

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

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**B.M., Appellant**

**and**

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

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**Docket No. 13-691  
Issued: September 12, 2013**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 5, 2013 appellant, through his attorney, filed a timely appeal from a September 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the decision.

**ISSUE**

The issue is whether appellant has greater than two percent right upper extremity permanent impairment.

On appeal appellant's attorney asserts that the opinion of an OWCP referral physician is insufficient because he did not provide range of motion measurements and, at the very least, a conflict in medical evidence has been created between the opinions of the attending physician and OWCP's medical adviser.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On February 8, 2003 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim, alleging that he injured his left shoulder and right elbow when he slipped on ice while delivering mail that day. The claim was accepted for left shoulder rotator cuff tear, right shoulder bursitis and laceration of the right elbow. On March 17, 2003 appellant underwent rotator cuff repair on the left, and on May 16, 2003 right elbow surgery for excision of an olecranon bursa and osteophyte. He returned to limited duty for eight hours a day on June 16, 2003.

On October 20, 2004 appellant, through his attorney, requested a schedule award, and submitted a July 12, 2004 report from Dr. David Weiss, an osteopath, who advised that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>2</sup> appellant had 15 percent impairment of the left upper extremity. In a decision dated January 24, 2005, appellant was granted a schedule award for 15 percent loss of use of the left arm. In a March 22, 2005 report, Dr. Weiss advised that appellant had three percent impairment of the right upper extremity due to pain. Appellant retired in May 2005.

In a September 26, 2007 report, Dr. Morley Slutsky, an OWCP medical adviser, Board-certified in occupational medicine, advised that appellant had no ratable impairment of the right upper extremity.

OWCP referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In an October 18, 2008 report, Dr. Stark advised that appellant had two percent impairment of the right elbow. In a November 7, 2007 report, Dr. Arnold T. Berman, an OWCP medical adviser, Board-certified in orthopedic surgery, advised that appellant had a three percent impairment of the right arm, due to pain.

OWCP found that a conflict in medical evidence had been created between Dr. Weiss and Dr. Stark regarding the degree of appellant's right upper extremity impairment, and referred him to Dr. Samuel Epstein, a Board-certified osteopath specializing in orthopedic surgery, for an impartial evaluation. In an August 8, 2008 report, Dr. Epstein advised that appellant had two percent pain-related impairment of the right arm.<sup>3</sup> In a September 21, 2008 report, Dr. Andrew A. Merola, an OWCP medical adviser and Board-certified orthopedist, agreed with Dr. Epstein's assessment that appellant had a mild pain impairment which yielded a two percent rating of the right upper extremity.

On May 17, 2010 appellant was granted a schedule award for two percent impairment of the right upper extremity. In a February 9, 2011 decision, an OWCP hearing representative

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<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 1999).

<sup>3</sup> Dr. Epstein also noted that the statement of accepted facts indicated that appellant had a magnetic resonance imaging (MRI) scan of the right shoulder on April 17, 2003 but that a review of the report indicated that the study was done on a J.A., and not on appellant.

remanded the case to OWCP for determination of appellant's right upper extremity impairment under the sixth edition of the A.M.A., *Guides*.<sup>4</sup>

OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second-opinion impairment evaluation for appellant's right arm pursuant to the sixth edition of the A.M.A., *Guides*. In a May 6, 2011 report, Dr. Askin noted his review of the medical record and the statement of accepted facts. He advised that the physical examination demonstrated full motion of both elbows, forearms, wrists, fingers, thumbs and shoulders with crepitus noted on shoulder motion bilaterally. In response to specific OWCP questions, Dr. Askin indicated that, with a reasonable degree of medical certainty, appellant reached maximum medical improvement two months after the May 16, 2003 surgery. He advised that appellant had no evidence of any restriction of motion, and that his objective findings were those of a gentleman currently in the seventh decade of life with documentation of osteoarthritis at multiple joints, which may or may not have anything to do with his diagnosed gout condition, respecting the fact that he not only had complaints regarding his upper extremities but also had total knee replacement and reported having problems with metatarsophalangeal joints of his feet. Dr. Askin stated that the only thing that was potentially pertinent was that appellant had some crepitation on motion of his shoulder joints, which he indicated was a manifestation of an age-related degenerative condition. He continued that appellant could have bilateral carpal tunnel syndrome, but this was not related to the described employment injury and was not an accepted condition. Dr. Askin concluded that, at the time of his examination, appellant had no impairment secondary to the reported work injury, and that any physical changes were consistent with a person who had age-related osteoarthritis of multiple joints.

On June 6, 2011 Dr. Merola, an OWCP medical adviser, reviewed the medical record including Dr. Askin's report, and agreed with his conclusion that there were no objective findings to indicate that appellant had a ratable impairment of the right upper extremity.

By decision dated July 28, 2011, OWCP found that appellant was not entitled to an additional right upper extremity schedule award. Appellant's attorney requested a hearing, and resubmitted Dr. Weiss' July 12, 2004 report, which the physician updated on April 22, 2010 to comply with the sixth edition of the A.M.A., *Guides*.<sup>5</sup> Dr. Weiss did not reexamine appellant. He advised that appellant had 12 percent impairment of the left arm. Regarding the right arm, Dr. Weiss advised that, under Table 15-5, Elbow Regional Grid, appellant had a class 1 impairment due to degenerative joint disease of the right elbow. He found a functional history and clinical studies modifiers of two and a physical examination modifier of one. After applying the net adjustment formula, Dr. Weiss concluded that appellant had nine percent impairment of the right upper extremity, with a date of maximum medical improvement of July 12, 2004.

Appellant was not present at the hearing held on November 16, 2011. His attorney asserted that Dr. Askin's report was insufficient because he did not provide range-of-motion measurements and did not apply the sixth edition of the A.M.A., *Guides*. Counsel asserted that a

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

<sup>5</sup> Dr. Weiss also provided an impairment rating for appellant's right knee, not at issue in the present case.

conflict in medical evidence had been created between the opinions of Dr. Askin and the April 22, 2010 report of Dr. Weiss.

In the January 18, 2012 decision, OWCP's hearing representative remanded the case to OWCP to determine if the employment injury caused appellant to develop right elbow arthritis and to obtain a supplementary report from Dr. Askin regarding appellant's right arm impairment.

In a February 16, 2012 report, Dr. Henry J. Magliato, an OWCP medical adviser Board-certified in orthopedic surgery, noted the history of injury and his review of the medical record. He advised that temporary aggravation of underlying gouty arthritis of the elbow should be accepted, and the May 16, 2003 surgery should be authorized.

OWCP updated the statement of accepted facts to indicate that appellant had preexisting degenerative changes of the right elbow and a preexisting large osteophyte of the right elbow, and accepted that there was a temporary aggravation of the underlying gouty arthritis that had now resolved. In correspondence dated February 28, 2012, it asked Dr. Askin to provide a clear explanation as to whether appellant had a permanent impairment of the right upper extremity as a result of the work injury and how he arrived at his conclusion. In a March 1, 2012 report, Dr. Askin indicated that he followed the description found in section 15.7f, Figure 15-26 and Figure 15-27, and Table 15-33 of the A.M.A., *Guides*. He advised that he had carefully considered all of the information provided, with reference to the A.M.A., *Guides*, and again concluded that, within a reasonable degree of medical certainty, appellant did not have a measurable or definable impairment at the present time concerning his reported right elbow injury.

On March 27, 2012 Dr. Magliato, OWCP's medical adviser, again reviewed the record and Dr. Askin's March 1, 2012 report. He indicated that maximum medical improvement was reached on May 6, 2011, the date of Dr. Askin's examination, and agreed that appellant had no ratable impairment of the right upper extremity at the present time.

By decision dated May 10, 2012, OWCP denied appellant's claim that he was entitled to an additional schedule award for right upper extremity impairment. On May 13, 2012 counsel requested a hearing that was held on August 13, 2012. Appellant was not present at the hearing. Counsel argued that appellant had nine percent right arm impairment, based on Dr. Weiss' opinion. He asserted that appellant's preexisting arthritis should be considered, and that there was no evidence that Dr. Askin properly measured appellant's elbow range of motion. Counsel asserted that a conflict in medical evidence had been created, and the case should be referred for an impartial evaluation regarding appellant's right upper extremity impairment.

In a September 26, 2012 decision, an OWCP hearing representative affirmed the May 10, 2012 decision. He noted that, although preexisting impairments are to be included in calculating the percentage of schedule loss, when a claimant does not demonstrate any permanent impairment caused by the accepted employment injury, the claim is not ripe for consideration of preexisting impairment. The hearing representative further discussed the arguments raised regarding range-of-motion measurements, noting that Drs. Weiss, Stark and Epstein also found no loss of motion of the right elbow, and found that Dr. Askin complied with the A.M.A., *Guides*. The hearing representative concluded that the medical adviser, Dr. Magliato, properly

reviewed Dr. Askin's report and concluded that appellant had no impairment of the right arm, and thus did not have a right arm impairment greater than the two percent previously awarded.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>6</sup> and its implementing federal regulations,<sup>7</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>8</sup> For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>9</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>10</sup>

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).<sup>11</sup> Under the sixth edition, for upper extremity impairments the evaluator identifies 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).<sup>12</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>13</sup> The sixth edition of the A.M.A., *Guides* also provides that, under certain circumstances, range of motion may be selected as an alternative approach in rating impairment. An impairment rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.<sup>14</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>10</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>11</sup> A.M.A., *Guides*, *supra* note 4 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

<sup>12</sup> *Id.* at 385-419.

<sup>13</sup> *Id.* at 411.

<sup>14</sup> *Id.* at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>15</sup>

### ANALYSIS

The Board finds that the weight of the medical evidence establishes that appellant has no more than two percent impairment of his right upper extremity, for which he received a schedule award. The Board finds Dr. Weiss' April 22, 2010 report is of diminished probative value because it was based on a physical examination dated July 12, 2004 and not on current physical examination findings. The July 12, 2004 physical examination findings constitute stale medical evidence and cannot create a conflict with Dr. Askin, whose physical examination findings are more recent by almost seven years.<sup>16</sup>

Regarding appellant's argument that Dr. Askin, the referral physician, did not provide specific elbow range-of-motion measurements, in his May 6, 2011 report, he indicated that appellant had full motion of both elbows. He further explained in his March 1, 2012 report that he had followed section 15.7f and procedures in Figure 15-26 and Figure 15-27, along with Table 15-33, in concluding that appellant had normal elbow range of motion.

Section 15.7f of the A.M.A., *Guides* refers to an impairment evaluation of forearm/elbow motion.<sup>17</sup> Figure 15-26 and Figure 15-27 describe flexion and extension of elbow and pronation and supination of forearm.<sup>18</sup> Table 15-33 provides guidance for assessing impairments due to elbow/forearm range of motion.<sup>19</sup>

The Board finds that Dr. Askin's opinion that appellant had no ratable impairment at the time of his examination is sufficiently well rationalized and constitutes the weight of medical opinion in regard to appellant's right upper extremity impairment. Dr. Magliato, an OWCP medical adviser, agreed with Dr. Askin's conclusion that appellant had no ratable right upper extremity impairment.

While OWCP accepted that appellant sustained temporary aggravation of gouty arthritis that had resolved in February 2012, there is no probative medical evidence to establish that this condition caused a permanent impairment. With regard to preexisting degenerative changes of the right elbow, while preexisting impairments are to be included in calculating impairment, when a claimant does not demonstrate any permanent impairment caused by the accepted employment injury, the claim is not ripe for consideration of a preexisting impairment.<sup>20</sup>

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<sup>15</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

<sup>16</sup> See *W.M.*, Docket No. 12-773 (issued March 29, 2013).

<sup>17</sup> A.M.A., *Guides*, *supra* note 4 at 471.

<sup>18</sup> *Id.* at 474-75.

<sup>19</sup> *Id.* at 474.

<sup>20</sup> *Thomas P. Lavin*, 57 ECAB 353 (2006).

Dr. Askin advised that at the time of his examination in May 2011 that appellant had no impairment secondary to the employment injury.

Appellant therefore did not establish that he is entitled to an additional right upper extremity schedule award. Accordingly, the Board will affirm OWCP's September 26, 2012 decision.

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 appellant has no more than a two percent impairment of the right upper extremity for which he received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board