

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**W.S., Appellant**

**and**

**U.S. POSTAL SERVICE, CINCINNATI BULK  
MAIL CENTER, Cincinnati, OH, Employer**

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**Docket No. 06-1689  
Issued: January 22, 2007**

*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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 18, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 12, 2006 in which an Office hearing representative affirmed a schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination in this case.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish that she has greater than an three percent permanent impairment of the right upper extremity for which she received a schedule award.

**FACTUAL HISTORY**

On March 15, 2001 appellant, then a 55-year-old casual mail handler, sustained an employment-related right elbow radial head fracture, traumatic impingement of the right shoulder and traumatic bicep tendinitis when she tripped on stacked wood at work. She

continued working limited duty until February 28, 2002 when she underwent right shoulder acromioplasty. Appellant did not return to work and received appropriate compensation.

The Office continued to develop the claim and on August 22, 2003 referred appellant to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Fisher was provided the medical record, a statement of accepted facts and a set of questions. In a September 3, 2003 report, he noted the history of injury, his review of the record and provided examination findings. Dr. Fisher advised that appellant's work-related condition had resolved, that she could perform her mail handler duties and that she needed no further medical treatment. In an attached work capacity evaluation, he advised that appellant could work 8 hours a day with a 50-pound lifting restriction. On October 16, 2003 appellant's attending Board-certified orthopedic surgeon, Dr. Keith Kenter, advised that she could return to full duty.

By letter dated October 31, 2003, the Office informed appellant that it proposed to terminate her compensation benefits on the grounds that she had no residuals of her employment injuries. In response, appellant submitted a November 10, 2003 treatment note in which Dr. Kenter noted her continued complaint of right upper extremity pain. By decision dated May 26, 2004, the Office terminated appellant's compensation benefits on the grounds that residuals of the employment injury had ceased. On May 28, 2004 appellant, through counsel, requested a hearing. At the hearing, held on November 16, 2004 appellant's attorney argued that she had continuing residuals and requested a schedule award. Appellant thereafter submitted a December 13, 2004 report in which Dr. Martin Fritzhand, a Board-certified urologist who practices occupational medicine,<sup>1</sup> advised that appellant was being followed by a "Dr. Hubbard." Dr. Fritzhand stated that in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)<sup>2</sup> appellant had a three percent right upper extremity impairment under Figure 16-37 due to a range of motion deficit of supination diminished to 20 degrees. He found that under Table 16-10 she had a Grade 4 sensory impairment to the radial nerve yielding a 1.25 percent impairment and under Table 16-11 a Grade 4 motor impairment of 8.75 percent. Dr. Fritzhand also advised that under Figure 18-1 appellant was entitled to a 5 percent impairment for pain, for a total right upper extremity impairment of 18 percent.

By decision dated February 22, 2005, an Office hearing representative affirmed that the Office met its burden of proof to terminate appellant's compensation benefits on May 26, 2004 but that Dr. Fritzhand's report was sufficient to establish a conflict in medical evidence with Dr. Fisher's opinion regarding whether appellant had any continuing residuals or disability from her accepted conditions and regarding the degree of permanent impairment. The hearing

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<sup>1</sup> Dr. Fritzhand's letterhead notes that he is a fellow in the American Academy of Disability Evaluating Physicians and the American Board of Independent Medical Examiners.

<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

representative also requested that appellant provide the medical reports from Dr. Hubbard. By letter dated March 21, 2005, appellant's attorney informed the Office that she had never been treated by a Dr. Hubbard.

On April 8, 2005 appellant was referred to Dr. Stephen T. Autry, Board-certified in orthopedic surgery, for an impartial evaluation. A statement of accepted facts, the medical record and a set of questions were provided for his review. In a report dated May 26, 2005, Dr. Autry noted the history of injury, his review of the medical records and appellant's complaints of pain. Examination findings included full range of motion of the right shoulder with subjective pain in external rotation and no right upper extremity atrophy. Motor and sensory examinations were intact. Elbow range of motion demonstrated full pronation and supination, flexion to 165 degrees and a lack of 10 degrees of full extension with no focal tenderness, crepitation or other abnormality of the elbow. Dr. Autry advised that weakness appeared to be more of a giveaway type that was not quantifiable but was approximately 4/5. He noted diffuse tenderness over the right wrist and that she had reached maximum medical improvement. Dr. Autry stated that, under Table 16-34 of the fifth edition of the A.M.A., *Guides*, appellant was entitled to a 1 percent right upper extremity impairment for loss of 10 degrees of extension. He advised that the best way to assess appellant's 4/5 giveaway weakness and subjective shoulder pain was by using section 18.3d of the A.M.A., *Guides*, finding that she had a two percent whole person impairment for her residual pain. In an attached work capacity evaluation, Dr. Autry opined that appellant could work for 8 hours a day with a 25-pound lifting restriction.

In a report dated June 27, 2005, an Office medical adviser noted review of the medical record, including Dr. Autry's evaluation. He found that maximum medical improvement had been reached in January 2003 and that, based on Dr. Autry's range of motion measurements and recommendations, under Figure 16-34 of the A.M.A., *Guides*, appellant had had a 1 percent right upper extremity impairment for the 10 degrees loss of extension. The Office medical adviser noted that Dr. Autry found full range of motion of the right shoulder and advised that, based on his findings of no evidence of sensory or motor loss, appellant was not entitled to an impairment rating under Tables 16-10 and 16-11, explaining that the physician's finding of giveaway weakness and an inconsistent examination was interpreted as normal strength and sensation. He agreed that appellant was entitled to an additional two percent under section 18.3d of the A.M.A., *Guides*, based on an increasing burden for pain, for a total three percent right upper extremity impairment.

By decision dated July 12, 2005, appellant was granted a schedule award for a 3 percent impairment of the right upper extremity, for a total of 65.52 days, to run from January 1 to March 7, 2003.<sup>3</sup> On July 13, 2005 appellant, through her attorney, requested a hearing that was held on March 28, 2006. At the hearing appellant's attorney argued that Dr. Fritzhand's impairment rating should be credited. In a June 12, 2006 decision, an Office hearing representative affirmed the July 12, 2005 schedule award decision.

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<sup>3</sup> The Board notes that the July 12, 2005 schedule award decision contains a typographical error stating that the award was for 65.52 weeks.

## LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act<sup>4</sup> and section 10.404 of the implementing federal regulation,<sup>5</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*<sup>6</sup> has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>7</sup>

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 figures and tables found in the A.M.A., *Guides*. 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.<sup>8</sup>

Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.<sup>9</sup> Section 16.4 provides that in evaluating abnormal motion both active and passive motion measurements are necessary to evaluate the joint motion under the appropriate charts and these should be added to obtain the total motion impairment.<sup>10</sup> Section 18.3b provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*. Office procedures provide that, if the conventional impairment adequately encompasses the burden produced by pain, the formal impairment rating is determined by the appropriate section of the A.M.A., *Guides*.<sup>11</sup> Section 18.3d of the A.M.A., *Guides*, however, provides guidance on how a pain-related impairment should be rated, noting that an award of up to three percent whole person impairment may be

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> A.M.A., *Guides*, *supra* note 2.

<sup>7</sup> See *Joseph Lawrence, Jr.*, *supra* note 2; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

<sup>8</sup> *Robert V. Disalvatore*, 54 ECAB 351 (2003).

<sup>9</sup> A.M.A., *Guides*, *supra* note 2 at 433-521.

<sup>10</sup> *Id.* at 451-52.

<sup>11</sup> FECA Bulletin No. 01-05 (issued January 29, 2001).

granted if pain increases the burden of the employee's condition.<sup>12</sup> While the A.M.A., *Guides*, provides for impairment to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person.<sup>13</sup>

Section 8123(a) of the Act<sup>14</sup> provides that 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.<sup>15</sup> When 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.<sup>16</sup> Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.<sup>17</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision. The Office found that a conflict had been created regarding appellant's degree of impairment. Dr. Fisher, who performed a second opinion evaluation for the Office found that appellant's employment-related condition had resolved without residuals and Dr. Fritzhand, an attending physician, found an 18 percent right upper extremity impairment. On April 8, 2005 the Office referred appellant to Dr. Autry for an impartial evaluation. In a report dated May 26, 2005, Dr. Autry advised that appellant had reached maximum medical improvement. Right upper extremity examination findings included full range of motion of the shoulder with subjective pain in external rotation and no atrophy. Motor and sensory examinations were intact. Elbow range of motion demonstrated full pronation and supination, flexion to 165 degrees and a lack of 10 degrees of full extension with no focal tenderness, crepitation or other abnormality of the elbow. He advised that under Table 16-34 of the fifth edition of the A.M.A., *Guides*, appellant was entitled to a 1 percent right upper extremity impairment for the loss of 10 degrees of extension. In a June 27, 2005 report, an Office medical adviser assessed appellant's right upper extremity impairment based on Dr. Autry's physical findings and in accordance with the A.M.A., *Guides* and agreed that appellant was entitled to a 1 percent right upper extremity impairment for 10 degrees loss of elbow extension. The Board, therefore, finds that, based on Dr. Autry's physical findings, appellant would be entitled to a one percent right upper extremity impairment for loss of elbow extension.

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<sup>12</sup> A.M.A., *Guides*, *supra* note 2 (*Errata* March 2002) at 573, 588; *see Richard B. Myles*, 54 ECAB 379 (2003).

<sup>13</sup> *See Janae J. Triplette*, 54 ECAB 792 (2003).

<sup>14</sup> 5 U.S.C. §§ 8101-8193.

<sup>15</sup> 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

<sup>16</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>17</sup> *See Thomas J. Fragale*, 55 ECAB 619 (2004). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002), *id.*

Dr. Autry, however, also advised that appellant's right upper extremity weakness appeared to be more of a giveaway type that was not quantifiable but was approximately 4/5. He opined that the best way to assess this weakness and her subjective shoulder pain was by using section 18.3d of the A.M.A., *Guides*, concluding that she had a two percent whole person impairment. As stated above, section 18.3b provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*.<sup>18</sup> The Board finds that Dr. Autry did not adequately explain why appellant's giveaway weakness and pain could not be adequately rated under Chapter 16 of the A.M.A., *Guides*. The Board also notes that the Act does not provide for permanent impairment of the whole person<sup>19</sup> and Dr. Autry awarded appellant a two percent whole person impairment under section 18.3b. When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in the original report.<sup>20</sup> The case must, therefore, be remanded to the Office to secure a supplementary report from Dr. Autry for a further explanation as to why appellant's right upper extremity giveaway weakness and pain cannot be adequately assessed in accordance with Chapter 16 of the A.M.A., *Guides*. After such further development as it deems necessary, the Office shall issue an appropriate decision.<sup>21</sup>

### CONCLUSION

The Board finds that this case is not in posture for decision regarding the degree of appellant's right upper extremity impairment.

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<sup>18</sup> A.M.A., *Guides*, *supra* note 11.

<sup>19</sup> *Janae J. Triplette*, *supra* note 13. Table 16-3 provides a chart for converting upper extremity impairments to the whole person. A.M.A., *Guides*, *supra* note 2 at 439.

<sup>20</sup> *See Adrienne L. Curry*, 53 ECAB 750 (2002).

<sup>21</sup> The record before the Board does not contain a final decision regarding whether appellant has any continuing disability. The Board's jurisdiction is limited to reviewing final decisions of the Office and extends only to those final decisions issued within one year prior to the filing of the appeal. *See Annett Louise*, 54 ECAB 783 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 12, 2006 be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: January 22, 2007  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board