U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL T. GLASPER and U.S. POSTAL SERVICE,
POSTAL SERVICE, Oakland, CA

Docket No. 01-16; Submitted on the Record;
Issued July 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issue is whether appellant has established entitlement to a schedule award greater than a 26 percent to the right arm.

On June 26, 1996 appellant, then a 42-year-old truck driver, injured his right shoulder when he pulled a handle to release the kingpin to separate the tractor from the trailer. He filed a notice of traumatic injury and claim for compensation (Form CA-1) and the claim was accepted for a right shoulder strain on December 18, 1998.

Appellant stopped work on June 26, 1996, underwent surgery on November 16, 1999 and returned to work in a modified-duty position on March 10, 1997. He had additional surgery on April 24, 1997, returned to work in July 1997 and stopped one month later.

On September 28, 1998 appellant injured his right shoulder again when he struck his neck and shoulder against a vehicle side mirror. On December 18, 1998 while driving a postal truck he was making a U turn and felt sharp pain and pop in his right shoulder. The Office of Workers' Compensation Programs accepted that he sustained strains of the right shoulder and cervical as a result of these incidents. Appellant has had four surgical procedures on his right shoulder. He continues to work modified duty. On February 5, 1999 he was issued a schedule award for 26 percent impairment to the right arm.

Appellant disagreed with the amount of the award and requested a hearing.

In a September 30, 1999 decision, the hearing representative remanded the case for further medical development.

In an October 28, 1999 letter, the Office referred appellant to Dr. John Lavorgna, a Board-certified orthopedic surgeon, for a second opinion referral.

In a November 29, 1999 report, Dr. Lavorgna diagnosed status post right shoulder rotator cuff repairs and decompression procedures and degenerative disc disease, cervical spine. He also found range of motion of the right shoulder showed 75 degrees forward flexion, 90 degrees of abduction and 10 degrees of internal rotation. Otherwise there was a full range of motion. Using the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* he found the degree of impairment of the upper extremity due to loss of function from decreased strength to be 15 percent. The degree of impairment of the upper extremity resulting from sensory deficit, pain or discomfort was 10 percent. And zero percent impairment of the digits.

The Office referred the record to the Office medical adviser to review Dr. Lavorgna's report. In a March 5, 2000 report, the Office medical adviser found:

> "Impairment due to loss of range of motion: for the shoulder, loss of flexion, 7 percent and loss of extension, 0 percent (Figure 38, page 430) loss of abduction; 4 percent (Figure 41, page 44); loss of internal rotation, 5 percent and loss of external rotation; 5 percent (Figure 44, page 45) total 16 percent.
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> "Impairment due to loss of strength: none. Impairment due to sensory deficit or pain: level of impairment as Grade 3; 60 percent (Tables 11, page 48). Maximum impairment based on the axillary nerve is 5 percent (Table 15, page 64) 60 percent x 5 percent = 3 percent."

Using the Combined Values Chart, page 322, the impairment due to resection of the distal clavicale is 10 percent as per Table 27, page 61.

His total impairment for the right upper extremity equals 26 percent based on the report of Dr. Lavorgna. This impairment is the same as the previous calculation.

In a March 13, 2000 decision, appellant's request for an additional schedule award was denied finding the weight of the evidence rested with Dr. Lavorgna and the Office medical adviser both of whom found no greater than a 26 percent permanent impairment.

In a May 1, 2000 letter, appellant requested reconsideration arguing the physicians he had seen were biased because they were paid by the Office and that he had at least a 50 percent impairment. In support of his request for reconsideration, he submitted several medical reports; several were already in the record. The new and relevant included two medical reports from Dr. Tom R. Norris. In his April 20, 2000 report, Dr. Norris found abduction at 55/90 degrees, external rotation at 45/80 degrees and active total elevation of arm at 80/160 degrees. His strength was considered good (measuring 4 of possible 5) for the anterior and middle deltoids and external and internal rotations. The strength of the trapezius, triceps and biceps were normal.

In addition, Dr. Norris wrote:

> "[Appellant has] pain out of proportion to the MRI [magnetic resonance imaging] scan findings … good muscles about both shoulders with only slightly atrophy of his right spinatti. Of concern is that all points in the right shoulder are tender.

> This diffuse response limits the usefulness of many of the diagnostic procedures in that everything hurts. Also of concern, when the patient attempts to lift his arm or participate in manual testing, he grimaces, leans to the right side, literally squirms while sitting on the examining table. This is also not suggestive of a focal single point of injury…. Lastly, his understanding is that a rotator cuff tear was found after his third operative procedure where in fact the study demonstrated normal rotator cuff muscles."

In a May 18, 2000 report, Dr. Norris stated that appellant was reevaluated after his MRI scan which confirmed that he did not have a rotator cuff tear. "He still has uncontrolled pain. As I review the various pathologies that can contribute to this patient's pain, many of the possibilities appear to have been adequately addressed. Any motion seems to cause him to writhe, tilt to the right side and twist."

In a December 27, 1999 report, Dr. Joseph Cheng stated:

> "[N]o deltoid atrophy but range of motion severely limited with abduction and forward flexion at to about 90 degrees with severe pain. External rotation was painful. The patient is unable to perform internal rotation because of pain. Cuff testing showed gross weakness throughout external rotators, as well as supraspinatus muscles."

Other new medical evidence included progress reports from appellant's treating physician, work status forms and PS Form 3956 that were silent on his impairment.

In a June 6, 2000 decision, the Office denied modification of the schedule award finding the weight of the medical evidence remained with Dr. Lavorgna.

The Board finds appellant has not met his burden of proof that he is entitled to a greater than 26 percent schedule award of the right arm.

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3]

The schedule award provision of the Act[4] and its implementing regulation[5] 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, the Act does not

[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

Appellant has not submitted medical evidence conforming to the A.M.A., *Guides* that supports his contention that he has a greater than 26 percent permanent impairment. Neither Dr. Norris nor Dr. Cheng provided impairment ratings based on pain, strength and motion and both questioned the accuracy of their reports due to appellant's complaints of pain and constant movement.

The reports of Drs. Norris and Cheng are of limited probative value in that they failed to provide an explanation of how their assessment of permanent impairment were derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[7]

As the report of the Dr. Lavorgna is the only medical evidence provided in conformance with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[8]

The decisions by the Office of Workers' Compensation Programs dated June 6 and March 13, 2000 are hereby affirmed.

Dated, Washington, DC
July 19, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

[6] *See id.; James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[7] *See James Kennedy, Jr.*, *supra* note 6 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[8] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).