

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

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**E.P., Appellant**

**and**

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

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**Docket No. 10-2398  
Issued: June 20, 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 September 27, 2010 appellant timely appealed the June 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), 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 one percent impairment of the right upper extremity.

**FACTUAL HISTORY**

Appellant, then a 39-year-old letter carrier, has an accepted traumatic injury claim for right shoulder contusion, which arose on January 18, 1997 when he slipped and fell on ice. He did not lose anytime from work due to his right shoulder injury, therefore, his claim was

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

administratively closed and the case record destroyed due to inactivity. On January 23, 2009 appellant filed a claim for a schedule award. On February 25, 2009 OWCP initiated efforts to reconstruct the case record.

On April 22, 2009 OWCP received a May 30, 2006 impairment rating from Dr. David Weiss, a Board-certified orthopedic surgeon. Applying the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001), Dr. Weiss found five percent impairment of the right upper extremity due to loss of shoulder motion (two percent) and pain (three percent).<sup>2</sup>

OWCP subsequently referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon. In a report dated October 23, 2009, Dr. Hanley found one percent impairment of the right upper extremity based on the sixth edition of the A.M.A., *Guides* (2008), which OWCP adopted effective May 1, 2009.<sup>3</sup>

On January 24, 2010 the district medical adviser (DMA) reviewed the record, including Dr. Hanley's report, and concurred with the finding of one percent impairment of the right upper extremity.

By decision dated February 22, 2010, the Office granted a schedule award for one percent impairment of the right upper extremity. The award covered a period 312 weeks, from October 23 to November 13, 2009.

Appellant's counsel requested a review of the written record. In a decision dated June 10, 2010, the Branch of Hearings & Review affirmed the February 22, 2010 schedule award.

### **LEGAL PRECEDENT**

Section 8107 of FECA 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>4</sup> FECA, 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 implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>5</sup> Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6<sup>th</sup> ed. 2008).<sup>6</sup>

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<sup>2</sup> Dr. Weiss also rated appellant's right lower extremity.

<sup>3</sup> The rating was based on appellant's right shoulder contusion. Dr. Hanley cited Table 15-5 (Shoulder Regional Grid), A.M.A., *Guides* 401 (6<sup>th</sup> ed. 2008).

<sup>4</sup> For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

## ANALYSIS

OWCP based the February 22, 2010 schedule award on the one percent impairment rating Dr. Hanley calculated under the sixth edition of the A.M.A., *Guides*. The DMA concurred with Dr. Hanley's one percent rating. Appellant's counsel did not specifically challenge the validity of Dr. Hanley's examination and findings, but instead argued that appellant should have received a schedule award for five percent impairment under the fifth edition of the A.M.A., *Guides* as Dr. Weiss calculated in May 2006.

Counsel claimed he initially submitted Dr. Weiss' impairment rating in July 2006 and that OWCP unreasonably delayed issuing a decision regarding appellant's entitlement to a schedule award. As previously noted, the instant claim was administratively closed and the record destroyed due to inactivity. There is no evidence to substantiate counsel's assertion that he previously submitted Dr. Weiss' May 30, 2006 report in support of a schedule award under the current claim.<sup>7</sup> There is also no evidence that appellant previously filed for a schedule award with respect to the current claim. The record indicates that OWCP received Dr. Weiss' May 30, 2006 report on April 22, 2009.

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 Security benefits) could not have those benefits terminated without procedural due process.

In *Harry D. Butler*,<sup>8</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>9</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>10</sup> 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.

As noted, both Dr. Hanley and the DMA agreed that appellant had one percent impairment of the right upper extremity due to a shoulder contusion. Applying Table 15-5,

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<sup>7</sup> Appellant has at least three other claims for employment-related hernias, which Dr. Weiss referenced in his May 30, 2006 report.

<sup>8</sup> 43 ECAB 859 (1992).

<sup>9</sup> *Id.* at 866.

<sup>10</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 Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

A.M.A., *Guides* 401, both found that appellant's right shoulder contusion represented a class 1 impairment with a range of one to three percent impairment of the upper extremity. After appropriate adjustment for Functional History, Physical Examination and Clinical Studies, Dr. Hanley and the DMA concurred that appellant had one percent impairment of the right upper extremity.<sup>11</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 one percent impairment of the right upper extremity.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 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

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<sup>11</sup> See Table 15-6, A.M.A., *Guides* 406 (6<sup>th</sup> ed. 2008).