

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

D.K., Appellant

and

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

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**Docket No. 10-2026
Issued: June 14, 2011**

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 August 3, 2010 appellant, through his attorney, filed a timely appeal of an April 26, 2010 Office of Workers' Compensation Programs' merit decision granting a schedule award. Pursuant to the Federal Employees' Compensation Act¹ 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 seven percent impairment of his left upper extremity for which he has received a schedule award.

On appeal, counsel argued that appellant was deprived of a property right under the U.S. Constitution by the Office's failure to apply the fifth edition of the American Medical

¹ 5 U.S.C. § 8101 *et seq.*

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² He further argued that the Office delayed in adjudicating the claim resulting in denial of due process.

FACTUAL HISTORY

On May 10, 2004 appellant, then a 49-year-old city letter carrier, filed a traumatic injury alleging that he injured his left arm and shoulder when he fell in the performance of duty and caught himself with his left arm. The Office accepted his claim for left rotator cuff strain on June 21, 2004. A magnetic resonance imaging (MRI) scan dated September 20, 2004 demonstrated tendinosis of the supraspinatus and subscapularis muscles without tears and a tear of the superior labrum both anteriorly and posteriorly. Dr. Bradford S. Tucker, a Board-certified orthopedic surgeon, performed a left shoulder arthroscopic superior labrum anterior and posterior (SLAP) repair, subacromial decompression and bursectomy and posterior capsule release on February 13, 2008. In a note dated July 29, 2008, Dr. Tucker indicated that appellant had reached maximum medical improvement with symmetric range of motion and strength and no pain.

In a letter dated November 12, 2008, appellant's attorney, requested a schedule award and submitted a report dated September 9, 2008 from Dr. David Weiss, an osteopath, who stated that appellant complained of intermittent left shoulder pain and stiffness. Dr. Weiss found focal acromioclavicular point tenderness and tenderness over the proximal third of the biceps. He noted that appellant had forward elevation of 130 degrees; abduction of 90 degrees; adduction of 65 degrees; as well as internal and external rotation of 90 degrees. Dr. Weiss stated that manual muscle strength testing was four out of five involving the supraspinatus musculature and four plus of five in biceps strength. He applied the fifth edition of the A.M.A., *Guides* and determined that appellant had 19 percent impairment of the left upper extremity. Dr. Weiss completed a quick dash evaluation and determined that appellant's score was 61 percent due to moderate difficulties in opening a jar, heavy chores, carrying a bag and using a knife as well as severe difficulty washing.

Appellant completed a claim for compensation requesting a schedule award on December 16, 2008. On January 27, 2009 the Office referred the medical evidence to the district medical adviser. A Dr. Morely Slutsky completed a report on January 30, 2009 finding impairment of 16 percent of the left upper extremity. He accorded appellant 7 percent impairment due to loss of range of motion and 10 percent due to left shoulder resection arthroplasty finding a similarity to a distal clavicle resection. Dr. Slutsky did not find that an additional impairment rating for pain was appropriate.

The Office requested that Dr. Weiss provide a supplemental report addressing the pain impairment by letter dated February 9, 2009. On March 16, 2009 it again requested a supplemental report from Dr. Weiss and allowed 15 days for a response. Counsel stated that he was submitting a report dated March 30, 2009 from Dr. Weiss on April 9, 2009. The Office received on April 29, 2009 a report from Dr. Weiss dated March 30, 2009. Dr. Weiss stated that the three percent impairment rating for pain was appropriate as appellant's pain level reached 6

² A.M.A., *Guides*, 5th ed. (2001).

of 10 and as his activities of daily living were impacted with difficulties performing overhead reaching and lifting as well as pushing and pulling with his left arm. He concluded that application of the three percent impairment due to pain as found in Chapter 18 of the fifth edition of the A.M.A., *Guides* was appropriate.

In a letter dated June 19, 2009, the Office requested that Dr. Weiss provide his impairment rating based on the sixth edition of the A.M.A., *Guides* which became applicable to schedule awards issued after May 1, 2009.³

On August 19, 2009 the Office referred appellant for a second opinion evaluation with Dr. Robert Draper, a Board-certified orthopedic surgeon. In a report dated August 28, 2009, Dr. Draper reviewed the statement of accepted facts provided by the Office and the September 20, 2004 MRI scan and operative report dated February 13, 2008. He found that appellant had 160 degrees of abduction and forward flexion as well as 90 degrees of internal rotation and external rotation. Dr. Draper reported no loss of strength, atrophy, ankylosis or measurable sensory changes. He applied the sixth edition of the A.M.A., *Guides* and found that the most significant injury was the biceps tendon rupture with a default rating of three percent.⁴ Dr. Draper found that appellant had grade modifiers of one for functional history, physical examination and clinical studies. Applying the net adjustment formula, he found a net adjustment of zero. Dr. Draper noted that appellant also had a SLAP lesion with a default value of three percent, but stated, “[T]hese two cannot be added together and I picked the one that appeared the most significant and that was the biceps tendon rupture.” He concluded that appellant had three percent impairment of the left upper extremity.

Dr. Weiss provided a supplemental report revised on September 18, 2009 and applied the sixth edition of the A.M.A., *Guides* to his prior findings. He found that appellant had loss of range of motion of three percent due to flexion and three percent due to abduction⁵ for a range of motion grade modifier of one.⁶ Dr. Weiss noted that appellant’s functional history modifier was 3 based on his quick dash score of 61.⁷ He stated that since appellant’s functional history modifier was two degrees higher than his range of motion grade modifier, appellant’s impairment rating should be increased by 10 percent. Dr. Weiss stated that appellant’s left upper extremity impairment was seven percent.

The Office referred the medical evidence to Dr. Henry J. Magliato, the Office medical adviser, on October 20, 2009. In a report dated November 10, 2009, Dr. Magliato stated that Dr. Weiss used the stand-alone range of motion method finding six percent impairment of the

³ For new decisions issued after May 1, 2009, the Office began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁴ A.M.A., *Guides* 404, Table 15-5.

⁵ *Id.* at 475, Table 15-34.

⁶ *Id.* at 477, Table 15-35.

⁷ *Id.* at 406, Table 15-7.

upper extremity or a grade one modifier.⁸ He noted that Dr. Weiss then used the quick dash of 61 percent which was a functional history grade modifier of three.⁹ Dr. Magliato stated that the impairment rating should be increased by 10 percent.¹⁰ He found that 6 multiplied by 10 percent equaled 0.6 which should be rounded up to 1 percent and that 6 plus 1 is seven. Dr. Magliato found that appellant was entitled to seven percent impairment as it was greater than the three percent properly found by Dr. Draper.

By decision dated December 29, 2009, the Office granted appellant a schedule award for seven percent impairment of his left upper extremity. Appellant, through his attorney, requested a review of the written record and alleged that the Office failed to make a timely schedule award decision and deprived him of his due process rights. The Branch of Hearings and Review issued a decision on April 26, 2010 and found that the Office's actions in regard to appellant's schedule award were not deliberately delayed affirming the December 29, 2009 decision.

LEGAL PRECEDENT

The schedule award provision of the Act¹¹ and its implementing regulations¹² set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. The Act, 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 discretion of the Office. 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 Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.¹³

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴ The range of motion section is to be used as a stand-alone rating when other grids direct or when no other diagnosis-based sections are applicable.¹⁵

⁸ *Id.* at 477, Table 15-35.

⁹ *Id.* at 406, Table 15-7.

¹⁰ *Id.* at 477, Table 15-36.

¹¹ 5 U.S.C. §§ 8101-8193, 8107.

¹² 20 C.F.R. § 10.404.

¹³ *Supra* note 3.

¹⁴ A.M.A., *Guides* 411.

¹⁵ *Id.* at 461.

ANALYSIS

The Office accepted appellant's claim for left shoulder injury and resulting surgery. Appellant requested a schedule award and submitted an impairment rating from Dr. Weiss under the fifth edition of the A.M.A., *Guides* dated September 9, 2008. The Office referred this report to the district medical adviser who disagreed with Dr. Weiss' application of the pain provision of Chapter 18 of the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.¹⁶ The Office requested a supplemental report from Dr. Weiss on February 9 and March 16, 2009. Dr. Weiss did not respond until his March 30, 2009 report which the Office received on April 29, 2009. As the sixth edition of the A.M.A., *Guides* was applicable to all decisions issued after May 1, 2009, the Office appropriately requested that Dr. Weiss provide an impairment rating corresponding to the sixth edition of the A.M.A., *Guides*. It requested and received an impairment rating from Dr. Draper, the second opinion evaluation based on the sixth edition of the A.M.A., *Guides*.

Dr. Draper evaluated appellant's left shoulder impairment using the diagnosis-based impairment rating system and found that appellant had three percent impairment due his shoulder injury. He applied the appropriate formula and determined that appellant's adjustments for functional history, physical examination and clinical studies in the above formula did not result in more than three percent impairment. The Office medical adviser, Dr. Magliato reviewed this report and agreed with the rating.

Following Dr. Draper's report, Dr. Weiss provided an impairment rating of seven percent of the upper extremity based a stand-alone range of motion impairment. He found that appellant had three percent impairment due to loss of flexion and abduction, applied the appropriate adjustment due to functional history and reached seven percent impairment. Dr. Magliato also found that this impairment rating was appropriate under the A.M.A., *Guides* and concluded that as appellant received a greater impairment rating under this formula, it should be used to calculate appellant's permanent impairment for schedule award purposes. The Board finds that there is no medical evidence properly correlated with the sixth edition of the A.M.A., *Guides* which establishes that appellant had more than seven percent impairment of his left upper extremity.

On appeal, counsel argued that the Office deprived appellant of due process of law and property rights by failing to adjudicate his scheduled claim in a timely manner pursuant to the fifth edition of the A.M.A., *Guides*. As noted above, the Office pursued appellant's impairment

¹⁶ Federal Procedure Manual, *supra* note 3, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

rating in a timely manner, requesting a supplemental report from Dr. Weiss on two occasions prior to the May 1, 2009 change to the sixth edition.

In *Harry D. Butler*,¹⁷ 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.¹⁸ On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.¹⁹ 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 for such award was filed.

CONCLUSION

The Board finds that appellant has no more than seven percent impairment of his left upper extremity for which he has received a schedule award.

¹⁷ 43 ECAB 859 (1992).

¹⁸ *Id.* at 866.

¹⁹ FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 3, Chapter 2.808.6(a) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 2011
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