

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID G. BRICKLEY, JR. and DEPARTMENT OF JUSTICE,  
IMMIGRATION & NATURALIZATION, Chula Vista, CA

*Docket No. 02-560; Submitted on the Record;  
Issued September 12, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has more than a 19 percent impairment of the left upper extremity, for which he received two schedule awards.

The Office of Workers' Compensation Programs accepted, in case number 13-1158490, appellant's claim for a left fourth finger fracture. By decision dated October 20, 1998, the Office granted a schedule award for a 12 percent impairment to the left upper extremity.

The Office further accepted, in case number 13-1211649, the conditions of left shoulder strain, left shoulder impingement and authorized a left shoulder arthroscopy. On October 29, 2001 the Office combined appellant's former claim (file number 13-1158490) into this case. By decision dated November 26, 2001, the Office issued a schedule award for an additional seven percent left upper extremity impairment.<sup>1</sup> Accordingly, appellant was awarded a total of 19 percent permanent loss of use of his left upper extremity.

On appeal, appellant contends that he has greater impairment.

The only decision before the Board on this appeal is the Office's November 26, 2001 decision awarding appellant an additional 7 percent permanent loss of use of his left upper extremity to its previous award of 12 percent. Because more than 1 year has elapsed between the issuance of the Office's October 20, 1998 decision awarding a total of 12 percent permanent loss of use of the left upper extremity and January 7, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 20, 1998 decision.<sup>2</sup>

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<sup>1</sup> The Board notes that although the Office referred to a right arm impairment, the reference to the right arm is a typographical error as appellant's accepted conditions dealt with his left arm.

<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

The Board finds that appellant has no more than a 19 percent permanent impairment of his left upper extremity.

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> and its implementing regulation<sup>4</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, 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>5</sup>

Appellant's additional seven percent permanent disability rating for the loss of use of his left upper extremity was based partially upon the September 24, 2001 medical report of Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, who reviewed the medical record and calculated appellant's schedule award utilizing the A.M.A., *Guides*, fifth edition based upon the examination findings contained in a May 2, 2001 medical report of Dr. Thomas W. Harris, appellant's treating orthopedic surgeon. Dr. Harris who noted that appellant's treating orthopedic physician, also named Dr. Harris, had opined that appellant reached a permanent and stationary status on May 2, 2001. He also noted that the examination findings from the May 2, 2001 medical report of appellant's treating orthopedic physician revealed that appellant had continued complaints of pain in his left shoulder. Examination did not demonstrate any obvious muscle weakness. Examination demonstrated limited range of motion with flexion 165 degrees, extension 30 degrees, abduction 170 degrees, adduction 20 degrees, external rotation 80 degrees and internal rotation 60 degrees. Appellant was not noted to have any obvious instability. Appellant's treating orthopedic felt that appellant had 12 percent impairment of his left upper extremity.<sup>6</sup> Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Harris calculated appellant's left upper extremity impairment as follows: shoulder flexion of 165 degrees equated to a 1 percent impairment (Figure 16-40, p. 476), shoulder extension of 30 degrees equated to 1 percent impairment (Figure 16-40, p. 476), shoulder abduction of 170 degrees equated to a 1 percent

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

<sup>5</sup> Under FECA Bulletin 01-5 (issued January 29, 2001), any new schedule award decision issued after February 1, 2001 must be based on the fifth edition of the A.M.A., *Guides*. The Board notes that the Office properly utilized the fifth edition of the A.M.A., *Guides* in this case.

<sup>6</sup> Dr. Thomas W. Harris based his 12 percent impairment rating of appellant's left upper extremity on the fourth edition of the A.M.A., *Guides*, which is not the correct edition. Dr. Harris further opined that appellant had a two percent lower extremity impairment secondary to the muscle biopsy performed in the right groin. The Board notes that the record appears to be devoid of any development pertaining to appellant's lower extremity. As there has been no development and, consequently, no final decision issued by the Office regarding any impairment for appellant's lower extremity, the Board does not have jurisdiction over whether appellant is entitled to a schedule award for the muscle biopsy he underwent to rule out a malignant hypothermia prior to his February 8, 2001 surgery on his left shoulder. 20 C.F.R. § 501.2(c).

impairment<sup>7</sup> (Figure 16-43, p. 477), and external rotation of 80 degrees equated to a 2 percent impairment<sup>8</sup> (Figure 16-46, p. 479). Dr. Harris totaled the above percentages to derive a five percent total impairment for loss of motion. Dr. Harris additionally noted that appellant had a three percent impairment rating for pain. This was derived as follows: under Table 16-10, p. 482, Dr. Harris classified appellant's pain as a Grade 3 (abnormal sensations or slight pain, that interferes with some activities) and attributed a 60 percent sensory deficit. Under Table 16-15, p. 492, the axillary nerve/deltoid muscle provides a maximum sensory deficit or pain of 5 percent. Multiplying the 2 percentages together (.60 times 5) equated to a 3 percent total impairment rating for pain. Dr. Harris then utilized the Combined Values Chart for the five percent impairment in loss of motion and three percent impairment for pain to find the current total impairment for the left upper extremity equaled eight percent.

Dr. Harris additionally noted that appellant was previously found to have a 12 percent loss of use of his left upper extremity under case file number A13-1158490. He stated that as no information had been provided concerning the previous case, he was unable to determine whether the 12 percent loss of use of the upper extremity resulted from a shoulder problem or some other problem with the left upper extremity. Dependant upon what area the previous loss of use resulted from, Dr. Harris advised there may be some overlap with appellant's schedule award for his left upper extremity.

On November 13, 2001 the Office medical adviser reviewed the medical evidence of both case files and used Dr. Harris' September 24, 2001 report for impairment due to appellant's work-related left shoulder problems and the previously awarded 12 percent impairment determination from appellant's work-related fourth left finger problems to render a current determination of impairment of the left upper extremity. Utilizing the Combined Values Chart (p. 604-06) for the above percentages, the Office medical adviser found the total impairment for the left upper extremity equaled 19 percent or an additional 7 percent impairment since the previous determination.

The Office medical adviser's November 13, 2001 calculation of the total percentage of impairment of appellant's left upper extremity along with calculations derived from Dr. Harris's medical report of September 24, 2001 for impairment values from appellant's accepted left shoulder conditions conforms to the A.M.A., *Guides* and, therefore, constitutes the weight of the medical evidence.<sup>9</sup> Although appellant had two separate work-related claims which involved his left shoulder and the fourth finger on his left hand, regional impairments resulting from the hand,

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<sup>7</sup> The Board notes that under Figure 16-43, p. 477, a shoulder abduction of 170 degrees equates to a 0 percent impairment. However, as Dr. Harris failed to calculate appellant's shoulder adduction of 20 degrees, which equates to a 1 percent impairment (Figure 16-43, p. 477), the error in the calculation is harmless as appellant still maintained a 1 percent impairment total due to upper extremity motion impairment due to lack of abduction and adduction of his shoulder.

<sup>8</sup> The Board notes that under Figure 16-46, p. 479, an external rotation of 80 degrees equates to a 0 percent impairment. However, an internal rotation of 60 degrees, which Dr. Harris did not calculate, equates to a 2 percent impairment. As the total value of impairment due to lack of internal and external rotation of the shoulder remains the same, the error in calculation is held harmless.

<sup>9</sup> See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

wrist, elbow and shoulder regions are combined to provide the upper extremity impairment.<sup>10</sup> He has failed to provide any probative medical evidence that he has greater than a 19 percent permanent impairment of his left upper extremity. Appellant was previously awarded a 12 percent impairment for his left upper extremity on October 20, 1998 and the Office's award of an additional 7 percentage impairment on November 26, 2001 was proper. There is no evidence of greater impairment.

The decision of the Office of Workers' Compensation Programs dated November 26, 2001 is hereby affirmed.

Dated, Washington, DC  
September 12, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>10</sup> See section 16.1b, Impairment Evaluation: Documentation and Recording, p. 434-435; *see also* section 1.4, Philosophy and Use of the Combined Values Chart, p. 9-10, and the Combined Values Chart, p. 604, A.M.A., *Guides* (5<sup>th</sup> ed. 2000).