United States Department of Labor
Employees' Compensation Appeals Board

RICHARD W. MILLER, Appellant	)	
and	)	**Docket No. 06-275**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Bellmawr, NJ, Employer	)	**Issued: April 6, 2006**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 16, 2005 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated July 20 and September 14, 2005, adjudicating his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant has more than an 18 percent impairment of his right upper extremity.

FACTUAL HISTORY

On June 20, 2000 appellant, then a 56-year-old maintenance mechanic, filed a traumatic injury claim alleging that he injured his right shoulder on June 16, 2000 when he struck a bolt with a hammer. He was released to return to work with restrictions on June 19, 2000. The claim was accepted for a right rotator cuff strain.

On January 4, 2002 appellant underwent surgery consisting of right shoulder arthroscopy with biceps debridement, rotator cuff debridement, superior labral repair, arthroscopic subacromial decompression and arthroscopic distal clavicle resection.

In a September 5, 2002 report, Dr. Nicholas P. Diamond, an osteopath, provided findings on physical examination. He diagnosed right shoulder impingement with acromioclavicular joint arthritis, superior labral tear and biceps and rotator cuff fraying. Appellant's status was post right shoulder arthroscopy with biceps debridement, rotator cuff debridement, superior labral repair; arthroscopic subacromial decompression and arthroscopic distal clavicular resection and chronic right shoulder tenosynovitis. Dr. Diamond noted that appellant had daily right shoulder pain and stated:

> "Examination of the right shoulder reveals … periscapular tenderness. There is acromioclavicular tenderness. There is rotator cuff tenderness noted…. Range of motion reveals forward elevation of 170/180 degrees, abduction of 170/180 degrees, … adduction of 70/75 degrees, and external rotation of 90/90 degrees. Posterior reach (internal rotation) is abnormal to the spine at level L5. All ranges of motion are carried through with pain at the extremes…. Manual muscle testing of the supraspinatus musculature is graded at 4 to 4+/5. Biceps testing is graded at 4+/5. Triceps testing is graded at 5/5. Deltoid muscle testing is graded at 4+/5."

* * *

> "Grip strength testing performed via Jamar … dynamometer at Level III reveals 36 [kilograms] of force strength involving the right hand versus 40 [kilograms] of force strength involving the left hand. [Appellant] is right-hand dominant."

Dr. Diamond calculated a 29 percent combined impairment of appellant's right upper extremity. This consisted of 4 percent impairment based on a 4/5 motor strength deficit of the supraspinatus muscle and Table 16-11 at page 484 and Table 16-15 at page 492 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*;[1] 6 percent for a 4/5 motor strength deficit of the biceps muscle based on Tables 16-11 and 16-15; 9 percent for a 4/5 motor strength deficit of the triceps muscle according to Tables 16-11 and 16-15; 10 percent for grip strength deficit based on Table 16-34 at page 509, and 3 percent for pain based on Figure 18-1 at page 575.

In a July 17, 2003 memorandum, an Office medical adviser found that appellant had a four percent impairment of the right upper extremity which included three percent for pain based on Figure 18-1 at page 574 of the A.M.A., *Guides,* fifth edition, and one percent for decreased flexion based on Table 16-40 at page 476.

On October 20, 2003 the Office referred appellant to Dr. Robert R. Bachman, a Board-certified orthopedic surgeon, in order to resolve a conflict in the medical opinion evidence

[1] A.M.A., *Guides,* 5th ed. 2001.

between Dr. Diamond and the Office medical adviser as to the extent of impairment to appellant's right upper extremity.

In a report dated October 29, 2003, Dr. Bachman provided findings on examination and diagnosed status post right shoulder impingement syndrome with a superior labral tear and status post degenerative arthritis of the right acromioclavicular joint. He stated:

> "There is slight restriction of hand placing ability on the right with complaints of shoulder pain. Active range of motion in the [right shoulder] is … forward flexion 100 [degrees], … backward flexion [extension] 20 [degrees], … abduction 90 [degrees], [external] rotation 80 [degrees], … [internal] rotation 70 [degrees], … and adduction 20 [degrees]…. [Appellant] reports pain in the right shoulder in all directions."

* * *

> "Neurologic: deep tendon reflexes are recorded as follow -- biceps trace, triceps 2+ and brachioradialis trace. Pinwheel sensation is intact. There is a generalized decrease in motor function in all directions about the right shoulder, rating a 4+ out of a possible 5…. Jamar dynamometer test results are: … I 50 [kilograms], III [kilograms], V 40 [kilograms]."

* * *

> "There is restriction of movement of the right shoulder as described … as well as slight decrease in right shoulder strength…. [T]here is no deformity, swelling, or atrophy about the right shoulder."

Dr. Bachman calculated an 18 percent impairment of appellant's right upper extremity that included five percent for decreased flexion and two percent for decreased extension, based on Table 16-40 at page 476 of the A.M.A., *Guides*; four percent for decreased abduction and one percent for decreased adduction, based on Table 16-43 at page 477, one percent for decreased internal rotation, based on Table 16-46 at page 479 and five percent for strength deficit based on Table 16-35 at page 510.

In a May 18, 2004 memorandum, an Office medical adviser indicated that appellant had a 13 percent impairment based on Dr. Bachman's findings. He did not allow the five percent calculated by Dr. Bachman for strength deficit.

By decision dated June 17, 2004, the Office granted appellant a schedule award for 40.56 weeks for the period October 29, 2003 to July 7, 2004, for a 13 percent impairment of the right upper extremity.

Appellant requested a hearing that was held on April 7, 2005.

By decision dated July 20, 2005, an Office hearing representative instructed the Office to issue an amended schedule award for an 18 percent impairment on the grounds that the opinion

of Dr. Bachman was entitled to the weight of the medical evidence and outweighed the opinion of the Office medical adviser that appellant had a 13 percent impairment.

By decision dated September 14, 2005, the Office granted appellant a schedule award for an additional five percent impairment of the right upper extremity, for a total schedule award of 18 percent.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] sets 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*[4] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[5]

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is required.

In this case, there was a conflict between Dr. Diamond who calculated a 29 percent impairment for appellant's right upper extremity and an Office medical adviser who calculated a four percent impairment. Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination.[6] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

Due to the conflict in the medical opinion evidence between Dr. Diamond and the Office medical adviser as to appellant's impairment, the Office properly referred appellant to Dr. Bachman, a Board-certified orthopedic surgeon, for an impartial medical examination.

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.,* 53 ECAB 331 (2002).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots,* 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan),* 45 ECAB 207 (1993).

[7] *See Roger Dingess,* 47 ECAB 123 (1995); *Glenn C. Chasteen,* 42 ECAB 493 (1991).

The Board finds that Dr. Bachman's impairment rating for appellant's right upper extremity based on decreased range of motion was correctly based on the A.M.A., *Guides.* Applying Tables 16-40, 16-43 and 16-46 of the fifth edition of the A.M.A., *Guides* to his findings on physical examination on October 29, 2003, he properly assigned 5 percent for 100 degrees of flexion and 2 percent for 20 degrees of extension, 4 percent for 90 degrees of decreased abduction, 1 percent for 20 degrees of adduction, and 1 percent for 70 degrees of internal rotation.

However, Dr. Bachman did not provide sufficient detail explaining how he calculated the five percent impairment for strength deficit based on Table 16-35 at page 510. The A.M.A., *Guides* explains the procedures to follow in using Table 16-35. Dr. Bachman did not explain how his calculation of a five percent impairment based on Table 16-35 was derived from those procedures. Additionally, Dr. Bachman noted that appellant had pain in his right shoulder but he did not include any impairment rating for pain. The Board finds that further development of the medical evidence is required.

On appeal, appellant contends that his schedule award should be based on the impairment rating from Dr. Diamond who calculated a 29 percent impairment. However, Dr. Diamond's rating is not correctly based on the A.M.A., *Guides.* He included in his impairment rating a three percent impairment due to pain based on Table 18-1 in Chapter 18. The Office's procedure manual provides that Chapter 18 should not be used to rate pain-related impairment for any condition that can be adequately rated on the basis of the impairment rating systems given in other chapters of the A.M.A., *Guides.*[8] Dr. Diamond did not explain why other chapters in the A.M.A., *Guides* were not sufficient to use in assessing appellant's impairment due to pain. Dr. Diamond also included in his impairment rating a 10 percent rating for grip strength deficit. Grip strength is used to evaluate power weaknesses related to structures in the hand, wrist or forearm. The A.M.A., *Guides* do not encourage the use of grip strength as an impairment rating because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides,* for the most part, is based on anatomic impairment. Thus the A.M.A., *Guides* does not assign a large role to such measurements. Only in rare cases should grip strength be used, and only when it represents an impairing factor that has not been otherwise considered adequately.[9] The A.M.A., *Guides* states, "*Otherwise, the impairment ratings based on objective anatomic findings take precedence.*"[10] (Emphasis in the original.) Due to these deficiencies, Dr. Diamond's report was not sufficient to determine appellant's right upper extremity impairment rating.

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[8] *See* A.M.A., *Guides,* section 18.3b at page 571.

[9] A.M.A., *Guides,* section 16.8a at page 508

[10] *Id. See also Phillip H. Contee,* 56 ECAB ___ (Docket No. 04-1524, issued December 22, 2004).

CONCLUSION

The calculations of Dr. Bachman regarding appellant's range of motion were properly done. However, the case will be remanded for the Office to obtain a supplemental report from Dr. Bachman addressing how he calculated the five percent impairment for strength deficit based on Table 16-35 at page 510 of the A.M.A., *Guides.* Dr. Bachman should address why he did not include an impairment rating for pain in light of the fact that he noted in his report that appellant had pain in his right shoulder. After such further development as the Office deems necessary, it should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 14 and July 20, 2005 are set aside and the case is remanded for further action consistent with this decision.

Issued: April 6, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board