U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH J. SCHMIDT and DEPARTMENT OF DEFENSE, PERSONNEL & TRAINING DIVISION, MAXWELL AIR FORCE BASE, AL

Docket No. 02-1264; Submitted on the Record;
Issued December 12, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has greater than a seven percent permanent impairment of his left upper extremity, for which he has received a schedule award.

The Office of Workers' Compensation Programs accepted that on April 6, 1996 appellant, then a 46-year-old commissary meat cutter, was carrying 60 to 70 pounds of meat down a ladder when a rung broke and he fell, sustaining a cervical strain and a left rotator cuff tear for which he underwent arthroscopic surgery on July 30, 1998. He was referred for vocational rehabilitation and after appropriate rehabilitative intervention, accepted a light-duty job as a meat cutter. Thereafter, appellant returned to work, but on November 28, 1999 he sustained a right knee strain with a right knee meniscal tear when he fell over a pallet. He underwent meniscal repair surgery on April 5, 2000.

On March 28, 2000 appellant, through his representative, filed a claim for a schedule award for left shoulder permanent impairment. In support, he submitted a March 22, 2000 report from Dr. Edward L. Eyerman, a Board-certified neurologist and his attending physician, which provided measurements of degrees of range of motion, noted that the left shoulder was partly ankylosed but omitted which motion was affected, noted that the date of maximum medical improvement was not determined and recommended an impairment rating of 100 percent of the left upper extremity.

The Office referred Dr. Eyerman's report and the medical record to an Office medical examiner, Dr. David H. Garelick, an orthopedic surgeon, for determination in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* of appellant left upper extremity permanent impairment.

Dr. Garelick determined that Dr. Eyerman's report was insufficient upon which to base his opinion as it did not determine a date of maximum medical improvement and was not

presented with reference to the A.M.A., *Guides*[1] and he referred to other medical reports previously submitted to the case record.

By report dated November 17, 1998, Dr. Michael C. Chabot, a Board-certified osteopathic orthopedic surgeon to whom the Office referred appellant for a second opinion, reviewed appellant's factual and medical history, noted his present complaints and reported in detail the results of his physical examination, including measurement of appellant's cervical and bilateral upper extremity ranges of motion, measurements of thoracic and lumbar spine ranges of motion, muscle strength, reflex and sensation testing results. Dr. Chabot reviewed appellant's radiographic findings, diagnosed multiple conditions including left shoulder strain with partial tear of the infraspinatus tendon and status post left shoulder arthroscopic acromioplasty and distal clavicle resection and he opined that, although appellant continued to complain of left shoulder pain and restriction in range of motion when he should have, following the minimally invasion surgical procedure, regained full range of motion, strength and endurance, since a complete tear of the rotator cuff was never found, the majority of appellant's persisting left shoulder symptoms were not founded on objective organic pathology. Dr. Chabot opined that appellant had left shoulder residuals but with evidence of symptom magnification and he recommended that appellant could work eight hours per day sitting and walking, four hours per day standing, but with lifting and reaching restrictions with his left arm. Thereafter, the Office determined that there was a conflict in medical evidence between Dr. Chabot and appellant's treating physicians on his current medical status and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, for an impartial medical examination.

By report dated January 20, 1999, Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon, reviewed appellant's factual and medical history, reported his findings upon physical examination including left shoulder range of motion measurements and reflex testing results and noted appellant's complaints of pain on resisted abduction against Dr. Mirkin's hand. He reviewed radiologic testing results and opined that some of appellant's multiple subjective symptoms were out of proportion to his objective findings. Dr. Mirkin opined that appellant had reached maximum medical improvement at that time and that he did have residual left shoulder complaints.

Appellant returned to work again as a limited-duty meat cutter on June 20, 2000 and worked until August 14, 2000 when he ceased work and claimed recurrence of total disability commencing August 15, 2000.[2]

By report dated September 18, 2000, the Office medical adviser, Dr. Garelick, reviewed appellant's complete medical record, particularly the two above-noted reports from Drs. Chabot

[1] Dr. Eyerman, appellant's attending physician, provided measurements of retained degrees of motion but no analysis, a comment about ankylosis but without specification of which motion was affected, an impairment rating due to pain and weakness and loss of sensation but without identification of the affected nerves or application of the A.M.A., *Guides* grading scheme and a conclusion that appellant had a 100 percent impairment of his left upper extremity, which would be impossible without complete amputation at the shoulder or the equivalent thereof.

[2] Appellant claimed recurrences of both the 1996 and the 1999 injuries. As this claim is still under development, it is not now before the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

and Mirkin, and noted that appellant continued to complain of intermittent discomfort in the left shoulder. He allowed a two percent permanent impairment for grade three pain in the distribution of the suprascapular nerve according to Table 15, p. 3/54 and Table 11, p. 3/48 of the A.M.A., *Guides*, fourth edition and noted that, upon strength testing of appellant's rotator cuff muscular, he demonstrated grade 5/5 strength. Dr. Garelick provided a listing of appellant's measured ranges of left shoulder motion, from Drs. Chabot's and Mirkin's reports, with corresponding permanent impairment values from the A.M.A., *Guides*. Abduction was to 160 degrees or 1 percent, internal rotation was to 45 degrees or 2 percent, external rotation was to 45 degrees or 1 percent and flexion was to 160 degrees or 1 percent, for a total of 5 percent permanent impairment due to loss of motion. He used the Combined Values Chart from the A.M.A., *Guides*, p. 322, combined the values for pain with loss of motion and calculated that appellant had a permanent impairment of his left upper extremity of seven percent and opined that the date of maximum medical improvement was one year postoperatively, on July 30, 1999.

On June 7, 2001 the Office granted appellant a schedule award for a seven percent permanent impairment of his left upper extremity for the period July 30 to December 28, 1999 for a total of 21.84 weeks of compensation.

Also, by decision dated June 7, 2001, the Office determined that appellant had been reemployed as a meat cutter with wages of $615.20 per week, such that this position fairly and reasonably represented his wage-earning capacity.[3] Appellant's compensation was adjusted accordingly.[4]

By letter dated June 27, 2001, appellant disagreed with the two June 7, 2001 decisions and requested an oral hearing before an Office hearing representative.

A hearing was held on October 31, 2001 at which appellant testified. By decision dated January 28, 2002, the hearing representative affirmed the schedule award finding that the reports of Drs. Chabot and Mirkin, who provided detailed reports describing their findings on examination of appellant's left shoulder and arm, gave Dr. Garelick a sound medical basis upon which to base his impairment determination. The hearing representative found that Dr. Garelick had properly applied the A.M.A., *Guides* and had arrived at the correct determination of appellant's degree of permanent impairment. He further found, however, that the concomitant determination of appellant's loss of wage-earning capacity could not stand, as he had filed a claim for recurrence of disability, for which he had stopped work on August 15, 2000 and that

[3] Although the Office determined that appellant had worked at this position from June 14 until August 15, 2000, and, therefore, had been there 60 days such that it could be used to determine his wage-earning capacity, the Board notes that the job offer was not even made to appellant until June 14, 2000 and that he did not sign the job offer until June 20, 2000 and thereafter return to work, such that he had not worked in this position for the requisite 60 days, and accordingly it cannot be used to determine wage-earning capacity. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997) on retroactive determinations.

[4] However, the hearing representative reversed this determination for other reasons.

claim was still being developed. As this decision is not unfavorable to appellant, it is not now going to be considered by the Board on this appeal.[5]

The Board finds that appellant had no greater than a seven percent permanent impairment, for which he has received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[6] and its implementing regulation[7] set forth the number of weeks of compensation payable to employees sustaining permanent from loss or loss of use, of scheduled members of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[8] However, the Act 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (fifth edition) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[9]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[10] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.

Dr. Eyerman, an attending physician, provided measurements of retained degrees of motion but no analysis, a comment about ankylosis but without specification of which motion was affected, an impairment due to pain and weakness and loss of sensation without identification of the affected nerves or application of the A.M.A., *Guides* grading scheme and a conclusion that appellant had a 100 percent impairment of his left upper extremity, which would be impossible without complete amputation or the equivalent thereof. Board precedent is well settled, however, that when an attending physician's report gives an estimate of permanent

[5] *See* 20 C.F.R. § 501.3(a). The decision must be adverse to the claimant.

[6] 5 U.S.C. § 8101 *et seq.*; *see* 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.304.

[8] 5 U.S.C. § 8107(c)(19).

[9] 20 C.F.R. § 10.404 (1999).

[10] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

impairment but does not indicate that the estimate is based upon the application of the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[11] Board cases are clear that, if the attending physician does not utilize the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of any permanent impairment.[12]

Dr. Eyerman did not demonstrate that he applied the A.M.A., *Guides* in assessing appellant's permanent impairment due to left rotator cuff tear and repair. He simply concluded that appellant had a 100 percent permanent impairment of the left upper extremity and did not determine a date of maximum medical improvement. Accordingly, this report is of diminished probative value. On the other hand, Dr. Garelick, an Office medical adviser, relied on Drs. Chabot's and Mirkin's extensive and detailed findings to determine the permanent impairment of appellant's left upper extremity and properly applied the A.M.A., *Guides* to those findings to calculate a seven percent left upper extremity permanent impairment. Therefore, his report is entitled to great weight and constitutes the weight of the medical evidence of record.

Appellant has submitted no further probative medical evidence which establishes any greater left upper extremity permanent impairment.

Therefore, the decision of the Office of Workers' Compensation Programs dated June 20, 2001 regarding appellant's schedule award is hereby affirmed.

Dated, Washington, DC
December 12, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[11] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

[12] *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).