United States Department of Labor
Employees' Compensation Appeals Board

TERRY E. NOE, Appellant	)	
and	)	**Docket No. 04-1531**
	)	**Issued: December 7, 2004**
DEPARTMENT OF THE ARMY, BLUE GRASS ARMY DEPOT, Richmond, KY, Employer	)	

Appearances:
Terry E. Noe, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 24, 2004 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated February 12 and April 28, 2004, in which the Office found that appellant was not entitled to a schedule award for his employment-related right shoulder impingement and degenerative disc disease at C5-6. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to a schedule award for his employment-related right shoulder and degenerative disease conditions.

FACTUAL HISTORY

On April 4, 2002 appellant, then a 46-year-old explosives operator, filed an occupational disease claim, alleging that factors of employment caused severe pain and numbness in his right arm, shoulder and neck. He did not stop work. On May 15, 2002 the Office accepted that he sustained employment-related impingement of the right shoulder for which he underwent

subacromial decompression on September 12, 2002. On February 25, 2003 the Office accepted that appellant's cervical degenerative disc disease at C5-6 was employment related and he underwent C5 corpectomy and fusion on April 1, 2003. He returned to light duty on July 30, 2003 and retired on October 1, 2003.

On October 21, 2003 appellant filed a schedule award claim. By letter dated December 12, 2003, the Office requested that he obtain an impairment rating from his attending physician. In a treatment note dated October 22, 2003, Dr. J. Rick Lyon, a Board-certified orthopedic surgeon, advised that appellant had full range of motion of the shoulder, "but obviously still has pain" which should be evaluated. He stated that appellant thought he was "about 75 percent better but nowhere near 100 percent."

By decision dated February 12, 2004, the Office found that appellant was not entitled to a schedule award, noting that the medical evidence did not support entitlement because it did not indicate that maximum medical improvement had been reached or provide an impairment rating in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[1]

On February 19, 2004 appellant requested reconsideration and submitted a February 25, 2004 report in which Dr. Lyon again advised that he had full range of motion of his shoulder. The physician stated that, pursuant to the fifth edition of the A.M.A., *Guides*, under Table 18-4 appellant had a 23 pain score which, when added to a 10 score, pursuant to Table 18-5, totaled 33. He concluded that this indicated that appellant had a moderate impairment due to chronic pain under the A.M.A., *Guides*. In an April 1, 2004 report, an Office medical adviser stated that maximum medical improvement had been reached on February 5, 2004. He advised that, since chronic pain had not been accepted as employment related, appellant was not entitled to a schedule award.[2]

By decision dated April 28, 2004, the Office denied modification of the February 12, 2004 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulation,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of

[1] A.M.A., *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ Docket No. 01-1361 (issued February 4, 2002).

[2] The record also contains a preliminary finding of an overpayment in compensation in the amount of $564.57. It was paid in full.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*[5] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[6] The fifth edition of the A.M.A., *Guides* became effective February 1, 2001.[7] FECA Bulletin No. 01-05, issued January 29, 2001, provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*.

FECA Bulletin No. 01-05 also addresses the method to be followed in evaluating impairments of the upper and lower extremities, noting that the evaluation is to conform to the methods used in combination with Chapters 16 and 17. Before finalizing any impairment calculation for the extremities, the Office medical adviser is to verify the appropriateness of the rating. The bulletin notes that with regard to Chapter 18 and impairment ratings based on pain, section 18.3(b) states that "examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. The bulletin provides that Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain, identifying those as Chapters 13, 16 and 17.[8]

ANALYSIS

The Board finds this case is not in posture for a decision regarding appellant's entitlement to a schedule award. Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[9] In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[10]

Here the Office medical adviser stated that appellant was not entitled to an impairment rating for chronic pain as it had not been accepted as employment related. Appellant's attending physician, Dr. Lyon, advised that appellant's chronic pain was a residual of his employment-related conditions. The A.M.A., *Guides* provides that the impairment ratings in the body system organ chapters make allowance for any accompanying pain[11] and Chapter 18 should not be used

[5] A.M.A., *Guides*, *supra* note 1.

[6] *See Joseph Lawrence, Jr.*, *supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[7] *See Joseph Lawrence, Jr.*, *supra* note 1.

[8] *See Mark A. Holloway*, 55 ECAB ____ (Docket No. 03-2144, issued February 13, 2004).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] A.M.A., *Guides*, *supra* note 1, Chapter 2.5e.

to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.

Dr. Lyon provided a rating solely based on Chapter 18. He did not address Chapter 16 of the A.M.A., *Guides* or whether appellant's shoulder pain could be assessed as a sensory deficit according to the protocols related to rating upper extremity impairment. Rather, he indicated that appellant had a pain score of 23 under Table 18-4 and a pain score of 10 under Table 18-5, to total 33, which he indicated provided a moderate impairment under the A.M.A., *Guides*.

It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to a schedule award, the Office shares responsibility in the development of the evidence.[12] On remand the Office should refer appellant for examination by Dr. Lyon to determine whether appellant is entitled to a schedule award pursuant to the A.M.A., *Guides*, applying Table 16-5. After such development as the Office deems necessary, an appropriate decision shall be issued.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant is entitled to a schedule award.

[12] *See Leon Thomas*, 52 ECAB 202 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 28 and February 12, 2004 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: December 7, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member