United States Department of Labor
Employees' Compensation Appeals Board

THOMAS L. PATTON, Appellant	)	
and	)	**Docket No. 06-355**
	)	**Issued: June 12, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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

JURISDICTION

On December 5, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 31, 2005, in which an Office hearing representative affirmed the Office's August 10, 2004 decision, finding that he had no more than a 30 percent impairment of the right upper extremity, for which he received schedule awards. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant, then a 45-year-old clerk, has more than a 30 percent impairment to the right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On July 26, 2000 appellant filed an occupational disease claim alleging that his thumb pain was caused by his employment. Appellant stated that he was initially aware of his condition in October 1999, that it was caused by his employment on May 2000 and that he first reported

the condition to his supervisor in May 1999. Appellant did not stop work. On February 24, 2003 the Office accepted appellant's claim for bilateral osteoarthritis of the thumbs.[1]

On December 18, 2002 the Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for an impairment rating for his bilateral thumb osteoarthritis. On December 30, 2002 Dr. Kaffen found a four percent impairment of the right upper extremity and a four percent impairment of the left upper extremity. On March 5, 2003 an Office medical adviser reviewed Dr. Kaffen's report and concurred with his findings.

On March 19, 2003 the Office granted appellant four percent impairment for the right upper extremity and four percent impairment of the left upper extremity to run for 24.96 weeks from December 23, 2002 to June 15, 2003.

On June 7, 2001 appellant filed a claim for a right distal biceps tendon rupture, which the Office accepted, authorized surgical repair and paid appropriate benefits. Dr. Steven B. Lippitt, a Board-certified orthopedic surgeon, performed surgical repair of the distal biceps tendon on June 8, 2001. Appellant then filed a schedule award on October 24, 2001 and submitted a November 13, 2001 report from Dr. Paul A. Steurer, appellant's treating Board-certified orthopedic surgeon, who provided eight percent impairment rating of appellant's right upper extremity using the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) (5th ed. 2001). The Office medical adviser reviewed Dr. Steurer's report and recommended five percent impairment for loss of the right arm.

On February 6, 2002 the Office granted appellant a five percent schedule award for loss of use of the right arm. Appellant then requested an oral hearing, which was held on August 28, 2002. In a decision dated December 6, 2002, the hearing representative found a conflict in medical opinion between Dr. Steurer and the Office medical adviser and remanded the case to the Office for referral to an impartial medical examiner. In a report dated March 9, 2003, Dr. David A. Brys, the impartial medical examiner and a Board-certified orthopedic surgeon, stated that appellant had a 26 percent impairment of the right upper extremity. Dr. Brys stated that appellant's motor deficit in elbow flexion and forearm supination, based on Table 16-35 on page 510 of the A.M.A., *Guides* equaled a strength deficit of between 30 and 50 percent. Based on that table, the physician found that appellant had 8 percent impairment for loss of flexion and 6 percent impairment for loss of supination for a total of 14 percent for motor deficit. He rated range of motion loss of 20 degrees[2] of extension as 2 percent impairment based on Figure 16-34,[3] page 472 and flexion of 135 degrees of no ratable impairment. He determined that

[1] The Office initially denied appellant's claim, which the Board affirmed. Docket No. 01-1029 (issued January 3, 2002). Appellant requested reconsideration with the Office, which it denied on June 7, 2002. Appellant again requested reconsideration of the June 7, 2002 decision and submitted new evidence to the Office on September 3, 2002. Appellant also appealed the June 7, 2002 decision to the Board; however, based on the Director's motion to remand, the Board remanded the case to the Office on January 29, 2002. Docket No. 02-2355 (issued January 29, 2002). The Office thereupon accepted appellant's claim for bilateral osteoarthritis of the thumbs on February 24, 2003.

[2] The report incorrectly states 20 percent vice 20 degrees.

[3] The report incorrectly states Table vice Figure for 16-34, page 472.

appellant's right grip deficit was 28 percent and based on Table 16-34, page 509, this equaled 10 percent impairment of the upper extremity. Dr. Brys added 14 percent for motor deficit impairment, 2 percent for range of motion deficit and 10 percent for grip strength loss to find 26 percent upper extremity impairment based on Table 16-3, page 439.

In a decision dated March 24, 2003, the Office granted appellant a 21 percent schedule award of the right upper extremity. The Office reduced the 26 percent impairment finding of Dr. Brys by 5 percent based on its prior award.

On October 24, 2003 the Office authorized right shoulder arthroscopic surgery, which was performed on November 20, 2003 by Dr. Raymond W. Acus, a Board-certified orthopedic surgeon.[4] The record includes an internal Office report indicating that it erroneously authorized arthroscopic surgery as no medical evidence established the causal relationship between appellant's employment and the surgery. Appellant returned to work on January 27, 2004. On April 9, 2004 Dr. Acus stated that appellant had reached maximum medical improvement and noted restrictions.

On May 20, 2004 Dr. Steurer stated that he examined appellant on May 17, 2004 and that he had reached maximum medical improvement on April 9, 2004. Dr. Steurer stated that based on Figure 16-40 of the A.M.A., *Guides*, appellant had three percent loss of flexion and zero percent loss of extension. Using Figure 16-43,[5] appellant had 30 percent loss of adduction, using Figure 16-46 appellant had 1 percent loss for internal rotation and 0 percent loss for external rotation. For weakness in the right shoulder the physician used Figure 16-35 and determined that decreased flexion equaled two percent impairment, decreased extension equaled zero percent impairment, loss of abduction equaled one percent impairment and that loss of adduction equaled one percent impairment. For weakness in the right shoulder, Dr. Steurer stated that decreased flexion equaled 2 percent impairment using Table 16-35; for extension there was no impairment; for abduction, 1 percent impairment; for adduction, also 1 percent; for internal and external rotation, appellant had 3 percent impairment each for a total 10 percent loss of strength of the upper extremity. Dr. Steurer combined strength and motor loss to reach a total impairment rating of 17 percent.

In a report dated June 25, 2004, the Office medical adviser determined that appellant had right upper extremity impairment of seven percent. The Office medical adviser relied on Dr. Steurer's data to provide the following impairment rating of the right upper extremity: abduction of 120 degrees was 3 percent impairment and abduction of 30 degrees was 1 percent impairment based on Figure 16-43; forward flexion of 140 degrees was 3 percent impairment and extension of 60 degrees was 0 percent impairment based on Figure 16-40; internal rotation of 75 degrees was 0 percent impairment and external rotation of 75 degrees was 0 percent impairment based on Figure 16-40, for a total upper extremity award of 7 percent. The Office

[4] On August 30, 2004 the Office authorized payment for arthroscopy with debridement and arthroscopy with removal of loose or foreign body. These procedures were part of the surgery performed on November 24, 2003.

[5] He stated: "Table" instead of Figure in several calculations.

medical adviser noted that under 16.8a principles, "Decreased strength cannot be rated in the presence of decreased motion … therefore only decreased motion impairments [are] allowed."[6]

On August 10, 2004 the Office denied appellant's claim for a schedule award noting that the medical evidence failed to establish a greater impairment than 21 percent for the right upper extremity, which the Office had previously granted.

In a memorandum for the file dated August 11, 2004, the Office noted that it doubled appellant's claims for right shoulder and bilateral thumbs into claim number 09-2010221. The Office further noted that it had not deducted four percent from appellant's right upper extremity (osteoarthritis of the right wrist) impairment on August 10, 2004 when it granted an additional schedule award of 21 percent.

Appellant, on August 16, 2004, requested an oral hearing. On September 17, 2004 Dr. Steurer stated that his prior rating of 17 percent was based only on the condition for which he examined appellant and was in addition to any other right upper extremity impairment. The Office held the hearing on June 15, 2005.

By decision dated October 31, 2005, the hearing representative affirmed the Office's August 10, 2004 decision finding that appellant did not have more than a 30 percent impairment of the right upper extremity, for which he received a schedule award.[7]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulation[9] 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* (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[10]

[6] A.M.A., *Guides* 508.

[7] The hearing representative essentially modified the Office's prior decision by finding that it had granted appellant schedule awards totaling 30 percent. In its August 10, 2004 decision, the Office determined that it had granted appellant a total award of 21 percent.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Willie C. Howard*, 55 ECAB ___ (Docket No. 04-342 and 04-464, issued May 27, 2004).

ANALYSIS

In this case, the issue before the Board is whether appellant established an entitlement to a schedule award more than 30 percent for the right upper extremity which he had been granted.

With regard to the initial schedule award, the Board notes that the Office on March 19, 2003 granted appellant a four percent schedule award for right thumb osteoarthritis.[11]

With regard to appellant's claim for a schedule award based on a right biceps tendon rupture and repair, the Board notes that the Office developed the medical evidence and, subsequently rated appellant with a 26 percent impairment of the right upper extremity. The Office in a decision dated March 24, 2003, granted appellant a 21 percent impairment of the right upper extremity as it deducted 5 percent previously granted.[12] As noted by the hearing representative, appellant therefore had been granted a total of 30 percent for the right upper extremity based on the initial 4 percent impairment for right thumb osteoarthritis, followed by the 5 percent award for the right biceps tendon rupture and then the third schedule award of 21 percent based.

The examination of the appeal turns now to whether appellant established that he had more than a 30 percent impairment of the right upper extremity.

The Board finds that the Office medical adviser's impairment rating for appellant's right upper extremity based on Dr. Steurer's report noting 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 Dr. Steurer's findings on physical examination on May 17, 2005, he properly assigned 3 percent for 120 degrees of abduction and 1 percent for 30 degrees of adduction, 3 percent for 140 degrees of flexion, 0 percent for 60 degrees of extension, 0 percent for 75 degrees of external rotation and 0 percent for 75 degrees of internal rotation, for a total impairment rating of 7 percent of the right upper extremity.

Dr. Steurer included in his impairment rating a 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* does 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. The A.M.A., *Guides* states that "*Otherwise, the impairment ratings based on objective anatomic findings take precedence.*"[13] (Emphasis in the

[11] The initial schedule award was four percent for the right and four percent for the left thumb. Appellant did not appeal this award.

[12] Appellant did not appeal this decision. The Board's jurisdiction is limited to reviewing final Office decisions issued within one year prior to the filing of the appeal. *See* 20 C.F.R. §§ 501.2(c) and 501.3(d).

[13] A.M.A., *Guides*, *supra* note 6. *See Phillip H. Contee*, 56 ECAB ___ (Docket No. 04-1524, issued December 22, 2004).

original.) Dr. Steurer did not attempt to explain how appellant's grip strength represented an impairing factor that has not been otherwise considered adequately. While Dr. Steurer also asserted that the impairment he provided for loss of shoulder function should be in addition to appellant's other right arm impairments, the physician did not provide his own current impairment evaluation, consistent with the A.M.A., *Guides*, to show that appellant had more than a 30 percent right arm impairment, the amount of impairment for which appellant had already been compensated under 5 U.S.C. § 8107.[14] Consequently, Dr. Steurer's report was not sufficient to determine appellant's right upper extremity impairment rating.

There is no other medical evidence of record conforming to the A.M.A., *Guides* that supports any greater impairment. The Board finds that the Office properly found that appellant has no more than 30 percent impairment to the right upper extremity, for which he received a schedule award.

CONCLUSION

The Board finds that appellant has no more than a 30 percent impairment of the right upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 31, 2005 is affirmed.

Issued: June 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[14] Appellant bears the burden of proof to establish a greater impairment than that previously awarded. *See Edward A. Spohr*, 54 ECAB 806 (2003).