



award; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely.

On appeal, appellant contends that she is entitled to an 11 percent permanent impairment of the left upper extremity based on her belief that the impairment to her left upper extremity is worse than the right upper extremity, for which she received a higher impairment rating.

### **FACTUAL HISTORY**

OWCP accepted that appellant, then a 44-year-old nursing assistant, sustained a displacement of her cervical and lumbar intervertebral discs on September 17, 2010 in the performance of duty as a result of being in an elevator that fell. It authorized the May 11, 2011 anterior cervical discectomy and fusion at C6-7. Appellant returned to light duty on August 8, 2011 and, subsequently, filed a claim for a schedule award on October 24, 2011. By decisions dated February 3, 2012, OWCP expanded her claim to include cervical radiculopathy at C3-4 and granted a schedule award for five percent permanent impairment to the right upper extremity.

Appellant accepted a position as a modified medical support assistant and returned to work on March 28, 2012. By decision dated May 30, 2012, OWCP determined that the actual wages she earned as a modified medical support assistant, \$685.27 weekly, fairly and reasonably represented her wage-earning capacity which resulted in a loss of wage-earning capacity.

On April 18, 2013 appellant filed a claim for a schedule award.

In a March 15, 2013 report, Dr. David Coran, a Board-certified orthopedic surgeon, diagnosed cervical disc herniation at C6-7 due to an employment-related injury sustained in September 2010. He indicated that appellant complained of neck pain and left arm pain with numbness into the hand. Dr. Coran reviewed a magnetic resonance imaging (MRI) scan dated February 13, 2013 and stated that it showed disc herniation which had increased in size from preoperative MRI scan studies and was not moderately large and had some compression of the nerve root of C6 and C7. On April 12, 2013 he indicated that appellant complained of neck and left arm pain, as well as low back and right leg pain. Dr. Coran diagnosed cervical disc herniation, cervical radiculopathy, improved after therapy and low back pain, lumbar disc injury and lumbar radiculopathy related to the September 17, 2010 employment injury. He stated that appellant's pain was down to 4 out of 10 in the neck towards the left arm and she had not had any new numbness or weakness complaints in the arm or leg.

On March 26, 2013 Dr. Elizabeth Polacheck, a Board-certified physiatrist, indicated that appellant developed left arm symptoms three months prior. Appellant had numbness, tingling and pain and was unable to lift her left arm up very high. Upon physical examination, Dr. Polacheck found a positive Spurling's sign, decreased sensation on the left in the C6 and C5 dermatome and several trigger points in the left upper quadrant. She diagnosed left upper extremity weakness and impairment related to cervical radiculopathy. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Polacheck opined that appellant had a class 2 motion segment lesion, intervertebral disc herniation. She assigned a grade 2 modifier for functional history due to pain

symptoms with normal activity and a grade 1 modifier for physical examination due to the positive Spurling's sign, asymmetric reflexes and sensory deficits. Dr. Polacheck assigned a grade 1 modifier for motor strength and a grade 2 modifier for clinical studies, which equaled a grade B net adjustment. She concluded that appellant had an 11 percent whole person impairment.

In an April 25, 2013 letter, OWCP notified appellant of the deficiencies of her schedule award claim and requested additional evidence, including a recommended percentage of impairment of the affected member(s) of her body from her attending physician.

Appellant submitted an April 16, 2013 MRI scan of the lumbar spine which showed L5-S1 subtle broad-based right posterolateral disc protrusion and mild facet degeneration of the lower lumbar spine without stenosis.

In an April 30, 2013 report, Dr. Coran indicated that appellant complained of low back and neck pain. He diagnosed lumbar disc injury, lumbar disc protrusion, low back pain, radiculopathy with recent flare up and cervical disc herniation with chronic pain. Dr. Coran opined that appellant was functioning at a reasonable level and was able to work full time with restrictions.

On June 9, 2013 Dr. Christopher Gross, an orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence of record and based on Dr. Polacheck's notes determined that appellant had a three percent permanent impairment of the left upper extremity according to the sixth edition of the A.M.A., *Guides*. He found that she reached maximum medical improvement when she returned to work on March 28, 2012. Dr. Gross found that appellant had a grade 1 diagnosis of mild sensory deficits of C5 and C6 on the left under Table 2 of *The Guides Newsletter* July/August 2009. He indicated that she had pain with normal activity and assigned a grade modifier of 2 Functional History (GMFH) according to Table 15-7,<sup>3</sup> page 406. Dr. Gross indicated a grade modifier of 1 Physical Examination (GMPE) was found using Table 15-8,<sup>4</sup> page 408. He found that Clinical Studies (GMCS) were not applicable. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), Dr. Gross found that (2-1) + (1-1) + (n/a) resulted in a net grade modifier of 1, resulting in an impairment class 1, grade B, equaling a three percent permanent impairment of the left upper extremity. He found no evidence to suggest that the right upper extremity was impaired. Dr. Gross noted that Dr. Polacheck's 11 percent impairment rating for the left upper extremity was erroneous as she did not utilize *The Guides Newsletter* in her calculation.

By decision dated August 28, 2013, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity for the period July 28 through October 1, 2013.

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<sup>3</sup> Table 15-7, page 406, of the sixth edition of the A.M.A., *Guides* is entitled *Functional History Adjustment: Upper Extremities*.

<sup>4</sup> Table 15-8, page 408, of the sixth edition of the A.M.A., *Guides* is entitled *Physical Examination Adjustment: Upper Extremities*.

In an appeal request form dated September 15, 2013, postmarked October 23, 2013 and received on October 28, 2013, appellant requested an oral hearing before an OWCP hearing representative. She submitted reports dated September 27 and October 28, 2013 from Dr. Coran who reiterated his diagnoses and medical opinions regarding appellant's neck and back conditions.

By decision dated November 27, 2013, OWCP denied appellant's request for an oral hearing finding that her request was untimely because it was not made within 30 days of its August 28, 2013 decision. It further indicated that it had exercised its discretion and further denied the request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

### **LEGAL PRECEDENT -- ISSUE 1**

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

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).<sup>8</sup> Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>9</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

<sup>6</sup> See *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). See also 5 U.S.C. § 8107.

<sup>7</sup> See *D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3, *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.

<sup>9</sup> *Id.* at 494-531.

<sup>10</sup> See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

## ANALYSIS -- ISSUE 1

The record shows that OWCP paid appellant a schedule award for a three percent permanent impairment of the left upper extremity due to the accepted cervical and lumbar conditions. As appellant filed a claim for an additional schedule award, she has the burden to establish more than a three percent permanent impairment of the left upper extremity due to her employment-related conditions. It is her burden to submit sufficient evidence to establish the extent of permanent impairment.<sup>11</sup>

In accordance with its procedures, OWCP properly referred the evidence of record to its OWCP medical adviser, Dr. Gross, who reviewed the clinical findings of Drs. Coran and Polacheck on June 9, 2013 and determined that appellant had a three percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. Dr. Gross found that appellant had a grade 1 diagnosis of mild sensory deficits of C5 and C6 on the left under Table 2 of *The Guides Newsletter* July/August 2009. He indicated that she had pain with normal activity and assigned a functional history grade modifier of 2 according to Table 15-7,<sup>12</sup> page 406. Dr. Gross indicated a physical examination grade modifier of 1 was found using Table 15-8,<sup>13</sup> page 408. He found that clinical studies were not applicable. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), OWCP's medical adviser found that (2-1) + (1-1) + (n/a) resulted in a net grade modifier of 1, resulting in an impairment class 1, grade B, equaling a three percent permanent impairment of the left upper extremity. He found no evidence to suggest that the right upper extremity was impaired and determined that appellant reached maximum medical improvement when she returned to work on March 28, 2012.

The Board finds that OWCP's medical adviser applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to the clinical findings of Drs. Coran and Polacheck. The medical adviser's calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. OWCP's medical adviser explained that Dr. Polacheck's 11 percent impairment rating for the left upper extremity was erroneous as she did not utilize *The Guides Newsletter* in her calculation. Therefore, OWCP properly relied on the medical adviser's assessment of a three percent permanent impairment of the left upper extremity.<sup>14</sup>

On March 26, 2013 Dr. Polacheck diagnosed left upper extremity weakness and impairment related to cervical radiculopathy and opined that appellant had an 11 percent whole person impairment under the sixth edition of the A.M.A., *Guides*. FECA, however, does not

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<sup>11</sup> See *Annette M. Dent*, 44 ECAB 403 (1993).

<sup>12</sup> Table 15-7, page 406, of the sixth edition of the A.M.A., *Guides* is entitled *Functional History Adjustment: Upper Extremities*.

<sup>13</sup> Table 15-8, page 408, of the sixth edition of the A.M.A., *Guides* is entitled *Physical Examination Adjustment: Upper Extremities*.

<sup>14</sup> See *M.T.*, Docket No. 11-1244 (issued January 3, 2012).

provide for whole person impairment.<sup>15</sup> Thus, the Board finds that Dr. Polacheck's report lacks probative value and is insufficient to establish appellant's claim.

Dr. Coran did not provide an impairment rating based on the sixth edition of the A.M.A., *Guides* in his reports, therefore, the Board finds that they lack probative value and are insufficient to establish appellant's claim.

The April 16, 2013 MRI scan of the lumbar spine is diagnostic in nature and does not provide an impairment rating. Thus, this report is of no probative value regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.<sup>16</sup>

On appeal, appellant contends that she is entitled to an 11 percent permanent impairment of the left upper extremity based on her belief that the impairment to her left upper extremity is worse than the right upper extremity, for which she received a higher impairment rating. The Board finds that there is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than a three percent permanent impairment to the left upper extremity. Accordingly, the Board finds that appellant has not established that she is entitled to a schedule award greater than that previously received and her arguments are not substantiated.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."<sup>17</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."<sup>18</sup> The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.<sup>19</sup> OWCP has discretion, however, to grant or

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<sup>15</sup> See *E.A.*, Docket No. 13-958 (issued March 7, 2014); *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

<sup>16</sup> See *Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

<sup>17</sup> 5 U.S.C. § 8124(b)(1).

<sup>18</sup> 20 C.F.R. § 10.615.

<sup>19</sup> *Id.* at § 10.616(a).

deny a request that is made after this 30-day period.<sup>20</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

Appellant had 30 calendar days from OWCP's August 28, 2013 decision, or until September 27, 2013, to request an oral hearing. She filed a request for an oral hearing postmarked October 23, 2013, which was more than 30 days after OWCP issued its August 28, 2013 decision.<sup>22</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>23</sup> For this reason, the Board finds that the request was untimely. Because the application was not timely filed, appellant was not entitled to an oral hearing.

Appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA. Exercising its discretion to grant an oral hearing, OWCP denied appellant's request on the grounds that she could equally well address any issues in her case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's August 28, 2013 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.<sup>24</sup>

### **CONCLUSION**

The Board finds that appellant has not established that she sustained more than a three percent permanent impairment to the left upper extremity, for which she received a schedule award. The Board further finds that OWCP properly denied appellant's request for an oral hearing as untimely.

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<sup>20</sup> See *G.W.*, Docket No. 10-782 (issued April 23, 2010). See also *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>21</sup> *Id.* See also *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>22</sup> See 20 C.F.R. § 10.616(a). Under OWCP regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011). If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.*

<sup>23</sup> See *William F. Osborne*, 46 ECAB 198 (1994).

<sup>24</sup> See *Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 27 and August 28, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board