United States Department of Labor
Employees' Compensation Appeals Board

RONALD THOMAS, Appellant	)	
and	)	**Docket No. 05-1871**
	)	**Issued: January 23, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Asheville, NC, Employer	)	

Appearances:
Ronald Thomas, pro se,
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 September 2, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated July 20, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained more than a 17 percent permanent impairment of his left upper extremity for which he received a schedule award.

FACTUAL HISTORY

On May 15, 2002 appellant, then a 55-year-old clerk, filed an occupational disease claim for a left shoulder rotator cuff tear in the performance of duty. Appellant did not stop work. On May 29, 2002 the Office accepted appellant's claim for left rotator cuff tear and expanded the

claim on June 27, 2002 to include left rotator cuff repair.[1] Appellant received appropriate compensation benefits.

In a September 11, 2003 report, appellant's physician, Dr. Tally H. Eddings, III, a Board-certified orthopedic surgeon, opined that, "[a]t appellant's request, he is rated at 20 percent permanent impairment to the left shoulder given his intra articular pathologies and limited range of motion postoperatively." In a separate attending physician's report dated September 30, 2003, Dr. Eddings repeated that appellant had an impairment rating of 20 percent of the left shoulder.

On October 5, 2003 appellant filed a claim for a schedule award.

By letter dated October 16, 2003, the Office requested that Dr. Eddings utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A. *Guides*) to provide an evaluation to determine the extent of permanent partial impairment of appellant's left shoulder.

In a November 12, 2003 report, Dr. Eddings utilized range of motion measurements[2] to determine appellant's permanent impairment rating.[3] He opined that appellant had an impairment of 20 percent of the left upper extremity and reached maximum medical improvement on September 11, 2003.

In a November 21, 2003 report, the Office medical adviser reviewed Dr. Eddings' November 12, 2003 report and utilized the A.M.A., *Guides.* He determined that appellant was entitled to a 10 percent impairment of his left upper extremity. He referred to Figures 16-40, 16-43 and 16-46 of the A.M.A., *Guides*[4] and advised that appellant reached maximum medical improvement on September 11, 2003.

On December 9, 2003 the Office referred appellant for a second opinion examination, to determine an impairment rating for his left shoulder, with Dr. Surendrapal Mac, a Board-certified orthopedic surgeon.

In a February 20, 2004 report, Dr. Mac noted that appellant had an impairment of 13 percent to the left upper extremity pursuant to the A.M.A., *Guides.*

[1] The record reflects that appellant underwent an arthroscopic evaluation of the left shoulder with a repair of the rotator cuff and an open repair of the rotator cuff, mumford procedure and debridement of the distal clavicle on June 18, 2002. Appellant returned to light duty after the authorized surgery, on August 4, 2002 and full duty on January 23, 2003.

[2] A physical therapist provided measurements for the physician.

[3] He indicated that appellant had retained internal rotation from 0 degrees to 60 degrees, retained external rotation from 0 degrees to 50 degrees, retained forward flexion from 0 degrees to 130 degrees, retained backward elevation from 0 degrees to 45 degrees and retained abduction from 0 degrees to 125 degrees, and retained adduction from 0 degrees to 50 degrees.

[4] A.M.A., *Guides* 476, 477.

In an April 1, 2004 report, the Office medical adviser concurred with the findings provided by Dr. Mac.

By decision dated April 16, 2004, the Office awarded appellant compensation for 40.56 weeks from February 20 to April 17, 2004 based upon a 13 percent permanent impairment of the left upper extremity.

By letter dated April 27, 2004, appellant requested a hearing, which was held on October 20, 2004.[5]

In an October 28, 2004 report, Dr. Eddings explained that he utilized and "plotted" measurements from a physical therapist which were obtained on September 11, 2003, regarding appellant's shoulder motion. He noted that he utilized the A.M.A., *Guides* and referred to section 16.4i regarding shoulder motion.[6] Dr. Eddings noted that he referred to Figures 16-39, 16-42 and 16-45.[7] He determined that, regarding flexion/extension, appellant had 18 percent total impairment. Dr. Eddings provided a finding of 9 percent for his flexion/extension, and rated appellant's abduction at 30 percent, which was equivalent to a 12 percent shoulder function, which was equal to 4 percent. Regarding internal and external rotation, Dr. Eddings explained, appellant had 21 percent, which was 20 percent of the shoulder, and equal to 5 percent. He added up the findings of 5 percent, plus 9 percent, plus 4 percent for a total of 18 percent to the left upper extremity.

By decision dated May 9, 2005, the Office hearing representative set aside and remanded the Office's April 16, 2004 schedule award decision. The Office hearing representative requested that the Office refer the file to the Office medical adviser, along with the new report from Dr. Eddings, for an impairment evaluation and recommended a *de novo* decision on the claim for a schedule award.

In a June 16, 2005 report, the Office medical adviser reviewed Dr. Eddings' report and disagreed with certain of his findings. He explained that Dr. Eddings utilized Figures 16-39, 16-42, and 16-45;[8] however, these pertained to ankylosis. The Office medical adviser explained that Figures 16-40, 16-43, and 16-46[9] should be used. He noted that these figures would provide a rating of 13 percent to the left upper extremity pursuant to the A.M.A., *Guides.*

By letters dated June 23, 2005, the Office determined that a conflict existed between the Office medical adviser and appellant's physician, Dr. Eddings, regarding the extent of

[5] During the hearing, appellant testified that additional surgery was warranted; however, he did not wish to have additional surgery without any guarantee that his shoulder would improve. He advised that he felt he was entitled to a schedule award based on the 20 percent impairment rating provided by his treating physician Dr. Eddings.

[6] A.M.A., *Guides* 474.

[7] A.M.A., *Guides* 475, 477, 478.

[8] *Id.*

[9] A.M.A., *Guides* 476, 477, 479.

impairment of appellant's left arm. The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Stephen Shaffer, a Board-certified orthopedic surgeon.

In a July 12, 2005 report, Dr. Shaffer noted appellant's history of injury and treatment and conducted a physical examination. He noted that an examination of the left shoulder revealed diffuse muscle atrophy which measured 4/5 with diffuse muscle weakness in the general shoulder groups, and negative cross adduction and impingement tests. Dr. Shaffer advised that range of motion of the shoulder was adduction of 30 degrees, abduction of 80 degrees, flexion of 95 degrees, extension of 60 degrees, external rotation in abduction of 50 degrees and internal rotation in abduction of 15 degrees. He noted a 3 inch longitudinal scar over the lateral surface of the deltoid and tenderness and 2+ enlargement of the old anterior cruciate (AC) joint with additional tenderness at the supraspinatus musculotendinous unit and at the posterior superior aspect of the spinal border of the scapulae. Dr. Shaffer also noted that there were postoperative arthritic changes as revealed by diagnostic testing and limited shoulder motion with a 4/5 shoulder weakness. He referred to the A.M.A., *Guides*, Figure 16-40, 16-43 and 16-46. Dr. Shaffer explained that this would entitle appellant to six percent for flexion, zero percent for extension, one percent for adduction, five percent for abduction, four percent for internal rotation, and one percent for external rotation. He advised that these added up and determined that appellant was entitled to an impairment of 17 percent to the left shoulder.

In a July 18, 2005 report, an Office medical adviser advised that he concurred with Dr. Shaffer's findings and agreed that appellant was entitled to an impairment of 17 percent of the left upper extremity.

By decision dated July 20, 2005, the Office awarded appellant compensation for 12.48 weeks from November 30, 2004 to February 25, 2005 based upon an additional 4 percent impairment of the left upper extremity.[10]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[11] and its implementing regulation[12] 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[13]

[10] In a memorandum dated July 19, 2005, the Office noted that an additional schedule award of four percent was to be paid to be appellant.

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] A.M.A., *Guides* (5th ed. 2001).

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[14] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[15]

ANALYSIS

The Office determined that a conflict in medical opinion was created between appellant's physician, Dr. Eddings, who found that appellant had an impairment of 18 percent to the left arm, and an Office medical adviser, who determined that appellant had no more than 13 percent of the left arm. The Office referred appellant to Dr. Stephen Shaffer, a Board-certified orthopedic surgeon and impartial medical examiner, to resolve the conflict.

Section 8123(a) of the Act[16] provides, if there is 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.[17] In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[18]

Dr. Shaffer examined appellant, discussed the history of injury and reviewed the evidence of record, including diagnostic studies. In a July 12, 2005 report, he noted appellant's history of injury and treatment and conducted a physical examination. Dr. Shaffer referred to the A.M.A., *Guides,* Figures 16-40, 16-43 and 16-46. He explained that according to Figure 16-40[19] 95 degrees of flexion was equal to 6 percent and 60 degrees of extension was equal to 0 percent. Dr. Shaffer also referred to Figure 16-43[20] to determine the percentage of loss for lack of abduction and adduction of the shoulder. He determined that appellant had a loss of adduction of 30 degrees which would equate to 1 percent, and that he had a loss of abduction of 80 degrees which would equate to a loss of 5 percent. Regarding appellant's internal and external rotation,

[14] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[15] *Bernard A. Babcock, Jr*., 52 ECAB 143 (2000); *see also Paul A. Toms*, 28 ECAB 403 (1987).

[16] 5 U.S.C. §§ 8101-8193.

[17] 5 U.S.C. § 8123(a).

[18] *Barbara J. Warren*, 51 ECAB 413 (2000).

[19] A.M.A., *Guides* 476.

[20] A.M.A., *Guides* 477.

Dr. Shaffer referred to Figure 16-46[21] and determined that appellant had a loss of 50 degrees of external rotation, which was equal to 1 percent and that had a loss of 15 degrees of internal rotation which would entitle appellant to 4 percent. He added the percentages and determined that appellant was entitled to an impairment of 17 percent to the left shoulder. The Board finds that Dr. Shaffer provided a detailed and well-rationalized report based on a proper factual background and thus his opinion is entitled to the special weight accorded an impartial medical examiner. His report, therefore, constitutes the weight of the medical opinion evidence and establishes that appellant has an impairment of 17 percent to the left upper extremity. An Office medical adviser reviewed Dr. Shaffer's findings and concurred that the A.M.A., *Guides* were accurately applied.

The Board finds that there is no other medical evidence of record, based upon a correct application of the A.M.A., *Guides,* to establish that appellant has more than a 17 percent permanent impairment of the left upper extremity for which he received a schedule award. Accordingly, the Board finds that appellant has no more than a 17 percent permanent impairment of the left upper extremity.

On appeal, appellant alleged that he felt he was entitled to greater than the 17 percent he was awarded. Appellant particularly contended that Dr. Eddings' finding of 18 percent impairment should control. However, as noted above, section 8123 provides for referral of a claimant to a third physician when there is a conflict in the medical evidence. As Dr. Eddings' opinion created a medical conflict with the opinion of Office physicians, the Office properly referred the matter to an impartial specialist, Dr. Shaffer, who, as noted above, resolved the medical conflict in finding 17 percent impairment. Subsequent to Dr. Shaffer's report, appellant did not submit new medical evidence, conforming with the A.M.A., *Guides,* to support any greater impairment.[22]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained more than a 17 percent permanent impairment of his left upper extremity, for which he received a schedule award.

[21] A.M.A., *Guides* 479.

[22] Appellant is not precluded from submitting relevant medical evidence to the Office in support of a request for an additional schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 20, 2005 is affirmed.

Issued: January 23, 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