

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

R.W., Appellant

and

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

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**Docket No. 11-1537
Issued: March 26, 2012**

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

Case Submitted on the Record

ORDER AFFIRMING CASE

Before:

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

On June 17, 2011 appellant, through his attorney, filed a timely appeal of a February 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). The February 23, 2011 decision affirmed an August 24, 2010 OWCP decision finding that appellant had a two percent permanent impairment to his right and left arms.

The Board has duly considered the matter and will affirm the February 23, 2011 decision. On appeal, counsel expresses no disagreement with the schedule award per se; but rather argues that OWCP delayed adjudication of appellant's schedule award claim until the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) became applicable on May 1, 2009.¹ He argues that appellant has a property right in a schedule award benefit under the fifth edition and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The cases cited by counsel, however, held only that a claimant who was in receipt of benefits (in *Goldberg* welfare benefits and in *Mathews* social security benefits) could not have those benefits terminated without procedural due process. In this case, appellant had not received a schedule award under the fifth edition.

¹ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition. FECA Bulletin No. 09-03 (issued March 15, 2009).

In *Harry D. Butler*,² the Board noted that Congress delegated authority to the Director of OWCP 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.³ On March 15, 2009 he 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*.⁴ The applicable date of the sixth edition relates to the date of the schedule award decision. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.⁵ The Board accordingly finds that the arguments presented are without merit regarding the February 23, 2011 OWCP decision on appeal.

The Board notes that counsel also briefly suggested that there was a conflict in the medical evidence⁶ between Dr. David Bundens and Dr. David Weiss. There are no medical reports from Dr. Weiss in the case record. While appellant stated in his factual history there was a report from Dr. Weiss dated June 27, 2010, the most recent report from an attending physician is a December 6, 2007 report from Dr. Steven Allon. If appellant has additional relevant evidence, he may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit order, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

² 43 ECAB 859 (1992).

³ *Id.* at 866; 20 C.F.R. § 10.404.

⁴ *Supra* note 1.

⁵ *See D.O.*, Docket No. 11-350 (issued October 25, 2011).

⁶ FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a).

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2011 is affirmed.

Issued: March 26, 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