

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

N.D., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DELIVERY CENTER, Southeastern, PA,
Employer**)

**Docket No. 13-1314
Issued: December 20, 2013**

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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2013 appellant, through counsel, appealed from the February 19, 2013 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has more than a one percent impairment of the left upper extremity, for which she received a schedule award.

On appeal, appellant's counsel contends that there was a conflict in medical evidence that required OWCP to refer appellant for an impartial medical examination. He also contended that preexisting impairments to the same body part must be included in the determination of a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 9, 1997 appellant, then a 31-year-old part-time flexible mail handler, filed an occupational disease claim alleging that she suffered from a left shoulder strain caused by repeatedly lifting heavy bags and parcels. OWCP accepted his claim for tendinitis to the left shoulder.

On May 23, 2011 appellant filed a claim for a schedule award.

In a medical report dated November 22, 2010, Dr. Arthur Becan, an orthopedic surgeon, listed appellant's diagnoses as: (1) chronic post-traumatic rotator cuff tendinopathy left shoulder; (2) left brachial plexopathy; (3) left ulnar neuropathy; (4) subacromial impingement syndrome right shoulder; (5) right brachial plexopathy; (6) right radial neuropathy; (7) bulging C5-6 and C6-7 discs; and (8) C6-7 radiculopathy. He, after applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), opined that she had a four percent impairment to her left upper extremity. Dr. Becan, noted that appellant had left shoulder cuff tendinitis with residual loss which equaled a three percent impairment under Table 15-5 of the A.M.A., *Guides*.² He then found modifications to this figure by noting a grade modifier for Functional History (GMFH) of 1, a grade modifier for Physical Examination (GMPE) of 1³ and a grade modifier for Clinical Studies (GMCS) of 1.⁴ After applying the formula set forth in the A.M.A., *Guides*, he indicated that the grade modifiers amounted to a net adjustment of 0 to appellant's impairment rating, so appellant had a 3 percent impairment based on her left shoulder tendinitis. He then found that appellant had a class 1 left ulnar entrapment at her elbow and noted test findings of 1, functional history of 2 and physical examination of 1; he averaged these findings to equal 1 and determined that pursuant to the A.M.A., *Guides*, appellant had an impairment due to left ulnar entrapment of 1 percent.⁵ He then combined these figures and determined that appellant's left upper extremity impairment was 4 percent.

OWCP referred appellant's claim to its medical adviser for review. In a July 3, 2012 report, OWCP's medical adviser noted that pursuant to the A.M.A., *Guides*, Table 15-5, page 402, there are two categories for tendinitis. The first category describes history of painful injury of occupational exposure without consistent objective findings and lists grade C, default value of one percent with a range of zero to two percent. The second category within class 1 is for residual loss of function with normal motion. The medical adviser noted that Dr. Becan noted negative impingement sign, pain free range of motion and normal range of motion and it was therefore unclear why Dr. Becan would conclude that there is a residual loss. He concluded that the first category would be more appropriate in that there are residual symptoms without consistent objective findings, and the grade C default value would be one percent with a range of zero to two percent. Utilizing the adjustment grid of grade modifiers, the medical adviser found

² A.M.A., *Guides* 402, Table 15-5.

³ *Id.* at 408, Table 15-8.

⁴ *Id.* at 410, Table 15-9.

⁵ *Id.* at 449, Table 15-23.

grade modifiers of 1 each for GMPE, GMCS and GMFH.⁶ Therefore, he concluded that the net adjustment was 0 and that he recommended a grade C for a one percent impairment rating for the left upper extremity. The medical adviser did not include an impairment rating based on left ulnar nerve entrapment as he determined that this was not a condition accepted by OWCP.

On July 25, 2012 OWCP issued a schedule award for a one percent impairment of the left upper extremity.

By letter dated August 7, 2012, appellant, through counsel, requested a hearing before an OWCP hearing representative. By letter dated November 29, 2012, OWCP requested that this be changed to a request for review of the written record.

By decision dated February 19, 2013, OWCP's hearing representative affirmed the July 25, 2012 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ 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.⁹

For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.¹¹ 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.¹²

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).¹³ Under the sixth edition of the A.M.A., *Guides*, for upper extremity

⁶ *Supra* note 3 at Table 15-8; pp. 410-11, Table 15-9; and p. 406, Table 15-6, respectively.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹¹ *See* FECA Bulletin No. 09-03 (issued March 15, 2009).

¹² *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹³ A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, ICF: A Contemporary Model of Disablement.

impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.¹⁴ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹⁶

Section 8123(a) 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 an examination.¹⁷

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's claim for left shoulder tendinitis. Appellant filed a claim for a schedule award, and in support of her claim, she submitted the report of Dr. Becan, who opined that appellant had an impairment to her left upper extremity of four percent. Dr. Becan based his calculations, in part, on Table 15-5 of the A.M.A., *Guides*.¹⁸ He found a default value of 3, based on residual loss, functional, with normal motion. Dr. Becan determined that the grade modifiers did not alter this determination, and accordingly determined that appellant should be issued a three percent impairment based on tendinitis in her left shoulder. OWCP's medical adviser disagreed. He noted that Table 15-5 allows a default value of three in terms of residual loss, functional with normal motion, but that he believed that appellant's default was better represented by the first paragraph of Table 15-5 discussing tendinitis which described tendinitis with residuals symptoms without consistent objective findings which would yield a default value of one.¹⁹ The medical adviser agreed with Dr. Becan that the grade modifiers would not alter this value. Accordingly, the medical adviser and appellant's physician disagreed as to the proper criteria for determining the default impairment under Table 15-5 of the A.M.A., *Guides*. The disagreement appears to revolve around whether appellant can properly be said to have a residual loss for the left shoulder. Furthermore, Dr. Becan also gave appellant an impairment rating of one percent based on left ulnar entrapment at her elbow. The medical adviser did not believe that she was entitled to this amount as OWCP only accepted her claim for left shoulder tendinitis. Therefore, Dr. Becan concluded that appellant had an impairment to her left upper extremity of four percent and the medical adviser found an impairment rating of one percent.

¹⁴ *Id.* at 385-419.

¹⁵ *Id.* at 411.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability*, Chapter 2.808.6(d) (August 2002).

¹⁷ *D.H.*, Docket No. 12-1857 (issued February 26, 2013).

¹⁸ A.M.A., *Guides* 402.

¹⁹ *Id.*

The Board finds that a conflict in medical opinion exists between Dr. Becan and OWCP's medical adviser with regards to the best method by which to rate appellant's left upper extremity impairment. Because there is an unresolved conflict in medical opinion between these two physicians, the case will be remanded to OWCP for referral to an impartial medical examiner. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 19, 2013 is set aside, and the case is remanded for further action consistent with this decision.

Issued: December 20, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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