

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

T.S., Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
Toledo, OH, Employer**)

**Docket No. 11-2016
Issued: May 9, 2012**

Appearances:

Douglas Sughrue, 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 September 9, 2011 appellant, through his attorney, filed a timely appeal from a July 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an increased schedule award.

The Board has duly considered the matter and will affirm OWCP's July 22, 2011 decision. Appellant's attorney expresses no disagreement with the schedule award *per se*. Rather, he asserts only that appellant filed his schedule award claim before OWCP began using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) on May 1, 2009 and that his schedule award claim should be adjudicated under the fifth edition of the A.M.A., *Guides* (2001).

Appellant's attorney argued that appellant was deprived of a due process right to a determination under the fifth edition. He contended that OWCP retroactively applied the sixth edition of the A.M.A., *Guides* in violation of due process and further argued that the retroactive application was an unreasonable construction of statutory authority. Counsel cited *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) for the principle that an agency may not promulgate retroactive rules and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) for the idea that a retroactive rule "takes away or impairs vested rights acquired under existing law...." Counsel maintained that OWCP's application of the sixth rather than the fifth edition harmed

appellant by diminishing the amount of the schedule award to which he was entitled. The Board has held, however, that a claimant has no vested right to a schedule award when he or she has only made a claim for a schedule award.¹ To the extent that counsel is arguing that appellant was deprived of a protected property interest, the Board notes that such assertions are similar to arguments made in the cases of *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases 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 simply made a claim for a schedule award. He was not in receipt of schedule award benefits nor was OWCP attempting to terminate benefits. Appellant had no vested right to a schedule award under the A.M.A., *Guides*.²

Counsel further maintained that OWCP violated the limits on its construction of statutory authority in retroactively applying the sixth edition of the A.M.A., *Guides*. The Board, however, has previously found that the Director properly exercised its authority in applying the sixth edition of the A.M.A., *Guides* to all schedule awards issued after May 1, 2009.³ In *Harry D. Butler*,⁴ the Board noted that Congress delegated authority to the Director 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.⁵ On March 15, 2009 the Director 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*.⁶ The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim was filed. Accordingly, the Board will affirm the July 22, 2011 decision.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹ See P.V., *Order Affirming Case*, Docket No. 11-348 (issued September 15, 2011); B.M., *Order Affirming Case*, Docket No. 11-1468 (issued January 12, 2010).

² *Id.*

³ *Id.*

⁴ 43 ECAB 859 (1992).

⁵ *Id.* at 866.

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

IT IS HEREBY ORDERED THAT the July 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 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