 1994, accepted for a lumbar strain and aggravation of degenerative disc disease. (Claim Nos. xxxxxx502, xxxxxx352, xxxxxx318 and xxxxxx390).

for clinical studies as 0, or a net adjustment of 3. This resulted in total impairment of nine percent to the upper extremity. Dr. Denhart noted that, based on the May 28, 2009 report of Dr. Carlstrom, appellant had reached maximum medical improvement as of that date.<sup>4</sup>

OWCP requested that Dr. Denhart assess appellant's motor and sensory deficits in his impairment rating. In a May 3, 2010 supplemental opinion, Dr. Denhart rated appellant's mild motor deficit under Table 15-20. The default impairment value for the middle trunk (C7 nerve) class 1 was five percent. Appellant had a function history net adjustment of two and a clinical studies history with net adjustment of zero. This resulted in a net adjustment of two which yielded a nine percent motor deficit. Appellant had mild sensory loss with significant pain, which fell in the moderate sensory deficit category under Table 15-20, which had a default impairment of two. Again, the function adjustment was +2, the clinical studies adjustment was zero, for a net adjustment of plus two which yielded 3 percent sensory deficit to the upper extremity. Combining the motor and sensory deficits yielded a total impairment of 12 percent to the right arm.

On May 7, 2010 OWCP's medical adviser reviewed the medical evidence and agreed with the impairment rating by Dr. Denhart. He noted that Dr. Denhart had properly applied the sixth edition of the A.M.A., *Guides* in rating impairment of the right upper extremity based on motor and sensory loss. The medical adviser noted that a May 29, 2009 date of maximum medical improvement was recommended by Dr. Denhart based on review of the medical records.

On May 25, 2010 OWCP granted appellant a schedule award for 12 percent impairment of the right arm. The period of the award ran for 37.44 weeks of compensation from April 24, 2010 to November 11, 2011.

On June 17, 2010 appellant, through his attorney, requested reconsideration. Counsel contended that the date of maximum medical improvement under the schedule award, April 24, 2010, was in error as Dr. Carlstrom had found maximum medical improvement as of his May 28, 2009 report. He argued that if this date had been used then appellant could have received the award under one lump sum as he continued to work for the postal service. Counsel also noted that, by letter dated April 7, 2010, he had requested Dr. Carlstrom to provide an impairment rating under the sixth edition. He submitted a copy of the letter, returned by Dr. Carlstrom on April 10, 2010 with the following handwritten notation: "Page 564; class 2 motion. 1) segment lesions of c-spine 14 percent WB. Page 438 and 444, UI, ulnar and median nerve sensory deficits, 13 percent of UE; 13 percent of UE. Total 14 percent WB 26 percent UES." Counsel argued that Dr. Carlstrom rated impairment to both upper extremities of 13 percent and that, as an attending neurosurgeon, his opinion warranted greater weight than that of Dr. Denhart. Counsel submitted a June 24, 2010 report from Dr. Carlton, reiterating the 13 percent impairment found of each upper extremity based on ulnar and median nerve sensory deficits under pages 438 and 444 of the sixth edition.

OWCP referred the reports of Dr. Carlstrom to OWCP's medical adviser for review. On July 22, 2010 OWCP's medical adviser noted that the impairment ratings of Dr. Carlstrom under

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<sup>4</sup> The record reflects that appellant received wage-loss compensation for April 23, 2010 to attend his appointment with Dr. Denhart.

the sixth edition of the A.M.A., *Guides* were incomplete. He noted that the impairment ratings failed to provide any discussion of the elements or criteria that went into making the ratings as discussed at page 28. Further, appellant's condition was accepted by OWCP for residuals of a cervical nerve root at C7 which necessitated the use of Table 15-20. The impairment ratings of Dr. Carlstrom were based on the diagnosis of sensory deficits of the ulnar and median nerve under pages 438 and 444, conditions not accepted by OWCP as employment related.

In an April 4, 2011 decision, OWCP denied modification of the May 25, 2010 schedule award.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body.<sup>5</sup> FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, OWCP 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.<sup>6</sup> For schedule awards issued after May 1, 2009, the extent of impairment is to be evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>7</sup>

It is well established that the period of a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually the date of the evaluation by the examining physician which is accepted as definitive by OWCP.<sup>8</sup>

### **ANALYSIS**

Appellant's claim was accepted for permanent aggravation of a preexisting displaced cervical disc without myelopathy for which he underwent surgery on May 25, 2007 for a C6-7 foraminotomy and laminectomy. In a May 29, 2009 report, Dr. Carlstrom, the attending neurosurgeon, rated appellant's impairment under the fifth edition of the A.M.A., *Guides* but provided a range of 18 to 24 percent whole man impairment or 15 to 20 percent to the arms. OWCP's medical adviser noted that, as of May 1, 2009, impairment ratings were to be made applying the sixth edition of the A.M.A., *Guides*. Moreover, Dr. Carlstrom did not provide

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> See *Harry D. Butler*, 43 ECAB 859 (1992); *Frederick D. Piatt*, 23 ECAB 205 (1972); *August M. Buffa*, 12 ECAB 324 (1961).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

<sup>8</sup> See *P.C.*, 58 ECAB 539 (2007); *Mark A. Holloway*, 55 ECAB 321 (2004).

sufficient findings from his physical examination of appellant to allow an accurate impairment rating to be made.

Appellant was referred to Dr. Denhart who rated appellant's impairment due to C7 radiculopathy in to the right upper extremity. Dr. Denhart noted that the default motor impairment value for the C7 nerve was class 1 or five percent. Appellant had a functional history net adjustment of two and a clinical studies history with net adjustment of zero. This resulted in a net adjustment of two, which totaled nine percent motor deficit. Appellant complained of mild sensory loss with significant pain that fell into the moderate sensory deficit category under Table 15-20, with a default impairment of two. The functional adjustment was plus two, the clinical studies adjustment was zero, for a next adjustment of plus two which yielded three percent sensory deficit. Combining the motor and sensory deficits totaled 12 percent impairment to the right arm. OWCP's medical adviser reviewed the report of Dr. Denhart and agreed with the impairment rating. He noted that Dr. Denhart had listed a date of maximum medical improvement of May 29, 2009, based on the prior report of Dr. Carlstrom.

On appeal to the Board, appellant did not specifically dispute the 12 percent right arm impairment on which the May 25, 2010 schedule award was based. Rather, he noted that he disagreed with "altering my maximum medical improvement date from May 28, 2009 to April 24, 2010." As noted, the date of maximum medical improvement is a question to be determined by the probative medical evidence of record. The May 28, 2009 report of Dr. Carlstrom was not the medical evidence on which OWCP relied in determining appellant's impairment for schedule award purposes. Dr. Carlstrom provided an estimate of the range of impairment of the whole person and upper extremities under the fifth edition of the A.M.A., *Guides*. He failed to set forth sufficient findings from his examination of appellant to allow the medical adviser to utilize the sixth edition. For this reason, appellant was referred to Dr. Denhart, who examined him on April 23, 2010. OWCP found that the physical findings made by Dr. Denhart on examination of appellant were determinative of the extent of permanent impairment in this case. For this reason, the Board finds that the date of maximum medical improvement was properly based on Dr. Denhart's examination of April 23, 2010.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that OWCP erred in finding April 24, 2010 as the date of maximum medical improvement.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 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