

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

S.L., Appellant

and

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

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**Docket No. 10-2133
Issued: June 13, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2010 appellant, through her representative, filed a timely appeal from the May 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed her schedule award. Pursuant to the Federal Employees' Compensation Act (FECA),¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP applied the correct edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

FACTUAL HISTORY

On February 7, 2007 appellant, a 47-year-old postal clerk, sustained a left shoulder injury in the performance of duty while keying mail and lifting tubs. OWCP accepted her claim for left shoulder sprain and left rotator cuff syndrome.

¹ 5 U.S.C. § 8101 *et seq.*

On January 5, 2009 OWCP received appellant's December 29, 2008 schedule award claim. Appellant submitted an August 6, 2008 evaluation from Dr. Arthur Becan, an orthopedic surgeon. She complained of left shoulder pain and stiffness, which waxed and waned. Appellant also noted popping of the left shoulder.² Findings on physical examination included 170 degrees of forward elevation and 160 degrees of abduction. Dr. Becan diagnosed chronic strain and sprain of the left shoulder and chronic left rotator cuff tendinopathy. He found one percent impairment of the left upper extremity due to loss of flexion and one percent impairment due to loss of abduction. Adding three percent pain-related impairment, Dr. Becan concluded that appellant had five percent total impairment of her left upper extremity under the fifth edition of the A.M.A., *Guides*.³

On May 8, 2009 OWCP asked Dr. Becan to evaluate appellant's left upper extremity impairment using the sixth edition of the A.M.A., *Guides*. On October 23, 2009 it received his undated supplemental report. Dr. Becan found that appellant had a default upper extremity impairment of three percent for class 1 shoulder tendinitis with residual loss. He assigned a grade modifier of one (mild problem) for functional history,⁴ physical examination⁵ and clinical studies.⁶ Because the diagnosis was also class 1, the grade modifiers did not affect the default impairment value, which remained three percent.

On February 2, 2010 OWCP issued a schedule award for a three percent impairment of appellant's left upper extremity. On May 13, 2010 OWCP's hearing representative affirmed.

On appeal, counsel contends that OWCP's delay in adjudicating the claim deprived appellant of a protected interest in property without due process of law. He reasoned that had the delay not occurred, appellant would have been provided a decision under the fifth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

Section 8107 of FECA⁷ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the

² Appellant also complained of right elbow pain, stiffness, numbness, tingling and swelling. OWCP File No. xxxxxx258.

³ A.M.A., *Guides* (5th ed. 2001).

⁴ A.M.A., *Guides* 406 (6th ed. 2009) (Table 15-7).

⁵ *Id.* at 408 (Table 15-8).

⁶ *Id.* at 410 (Table 15-9).

⁷ 5 U.S.C. § 8107.

standards set forth in the specified edition of the A.M.A., *Guides*.⁸ As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition.⁹

ANALYSIS

Appellant's representative does not contest the percentage impairment awarded on February 2, 2010. He contests OWCP's delay in issuing a decision and the resulting application of the sixth edition of the A.M.A. *Guides*. OWCP procedures are clear: As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition. OWCP correctly followed its procedures.

Appellant's representative contends OWCP deprived appellant of an interest in property, and he cites United States Supreme Court cases for the proposition that an individual's entitlement to benefits cannot be terminated without a predeprivation notice and hearing. The cases cited are facially inapplicable.

The mere receipt of an impairment rating on August 6, 2008 did not establish a property right. In fact, the rating was of diminished probative value.¹⁰ In the cases cited, the individuals were already in receipt of federal welfare assistance or social security benefits and therefore had a statutorily created property interest in the continued receipt of such benefits. Appellant was not in receipt of any schedule award benefits prior to May 1, 2009.

In *Harry D. Butler*,¹¹ 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.¹² On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office

⁸ 20 C.F.R. § 10.404.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

¹⁰ Shoulder flexion of 170 degrees is a one percent impairment of the upper extremity under the fifth edition. A.M.A., *Guides* 476 (5th ed. 2001) (Figure 16-40). Abduction to 160 degrees is also one percent impairment. A.M.A., *Guides* 477 (5th ed. 2001) (Figure 16-43). Dr. Becan did not justify an additional three percent pain-related impairment. In the fifth edition of the A.M.A., *Guides*, the impairment ratings in the body organ system chapters make allowance for any accompanying pain. A.M.A., *Guides* 20 (5th ed. 2001). The chapter devoted to pain-related impairment should not be redundant of or inconsistent with principles of impairment rating described in other chapters. If an examining physician determines that an individual has pain-related impairment, he will have the additional task of deciding whether that impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the A.M.A., *Guides*. A.M.A., *Guides* 570 (5th ed. 2001). Dr. Becan's failure to offer rationale for a pain-related impairment diminished the probative value of his impairment rating.

¹¹ 43 ECAB 859 (1992).

¹² *Id.* at 866.

should reflect use of the sixth edition of the A.M.A., *Guides*.¹³ 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.¹⁴

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.

CONCLUSION

The Board finds that OWCP applied the correct edition of the A.M.A. *Guides*.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2011
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

¹⁴ A class 1 shoulder tendinitis with residual loss has a default impairment value of three percent. A.M.A., *Guides* 402 (6th ed. 2009) (Table 15-4).