

United States Department of Labor  
Employees' Compensation Appeals Board

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H.M., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Cherry Hill, NJ, Employer )

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Docket No. 10-2205  
Issued: June 6, 2011

*Appearances:*

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 30, 2010 appellant, through his attorney, timely appealed the June 1, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed a prior schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> 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 appellant has greater than 10 percent impairment of the right upper extremity.

**FACTUAL HISTORY**

Appellant, then a 59-year-old letter carrier, has an accepted traumatic injury claim for right acute carpal tunnel syndrome and right closed fracture lower end of radius with ulna. His right wrist injury occurred on December 11, 2007 when he tripped over a raised sidewalk and

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

fell into his work vehicle. On December 17, 2007 appellant underwent a right carpal tunnel release and open reduction and internal fixation of right distal radius fracture. He received appropriate wage-loss compensation and returned to work in a limited-duty capacity on February 11, 2008. Appellant resumed his full time, regular duties effective March 4, 2008.

On November 20, 2008 the Office received an August 28, 2008 impairment rating from Dr. Nicholas Diamond, a pain management specialist.<sup>2</sup> Applying the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001), Dr. Diamond indicated that appellant had 22 percent impairment of the right upper extremity. He found a combination of impairments for loss of motion in the right wrist 8 percent, lateral pinch deficit 10 percent and median nerve sensory deficits 7 percent. Dr. Diamond indicated that appellant reached maximum medical improvement on August 28, 2008.

On November 21, 2008 appellant's surgeon, Dr. Bruce A. Monaghan, reviewed Dr. Diamond's report and noted his agreement with the 22 percent right upper extremity impairment rating based on the fifth edition of the A.M.A., *Guides*. This latter report was received on January 16, 2009.

On August 10, 2009 the Office received another impairment rating from Dr. Diamond, also dated August 28, 2008. This rating was based on the sixth edition of the A.M.A., *Guides* (2008), which it adopted effective May 1, 2009. In this latter report, Dr. Diamond found 10 percent impairment of the right upper extremity due to loss of motion in the wrist.

On August 31, 2009 the district medical adviser (DMA) reviewed the record, including Dr. Diamond's reports, and concurred with the finding of 10 percent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides* (2008).

By decision dated January 12, 2010, the Office granted a schedule award for 10 percent impairment of the right upper extremity. The award covered a period of 31.2 weeks, from August 28, 2008 through April 3, 2009.

Appellant's counsel requested a review of the written record. In a decision dated June 1, 2010, the Branch of Hearings and Review affirmed the January 12, 2010 schedule award.

### **LEGAL PRECEDENT**

Section 8107 of the Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>3</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The

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<sup>2</sup> Appellant's counsel submitted the report under cover letter dated November 17, 2008. He advised that he was in the process of submitting a claim for a schedule award (Form CA-7) through the employing establishment. Counsel purportedly submitted the Form CA-7 to the employing establishment on December 16, 2008; however, the completed claim form is not part of the current record.

<sup>3</sup> For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>4</sup> Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6<sup>th</sup> ed. 2008).<sup>5</sup>

### ANALYSIS

The Office based the January 12, 2010 schedule award on the 10 percent impairment rating Dr. Diamond calculated under the sixth edition of the A.M.A., *Guides* (2008). The DMA concurred with Dr. Diamond's 10 percent rating. Counsel did not specifically challenge the validity of the most recent impairment rating he submitted on behalf of his client, but instead argued that appellant should have received a schedule award for 22 percent impairment under the fifth edition of the A.M.A., *Guides* (2001) as Dr. Diamond had originally calculated.

Counsel first submitted evidence in support of the schedule award claim under cover letter dated November 17, 2008. He then forwarded a Form CA-7 to the employing establishment on December 16, 2008, and later submitted a brief note from appellant's surgeon on January 12, 2009. The Office implemented the sixth edition of the A.M.A., *Guides* on May 1, 2009. Because a schedule award was not issued prior to that date, Dr. Diamond prepared a new impairment rating under the sixth edition of the A.M.A., *Guides*.

In *Harry D. Butler*,<sup>6</sup> 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.<sup>7</sup> 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*.<sup>8</sup> The applicable date of the sixth edition of the A.M.A., *Guides* 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.

Counsel argued that the Office's delay in issuing a decision constituted a denial of due process. He asserted that appellant has a property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and that a protected property interest cannot be deprived without due process. In support of this contention, counsel cited *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). However, these cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance, and in *Mathews* Social

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<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

<sup>6</sup> 43 ECAB 859 (1992).

<sup>7</sup> *Id.* at 866.

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

Security benefits) could not have those benefits terminated without procedural due process. In this case, appellant is simply making a claim for a schedule award. He is not in receipt of schedule award benefits nor is the Office attempting to terminate any benefits. Appellant has not established a vested right to a schedule award decision under the fifth edition of the A.M.A., *Guides* nor has he identified any due process rights that were purportedly infringed upon. The cases cited by counsel are not applicable to the present circumstances.

As noted, both Dr. Diamond and the DMA agreed that appellant had 10 percent impairment of the right upper extremity due to loss of wrist motion. Applying Table 15-32, A.M.A., *Guides* 473, both found that appellant's loss of wrist motion properly represented a 10 percent impairment of the right upper extremity.<sup>9</sup> The Board finds that these two reports conform to the A.M.A., *Guides* (6<sup>th</sup> ed. 2008), and thus, represent the weight of the medical evidence regarding the extent of appellant's right upper extremity impairment. Appellant has not submitted any credible medical evidence indicating he has greater than 10 percent impairment of the right upper extremity.

### **CONCLUSION**

Appellant failed to establish that he has greater than 10 percent impairment of the right upper extremity.

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<sup>9</sup> Dr. Diamond's August 28, 2008 physical examination revealed right wrist dorsiflexion of 0-50/75 degrees, palmar flexion of 0-50/75 degrees, radial deviation of 0-10/20 degrees and ulnar deviation of 0-20/35 degrees. Under Table 15-32, these measurements represented corresponding impairments of 3 percent, 3 percent, 2 percent and 2 percent, for a total loss of wrist motion impairment of 10 percent.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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