

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CURLY RUSSELL and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

*Docket No. 03-1313; Submitted on the Record;
Issued November 10, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he is entitled to more than two percent permanent impairment of the left upper extremity for which he received a schedule award.

On June 17, 2002 appellant, then a 54-year-old laborer custodian, filed a traumatic injury claim alleging that on June 13, 2002 he pulled his left arm, shoulder, neck and elbow while attempting to lift a heavy trash can.¹ The Office of Workers' Compensation Programs accepted the claim for neck sprain/strain and left sprain/strain of his left shoulder and upper arm. Appellant stopped work on June 13, 2002.²

Dr. Clinton Battle, a Board-certified internist, began treating appellant after the June 13, 2002 employment injury. In a duty status report dated October 21, 2002, Dr. Battle released appellant to full-time limited duty with specified work restrictions. On December 5, 2002 appellant filed a Form CA-7 claim for a schedule award. Appellant submitted an impairment rating from Dr. Battle dated December 2, 2002 in which he diagnosed acute cervical strain, left shoulder strain and left arm pain. Dr. Battle provided range of motion measurements including those for appellant's left arm. He indicated that appellant had 86 degrees of forward elevation yielding a 6 percent impairment, 38 degrees of extension yielding a 1 percent impairment, 88 degrees of abduction yielding a 4 percent impairment, 26 degrees of adduction yielding a 1 percent impairment, 55 degrees of internal rotation yielding a 2 percent impairment and 27 degrees of external rotation yielding a 1 percent impairment. Dr. Battle then combined the multiple impairments for a total of 15 percent of the left arm.

¹ The record reflects that, prior to the June 13, 2002 employment injury, appellant had permanent restrictions based on an injury to his right arm with cervical fusion.

² He initially received continuation pay for 45 days as a result of the employment injury and was eventually placed on the periodic compensation rolls for temporary total disability. Appellant subsequently accepted a modified custodian position with the employing establishment on October 25, 2002, effective January 26, 2003.

The Office referred the December 2, 2002 report and case record to the district medical adviser for schedule award consideration. In a report dated December 18, 2002, Dr. Ronald Blum, the district medical adviser, discussed Dr. Battle's impairment rating and noted that he recommended a 15 percent permanent impairment of the left shoulder based on loss of motion. Dr. Blum stated, however, that Dr. John Stasikowski, an orthopedic surgeon who treated appellant, described in two reports of record dated July 17 and 22, 2002 that appellant had a full range of motion of the left shoulder and that there had been resolution of the left shoulder and cervical strain. Therefore, Dr. Blum stated that he was unable to recommend an impairment rating based on Dr. Battle's report due to the conflict in the medical opinion.

The Office referred the case record to Dr. John Sklar, a Board-certified physiatrist, for an impairment rating. In his March 19, 2003 report, Dr. Sklar reviewed the records and his examination of appellant and indicated that appellant reached maximum medical improvement on December 2, 2002. He further stated:

"I do not find any objective evidence of impairment which I can rate. As I previously discussed shoulder range of motion is limited by pain and seems to vary from examination to examination. These inconsistent findings make rating impairment using shoulder range of motion inappropriate. Strength is similarly limited in the left upper extremity especially the shoulder due to pain. Therefore[,] strength cannot be used as the basis for an impairment rating. I find no objective structural basis for impairment rating at the time of my examination today. However, using the (A.M.A., *Guides*) [*American Medical Association Guides to the Evaluation of Permanent Impairment*] in accordance with [the Office] protocols I can rate [appellant] for pain in the left upper extremity. I will give him a two percent impairment rating of the left upper extremity due to pain."

The Office thereafter referred the case record along with Dr. Sklar's report to Dr. Blum who on March 28, 2003 stated:

"Dr. Sklar notes decreased ROM [range of motion] and strength in both shoulders but the measurements are inconsistent and seem to be inhibited due to pain avoidance behavior. He correctly states that for this reason loss of motion and strength cannot be used to determine impairment. He recommends two percent PPI [permanent partial impairment] for the LUE [left upper extremity] based on ongoing pain that is secondary to his work[-]related injury (Sec. 18.3d, p. 573). Permanent impairment of the LUE is two percent."

On April 23, 2003 the Office issued appellant a schedule award for two percent permanent impairment of the left upper extremity for the period December 12, 2002 to January 24, 2003.

The Board finds that this case is not in posture for decision.

The schedule award provisions of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

Section 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶

In this case, a conflict exists between the opinion of appellant's treating physician, Dr. Battle, and the opinion of the referral physician, Dr. Sklar. In a December 2, 2002 report, Dr. Battle stated that appellant had a 15 percent left arm impairment based on abnormal motion and provided his range of motion findings. These measurements indicated that appellant had abnormal flexion, extension, abduction, adduction, internal and external rotation. According to his findings appellant's range of motion for flexion was 86 degrees, which is a 6 percent impairment under Table 16-40 of the A.M.A., *Guides*.⁷ Appellant's range of motion for extension was 38 degrees, which is a 1 percent impairment under Table 16-40 of the A.M.A., *Guides*.⁸ Appellant's abduction range of motion was 88 degrees, which under Table 16-43 of the A.M.A., *Guides* is a 4 percent impairment.⁹ Appellant's adduction range of motion was 26 degrees, which under Table 16-43 of the A.M.A., *Guides* is a 1 percent impairment.¹⁰ Appellant's measurement for internal rotation was 55 degrees, which under Table 16-46 of the A.M.A., *Guides* is a 2 percent impairment and his measurement for external rotation was 27 degrees, which also under Table 16-46 of the A.M.A., *Guides* is a 1 percent impairment.¹¹ Dr. Battle determined that the 6 abnormal motions added together totaled 15 percent.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁶ *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272, 273-74 (1997).

⁷ A.M.A., *Guides*, p. 476.

⁸ *Id.*

⁹ A.M.A., *Guides*, p. 477.

¹⁰ *Id.*

¹¹ A.M.A., *Guides*, p. 479.

In a March 19, 2003 report, Dr. Sklar found that appellant had a two percent permanent impairment for the left upper extremity based on his ongoing pain and no rating based on motion.

To resolve the existing conflict in the evidence regarding appellant's impairment, the Office should refer appellant with a statement of accepted facts and the case record to an impartial medical specialist for an evaluation. After any further development it deems necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 23, 2003 is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
November 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member