U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNESTO E. TAMAYO and U.S. POSTAL SERVICE,
POST OFFICE, Santa Clarita, CA

Docket No. 03-1383; Submitted on the Record;
Issued March 8, 2004

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a two percent permanent impairment of his right arm, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied further reconsideration of appellant's case on the merits.

The Office accepted that on March 21, 2000 appellant, then a 41-year-old distribution clerk, sustained right shoulder rotator cuff tendinitis and a right rotator cuff tear from lifting, dumping, sweeping, pushing and throwing mail sacks in the performance of his duties. Appellant underwent arthroscopic decompression and surgical repair of a torn rotator cuff on November 28, 2000 which included a biceps tenotomy. Appellant returned to light-duty work with no lifting above his shoulder.

Appellant was treated by Dr. James M. Paule, a Board-certified internist, for complaints of right shoulder pain and stiffness. On December 12, 2001 the Office accepted appellant's left shoulder rotator cuff tear as a consequential injury to his right shoulder condition. On April 12, 2002 appellant underwent arthroscopic decompression for a left shoulder rotator cuff tear. By report dated June 25, 2002, Dr. Paule noted that appellant had pain in both of his shoulders and that the left shoulder was tender anteriorly with abduction limited to 175 degrees by pain in the entire joint.[1] He noted that the right shoulder was tender anteriorly with abduction and flexion not limited but with pain anteriorly and posteriorly near the top. Dr. Paule opined that appellant was totally disabled because of the status of his left shoulder repair.

On July 30, 2002 the Office requested that Dr. Paule determine the extent of appellant's permanent impairment related to his right shoulder for schedule award purposes according to the

[1] Abduction to 180 degrees is normal. *See* American Medical Association, *Guides to the Evaluation of Permanent Impairment*, page 476.

fifth edition of the A.M.A., *Guides*, and the date of maximum medical improvement. The Office did not request a rating of appellant's left shoulder.

On August 13, 2002 Dr. Paule noted that, with respect to appellant's right shoulder, he had moderately severe pain whenever he was driving or resting his right elbow on the couch. Dr. Paule noted that appellant had no sensory loss, but experienced paresthesias in the right shoulder and deltoid, and complained of weakness. Dr. Paule provided range-of-motion measurements, noting that appellant had 180 degrees of forward elevation bilaterally, 50 degrees of backward elevation bilaterally, 180 degrees of abduction bilaterally, 50 degrees of adduction bilaterally, 45 degrees of internal rotation on the right and 40 degrees of internal rotation on the left, with normal being 90 degrees,[2] 90 degrees external rotation on the right and an illegible amount of the left and 50 degrees of extension bilaterally. Dr. Paule indicated that appellant had no weakness or atrophy on the right side as a result of his shoulder pathology, and that there were not any additional factors of impairment. He indicated that August 13, 2002 was the date of appellant's maximum medical improvement. In a narrative addendum to the August 13, 2002 report, Dr. Paule noted that all of the ranges of motion of appellant's right upper extremity produced pain.

On October 6, 2002 the Office requested that an Office medical adviser, Dr. Ellen L. Pichey, a Board-certified family practitioner, review Dr. Paule's report. She determined that appellant had no impairment due to loss of range of motion, no impairment for loss of strength and a Grade 3 level of impairment due to pain, which was 40 percent according to Table 16-10, page 482. Dr. Pichey noted that the maximum impairment allowed for impairment of the suprascapular nerve was 5 percent according to Table 16-15, page 492, such that a 40 percent grade of 5 percent totaled a 2 percent impairment due to pain or sensory deficit.

On October 21, 2002 the Office granted appellant a schedule award for a two percent impairment of his right upper extremity for the period August 13 to September 25, 2002, for a total of 6.24 weeks of compensation.

By report dated November 5, 2002, Dr. Paule noted that appellant complained that the pain in his left shoulder was worse when he reached and his right shoulder was also worse. Dr. Paule noted that abduction was limited to 90 degrees by pain in the top and in the right deltoid,[3] and that flexion was limited to 90 degrees by pain in the top and the anterior aspect of the right deltoid.[4]

Appellant was released to return to light-duty work on December 3, 2002 with restrictions on pushing and pulling and reaching above the shoulder with either arm. Dr. Paule recommended no lifting over five pounds but indicated that appellant could work an eight-hour day. By report dated December 3, 2002, Dr. Paule noted that appellant continued to have pain in both shoulders, and that physical therapy had not provided any relief. He noted that appellant's

[2] Ankyloses in functional positions, 30 degrees internal rotation to 50 degrees internal rotation are given the lowest impairment rating of approximately 50 percent. *See* A.M.A., *Guides*, page 478.

[3] Normal abduction was to 180 degrees. *See* A.M.A., *Guides*, page 476.

[4] Normal range of flexion was to 180 degrees. *See* A.M.A., *Guides*, page 474.

flexion was limited to 90 degrees by pain anteriorly and posteriorly, and that abduction was limited to 95 degrees by pain anteriorly.

In a report dated January 20, 2003, Dr. Peter Yeung, a physician of unlisted specialty, noted that appellant had an 80 percent degeneration of the right biceps tendon, status post tenotomy, and had a recurrent tear involving the right supraspinatus tendon at the 12 o'clock position. Dr. Yeung provided documentation of losses in range of motion, noting that appellant had right shoulder flexion limited to 90 degrees by pain anteriorly and posteriorly, and abduction limited to 95 degrees by pain anteriorly.

By letter dated January 22, 2003, appellant requested reconsideration of the October 21, 2002 schedule award.

By decision dated February 28, 2003, the Office denied reconsideration finding that Dr. Yeung had neither reviewed nor commented upon the percentage of permanent impairment calculated by the Office medical adviser and did not provide his own opinion as to the extent of appellant's permanent impairment. The Office found that appellant had not provided evidence to establish greater impairment than that calculated by the Office medical adviser.

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

The probative value and therefore weight of any medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the opinion.[5] In this case, the medical reports of record are of diminished probative value as they did not properly apply the A.M.A., *Guides.*

On August 13, 2002 appellant's treating physician, Dr. Paule, found that appellant had reached maximum medical improvement with respect to his right upper extremity, and he provided measurements regarding losses in ranges of motion of the right upper extremity. Dr. Paule found internal rotation was restricted in both upper extremities, where the normal was to 90 degrees, and that appellant's right side internal rotation was only to 45 degrees, which according to the A.M.A., *Guides*, Figure 16-46, page 479, represents a 2 to 3 percent impairment. Dr. Paule also found that appellant's had right-sided deltoid paresthesis and weakness. In a subsequent November 5, 2002 report, Dr. Paule noted that appellant's right abduction was limited to 90 degrees by pain, which represents a 4 percent impairment,[6] and that right flexion was also limited to 90 degrees by pain, which represents a 6 percent impairment.[7] This report, however, varied significantly from his August 13, 2002 opinion where he found 180 degrees of abduction bilaterally.

Dr. Pichey did not agree with the right side range-of-motion deficit and found no impairment due to loss of range of motion and no impairment due to loss of strength. However,

[5] *Anna C. Leanza*, 48 ECAB 115 (1996).

[6] A.M.A., *Guides*, Figure 16-43, page 477.

[7] A.M.A., *Guides*, Figure 16-40, page 476.

the physician did not explain how she arrived at this determination. Dr. Pichey found that appellant had a Grade 3 sensory deficit or pain, which consisted of distorted superficial tactile sensibility with some abnormal sensation or slight pain that interfered with some activity, was appropriate to appellant's condition. The Board, however, notes that this grading seems to overlook some deficits addressed in Dr. Paule's reports. Dr. Pichey was not asked to clarify how she arrived at her conclusions that appellant's only impairment was graded at level 3 and due to a peripheral nerve disorder or lesion of the suprascapular nerve. The Board notes that Table 16-15 provides ratings for suprascapular nerve deficits by themselves and with motor deficits and combined motor and sensory deficits. Dr. Pichey applied the A.M.A., *Guides* to what she determined to be the unilateral right-sided impairment which, she found, was due solely to a peripheral nerve disorder. She did not, however, explain why the measured deficit of loss in range of motion of internal rotation found by Dr. Paule did not constitute a ratable loss of range of motion.

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulation[9] 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.

On remand, the case should be referred to an appropriate medical specialist for a rationalized opinion as to the nature and degree of appellant's right-sided shoulder impairment, and its cause, and for proper application of the A.M.A., *Guides*. The October 21, 2002 schedule award decision is set aside and the case remanded for further development.[10]

Regarding appellant's appeal of the Office's February 28, 2003 decision denying further review of appellant's case on its merits, it becomes moot due to the disposition of the case.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] It appears from the medical reports that appellant possibly has left-sided permanent impairment, which should be further developed.

The decision of the Office of Workers' Compensation Programs dated October 21, 2002 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board; the decision dated February 28, 2003 is moot.

Dated, Washington, DC
March 8, 2004

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member