United States Department of Labor
Employees' Compensation Appeals Board

ERNESTO E. TAMAYO, Appellant	)	
and	)	**Docket No. 04-1854**
	)	**Issued: April 25, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Santa Clarita, CA, Employer	)	

Appearances:
Ernesto E. Tamayo, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 19, 2004 appellant timely appealed a May 4, 2004 merit decision of the Office of Workers' Compensation Programs granting him a schedule award for additional impairment of his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than six percent right upper extremity impairment, for which he has received a schedule award.

FACTUAL HISTORY

This is appellant's second appeal before the Board. In a March 8, 2004 decision, the Board found that the case was not in posture for decision as to whether he had more than two

percent right upper extremity impairment.[1] The case was remanded for further development, including referral of the case to an appropriate medical specialist for a rationalized opinion of the extent of any impairment due to appellant's accepted conditions of right shoulder rotator cuff tendinitis and tear. The facts and circumstances of the case are set forth in the prior decision and hereby incorporated by reference.

On remand, the Office referred the medical evidence of record of Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and Office medical consultant. In an April 19, 2004 report, Dr. Harris reviewed a history of injury, noting that appellant was diagnosed with right rotator cuff tendinitis and that an magnetic resonance imaging scan demonstrated a rotator cuff tear for which he underwent surgical decompression and repair on November 28, 2000. Dr. Harris noted that the most recent evaluations of appellant's right upper extremity were represented by the January 20 and March 12, 2003 reports of Dr. Peter Yeung, a specialist in occupational medicine with Kaiser Permanente.[2] He calculated the impairment to appellant's right shoulder utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Harris noted that the medical evidence revealed a full range of motion of the right shoulder with flexion to 180 degrees,[3] extension to 50 degrees,[4] abduction of 180 degrees,[5] adduction of 45 degrees,[6] internal rotation of 90 degrees[7] and external rotation of 90 degrees.[8] Under the A.M.A. *Guides*, he noted that this did not represent any impairment for loss of range of motion. Dr. Harris applied Table 16-35, page 510, to rate appellant's mild weakness (motor deficit) on shoulder abduction as three percent impairment. He calculated appellant's impairment due to pain (sensory deficit) by identifying the axillary nerve, for which Table-15, page 492, notes a maximum of five percent impairment is allowed. Dr. Harris then graded the sensory deficit by application of Table 16-10, page 482, allowing Grade 3 (60 percent) for pain which interferes with some activity. He noted that 60 percent of the five percent maximum allowed for sensory deficit was three percent. Dr. Harris then combined the motor deficit (three percent) with the sensory deficit (three percent) under the Combined Values Chart to find a total of six percent impairment of the right shoulder.[9]

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[1] Docket No. 03-1383 (issued March 8, 2004). On October 21, 2002 the Office granted appellant a schedule award for two percent impairment of his right upper extremity following review by an Office medical adviser of medical reports from appellant's attending physician, Dr. James M. Paule, a Board-certified internist.

[2] Dr. Yeung reported that he examined appellant on January 20, 2003. He dated his report on January 28, 2003. On March 6, 2003 Dr. Yeung noted that appellant's examination remained unchanged since his January 20, 2003 report.

[3] *See* Figure 16-40, page 476.

[4] *Id.*

[5] *See* Figure 16-43, page 477.

[6] *Id.*

[7] *See* Figure 16-46, page 479.

[8] *Id*.

[9] Combined Values Chart, page 604.

By decision dated May 4, 2004, the Office granted appellant a schedule award for six percent impairment of his right upper extremity. The Office noted that, as he previously received a schedule award for two percent impairment, the award was for an additional 4 percent or 12.48 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[10] and its implementing regulation[11] 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.[12] A medical opinion regarding permanent impairment that is not based upon application of the A.M.A. *Guides*, the standard adopted by the Office and approved by the Board as appropriate for evaluating schedule losses, is of diminished probative value in determining the extent of a claimant's permanent impairment.[13]

It is the claimant's burden of proof to establish that he or she sustained permanent impairment of a scheduled member or function as a result of an employment injury.[14]

ANALYSIS

Appellant's claim was accepted by the Office for right rotator cuff tendinitis and tear, for which he underwent surgery on November 28, 2000. He was granted a schedule award on October 21, 2002 for two percent impairment of the right upper extremity. At the time of the prior appeal, the Board found that the medical evidence of record was insufficient to determine appellant's impairment under the A.M.A., *Guides* and remanded the case for appropriate review by a medical specialist.

The Board finds that the weight of medical opinion is represented by the report of Dr. Harris, an Office medical consultant Board certified in orthopedic surgery. On remand, he examined the medical evidence of record, noting that the most recent reports describing the impairment to appellant's right shoulder were from Dr. Yeung, an attending physician with Kaiser Permanente. Dr. Harris applied the range of motion findings to the A.M.A., *Guides*, to determine that Dr. Yeung's examination of appellant revealed a full range of right shoulder

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] 20 C.F.R. § 10.404.

[13] *Carolyn E. Sellers*, 50 ECAB 393 (1999).

[14] *Tammy L. Meehan*, 53 ECAB 229 (2001).

motion which did not represent any impairment. He noted Dr. Yeung's description of appellant's motor and pain deficits and applied the relevant tables of Chapter 16 to find a three percent motor deficit and a three percent sensory deficit. Dr. Harris utilized the Combined Values Chart to combine these multiple impairments and concluded that appellant had a six percent impairment of the right shoulder. The Board finds that Dr. Harris based his opinion on the extent of permanent impairment on a review of the relevant findings of the attending physician based on examination of appellant.[15] He properly applied the tables of Chapter 16 of the fifth edition of the A.M.A *Guides*, to rate the extent of right shoulder impairment as six percent.

On appeal, appellant contends that he has greater impairment than the six percent awarded by the Office. To support his contention, he noted that the March 6, 2003 report of Dr. Yeung addressed the prior schedule award and noted that the two percent impairment award "was somewhat low" in light of appellant's persistent pain and weakness. Appellant highlighted that part of the report in which Dr. Yeung stated:

> "I have reviewed [appellant's] case and in my note from January 20, 2003, I expressed the fact that his current disability level was greater than it was at the time he was made permanent and stationary by Dr. Paule. I felt that [he] had lost 50 percent of his preinjury capacity with regards to lifting as it relates to the right shoulder. Further, I also expressed the fact that he was to refrain from heavy pushing and pulling activities for the same reason."

The Board finds that this portion of Dr. Yeung's January 28, 2003 report does not establish that appellant has greater impairment than the six percent awarded by the Office. Of note is the fact that Dr. Yeung has never provided a rating of appellant's right shoulder utilizing the tables and protocols of the A.M.A., *Guides*. This was done by Dr. Harris, utilizing the findings from Dr. Yeung's January 20, 2003 examination of appellant. Moreover, the above quoted section of the report is not addressed to impairment of the right shoulder. Rather, Dr. Yeung is commenting on appellant's disability for work and resulting physical limitations in his capacity for heavy pulling, pushing and lifting. Under section 8107 a schedule award is payable for permanent impairment to appellant's right shoulder based on his accepted injury. Disability for work and resulting physical limitations, are not a factor to be included in a schedule award.[16] A schedule award is not intended to be compensation for wage loss or potential wage loss due to residuals of an accepted injury.[17] It is made without regard to whether or not there is a loss of wage-earning capacity resulting from the injury and regardless of the effects upon employment or social opportunities.[18] For this reason, the Board finds that the weight of medical opinion as to the extent of impairment to appellant's right shoulder is

[15] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Determining Schedule Awards*, Chapter 3.700.3 (October 1990).

[16] *See Lela M. Shaw*, 51 ECAB 372 (2000).

[17] *See Renee M. Straubinger*, 51 ECAB 667, 670 (2000).

[18] *Id.*

represented by the report of Dr. Harris. Appellant has not submitted medical evidence sufficient to establish more than six percent impairment to his right upper extremity.

CONCLUSION

The Board finds that appellant has no more than six percent impairment of his right shoulder, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2004 is affirmed.

Issued: April 25, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member