United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 10-1918**
	)	**Issued: May 16, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer	)	

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
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 19, 2010 appellant, through her attorney, filed a timely appeal of a March 29, 2010 Office of Workers' Compensation Programs' merit decision granting a schedule award. Pursuant to the Federal Employees' Compensation Act[1] 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 six percent impairment of her right upper extremity for which she has received a schedule award.

On appeal, counsel asserts that the Office failed to timely adjudicate appellant's claim under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*) and that appellant was entitled to a hearing on this issue.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 13, 2006 appellant, then a 47-year-old mail handler, filed a traumatic injury claim alleging that she injured her right elbow on February 23, 2006 pushing a full cage of mail in the performance of duty. By decision dated May 7, 2007, the Office accepted the claim for right elbow epicondylitis. It authorized medial epicondylar release on October 24, 2007. Dr. Frederic Liss, a Board-certified orthopedic surgeon, performed a medial epicondylar release and partial osteoctomy of the right elbow on January 30, 2008.

In a letter dated April 8, 2009, counsel requested a schedule award on appellant's behalf. On April 13, 2009 the Office received a report from Dr. Nicholas P. Diamond, an osteopath, dated February 19, 2009. Dr. Diamond reviewed appellant's medical history and provided findings on medical examination including tenderness of the acromioclavicular joint with anterior and rotator cuff tenderness and rhomboid tenderness. He found crepitance of circumduction and listed shoulder range of motion as 170 degrees of forward elevation, 160 degrees of abduction and internal rotation of 80 degrees. Dr. Diamond found manual muscle strength testing of 4+/5 in regarding to the supraspinatus and deltoids. He reported full range of motion of the elbow and no perceived dermatomal abnormalities. Dr. Diamond reported decreased grip and pinch strength testing on the right. He diagnosed cervical and thoracic strain and sprain with C3-4 disc bulging, right elbow medial epicondylitis and release, right shoulder strain and sprain and left ankle strain and sprain with talar contusion. Dr. Diamond reported appellant's impairment rating in terms of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] and concluded that she had 22 percent impairment of the right upper extremity and reach maximum medical improvement on February 19, 2009.

On May 21, 2009 the Office requested that appellant provide an impairment rating in accordance with the newly applicable sixth edition of the A.M.A., *Guides*.[3] Counsel protested this request as he had submitted a report under the fifth edition prior to May 1, 2009 and stated that the schedule award claim was pending for sometime.

[2] A.M.A., *Guides* (5th ed. 2001).

[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); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

On October 13, 2009 appellant submitted a revision of Dr. Diamond's report based on the sixth edition of the A.M.A., *Guides*. Dr. Diamond found:

> "Class 1 right shoulder strain and sprain = one percent[4]
> Grade Modifier Functional History (GMFH) (difficulty self-care) = 2[5]
> Grade Modifier Physical Examination (GMPE) (observed and palpatory) = 2[6]
> Grade Modifier Clinical Studies (GMCS) = 0
> GMFH - class for the diagnosed condition (CDX) (2 - 1) = 1
> GMPE - CDX (2 - 1) = 1
> GMCS - CDX (0 - 1) = -1
> net adjustment 1
> Right upper extremity impairment after net adjustment = two percent
> Class 1 right elbow medial epicondylitis status post surgical release = five percent[7]
> GMFH = 2
> GMPE = 2
> GMCS = 0
> GMFH - CDX (2 - 1) = 1
> GMPE - CDX (2 - 1) = 1
> GMCS - CDX (0 - 1) = -1
> net adjustment 1
> Right upper extremity impairment after net adjustment = six percent."

The Office prepared a statement of accepted facts listing appellant's accepted conditions as cervical strain, thoracic strain, left ankle strain and right upper shoulder strain. It referred the record to the Office medical adviser, Dr. Arnold T. Berman, on December 4, 2009 and noted appellant's accepted shoulder strain under a separate claim.[8] Dr. Berman reviewed Dr. Diamond's report on December 4, 2009 and stated that the only accepted condition was epicondylitis of the right elbow. He discounted Dr. Diamond's finding of two percent impairment of the right shoulder stating that this condition was not accepted. Dr. Berman found:

> "Therefore, utilizing page 399, Table 15-4: Elbow Regional Grid, Upper Extremity Impairment, epicondylitis lateral or medial, status post surgical release of flexor or extensor origin with residual symptoms Class 1, Grade C default value five percent impairment.
>
> "Utilizing an adjustment grid and grade modifier nonkey factors, page 406, Table 15-7: Functional History Adjustment, Upper Extremities, grade modifier 2, pain

[4] A.M.A., *Guides* 407, Table 15-5.

[5] *Id.* at 406, Table 15-7.

[6] *Id.* at 408, Table 15-8.

[7] *Id.* at 399, Table 15-4.

[8] The Office accepted that appellant sustained this injury on May 23, 2003.

and symptoms with normal activity according to Dr. Diamonds report, page 408. Table 15-8: Physical Examination Adjustment, Upper Extremities, class 2.

"Based upon Dr. Diamond's evaluation indicating grade modifier 2, moderate problem with moderate palpatory findings, page 410, Table 15-9: Clinical Studies Adjustment, Upper Extremities, grade modifier 0 for a net adjustment of plus 1 utilizing page 411 net adjustment formula.

"Therefore, applying the net adjustment formula to Table 15-4, page 399, epicondylitis, class 1, grade C I, increased by plus I to grade 0 equivalent to six percent impairment."

By decision dated January 5, 2010, the Office granted appellant a schedule award for six percent impairment of her right upper extremity.

Counsel requested a review of the written record on January 11, 2010. He contended that the Office failed to make a timely schedule award determination under the fifth edition of the A.M.A., *Guides* and deprived appellant of her due process rights and benefits under the Act.

By decision dated March 29, 2010, an Office hearing representative reviewed the written record and affirmed the Office's January 5, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of the Act[9] and its implementing regulations[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of 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*.[11]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[12] Under the sixth edition, the evaluator identifies the impairment class for the

[9] 5 U.S.C. §§ 8101-8193, 8107.

[10] 20 C.F.R. § 10.404.

[11] *Supra* note 3

[12] A.M.A., *Guides* (6th ed. 2009), page 3 section 1.3, *The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.*

CDX, which is then adjusted by GMFH, GMPE and GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

It is well established that, in determining entitlement to a schedule award, preexisting impairments to the scheduled member are to be included.[14] Office procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss, except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.[15]

The sixth edition of the A.M.A., *Guides* provides that in most cases only one diagnosis in each limb involved with be appropriate.[16] The A.M.A., *Guides* state, "If a patient has two significant diagnoses, for instance, rotator cuff tear and biceps tendinitis, the examiner should use the diagnosis with the highest causally related impairment rating for the impairment calculation." The A.M.A., *Guides* further provide:

> "If there are multiple diagnoses within a specific region, then the most impairing diagnosis is rated because it is probable this will incorporate the functional losses of the less impairing diagnoses. In rare cases, the examiner may combine multiple impairments within a single region if the most impairment diagnosis does not adequately reflect the losses."[17]

ANALYSIS

The Office accepted appellant's claim for right elbow epicondylitis due to a February 2006 employment injury as well as the resulting medial epicondylar release and partial osteoctomy of the right elbow. The record also establishes that the Office accepted in 2003 that appellant sustained a right shoulder strain due to employment activity.

Both Dr. Diamond and Dr. Berman found that appellant had six percent impairment of her right upper extremity due to the conditions accepted in this claim of right epicondylitis and resulting surgery. The physicians provided detailed citations to the appropriate edition of the A.M.A., *Guides* and reached consistent impairment ratings. There is no medical evidence comporting with the sixth edition of the A.M.A., *Guides* supporting more than six percent impairment of the upper extremity due to this condition.

Dr. Diamond, however, also provided an impairment rating for appellant's accepted right shoulder condition. Dr. Berman did not address this condition stating that a right shoulder

[13] A.M.A., *Guides* pp. 494-531.

[14] *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983); *H.P.*, Docket No. 10-962 (issued November 10, 2010).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.a(2) (November 1998).

[16] A.M.A., *Guides* 387 15.2 Diagnosis-Based Impairment.

[17] *Id*. at 419 15.3f Combining and Converting Impairments.

condition was not accepted under the current claim. As noted, appellant's right shoulder strain is a preexisting injury and under the Office's procedures should be included to the extent appropriate under the A.M.A., *Guides,* if she has not previously received a schedule award for this condition. The Board will remand the case for the Office to combine her right shoulder claim with the current claim for right epicondylitis and determine whether she previously received a schedule award for this condition. If not, it should adjudicate the issue of right shoulder impairment in accordance with the sixth edition of the A.M.A., *Guides*.

On appeal, counsel contends that appellant's schedule award claim should have been adjudicated under the fifth edition of the A.M.A., *Guides* and that she was entitled to a hearing on this issue.

In *Harry D. Butler*,[18] 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.[19] On March 15, 2009 the Director exercised authority to advise 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*.[20] 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 this case is not in posture for decision.

[18] 43 ECAB 859 (1992).

[19] *Id*. at 866.

[20] FECA Bulletin No. 09-03 (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).

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further development consistent with this decision of the Board.

Issued: May 16, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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