

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

E.C., Appellant

and

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

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**Docket No. 10-2397
Issued: July 14, 2011**

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

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

Appellant, a 44-year-old mail handler, sustained an employment-related back injury on March 24, 2002. The Office of Workers' Compensation Programs (OWCP) accepted his claim for lumbosacral sprain and lumbar disc displacement (L5-S1).¹ On September 27, 2010 appellant's counsel filed a timely appeal of a June 8, 2010 OWCP merit decision regarding entitlement to a schedule award.² Appellant previously received an award for 11 percent impairment of the left lower extremity.³ That award, however, was ultimately set aside by the Board. In a decision dated March 27, 2007, the Board found that the three percent pain-related

¹ OWCP also authorized a May 31, 2002 microdiscectomy.

² Pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193 (2006), and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

³ OWCP initially granted a schedule award on November 25, 2003. The award was based on the then-applicable fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). The overall 11 percent impairment rating included components for decreased hip flexion (5 percent), calf muscle atrophy (3 percent) and pain (3 percent). The November 25, 2003 schedule award was subsequently set aside by the Branch of Hearings & Review. By decision dated February 24, 2005, OWCP reaffirmed the previous three percent impairment attributable to calf muscle atrophy. In a decision dated May 5, 2006, the Branch of Hearings & Review found that the record did not establish an impairment of the left lower extremity in excess of 11 percent. The Board would later set aside the May 5, 2006 decision.

component of the award was not supported by the medical evidence of record.⁴ Accordingly, the Board remanded the case with instructions for OWCP to obtain clarification from either appellant's physician or the district medical adviser (DMA) regarding the appropriateness of a pain-related award under Chapter 18 of the A.M.A., *Guides* (5th ed. 2001).⁵

Almost 2½ years later, OWCP referred the case to the DMA pursuant to the Board's March 27, 2007 mandate.⁶ During the interim period, it adopted the sixth edition of the A.M.A., *Guides* (2008). This latest edition of the A.M.A., *Guides* is applicable to schedule award decisions issued on or after May 1, 2009.⁷ While the sixth edition also includes a separate chapter for pain-related impairment (Chapter 3), unlike earlier editions of the A.M.A., *Guides*, the sixth edition allows for a separate pain-related impairment "only" when the patient presents with a painful condition and "cannot" be rated according to the diagnosis-based principles outlined in Chapters 4 to 17, which include the upper and lower extremities.⁸ The sixth edition also provides a mechanism for rating spinal nerve extremity impairment.⁹

The DMA reviewed the case record on September 21, 2009, and expressed his opinion that an additional three percent pain-related impairment was appropriate under Chapter 18, A.M.A., *Guides* (5th ed. 2001). He referenced findings provided by appellant's treating physician in February 2003, and explained that the combined 8 percent impairment for hip flexor weakness and calf muscle (gastrocnemius) atrophy did not adequately compensate for appellant's work-related impairment. The DMA, therefore, found that an additional three (3) percent award for pain was appropriate under the fifth edition of the A.M.A., *Guides*.

By decision dated January 13, 2010, OWCP found that based on the DMA's recent report the three percent previously awarded for pain should be allowed.¹⁰ Accordingly, appellant did not establish permanent impairment of the left lower extremity in excess of the 11 percent he had previously been paid. The Branch of Hearings & Review affirmed OWCP's January 13, 2010 decision on June 8, 2010. The hearing representative found that the medical evidence of record did not support an additional schedule award. This later decision is the subject of the current appeal.

⁴ Docket No. 07-128 (issued March 27, 2007).

⁵ The Board's March 27, 2007 decision is incorporated herein by reference.

⁶ According to an August 4, 2009 OWCP internal memorandum, the Board's 2007 remand apparently "fell through the cracks."

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

⁸ A.M.A., *Guides* 39 (2008), Chapter 3, section 3.3(b) (emphasis in the original). See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, No. 6 (January 2010).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁰ OWCP further found that an overpayment did not exist.

On appeal, counsel argued that because the fifth edition of the A.M.A., *Guides* was no longer in effect by the time OWCP acted on the Board's March 27, 2007 remand, appellant's claim should have instead been reviewed under the sixth edition of the A.M.A., *Guides*.¹¹ The Board agrees. The procedure manual provides that all permanent partial impairment calculations made on or after May 1, 2009 must be based on the sixth edition of the A.M.A., *Guides* (2008).¹²

The Board previously vacated appellant's schedule award under the fifth edition and remanded the case for further medical development followed by the issuance of a *de novo* decision. While a review of the new medical evidence under the fifth edition would have been appropriate prior to May 1, 2009, OWCP did not act on the Board's remand order until after the effective date of the sixth edition. The hearing representative reasoned that the sixth edition was inapplicable because this was not a recalculation, but a remand where OWCP obtained clarification supporting the previous award. The hearing representative's stated rationale conflicts with the procedure manual.¹³ The Board had previously vacated the March 27, 2007 schedule award. Whether new evidence supports or refutes an earlier schedule award is not the determinative factor as to which edition of the A.M.A., *Guides* applies. Accordingly, OWCP erred in applying the fifth edition of the A.M.A., *Guides* (2001).

Because the fifth edition of the A.M.A., *Guides* was no longer applicable at the time OWCP issued its January 13 and June 8, 2010 decisions, the findings regarding the extent of appellant's left lower extremity impairment must be set aside. The case is remanded to OWCP for further medical development followed by a *de novo* decision regarding appellant's entitlement to a schedule award in accordance with the A.M.A., *Guides* (6th ed. 2008).

¹¹ Appellant's counsel raised the same argument before the Branch of Hearings & Review. The hearing representative disagreed, citing FECA Bulletin No. 09-03 (March 15, 2009).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7b(4) (January 2010).

¹³ *Id.*

IT IS HEREBY ORDERED THAT the June 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: July 14, 2011
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