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

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| **E.P., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1244** |
| | ) | **Issued: September 25, 2007** |
| **U.S. POSTAL SERVICE, PHILADELPHIA BULK MAIL CENTER, Philadelphia, PA, Employer** | ) | |

*Appearances:*
*Jeffrey P. Zeelander, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID GERSON, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On April 4, 2007 appellant, through his attorney, filed a timely appeal from a March 21, 2007 merit decision of the Office of Workers' Compensation Programs denying modification of its schedule award determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award.

### ***ISSUE***

The issue is whether appellant has more than a four percent permanent impairment of the right upper extremity.

### ***FACTUAL HISTORY***

This case is before the Board for the second time. Appellant dislocated his right shoulder on May 5, 1978. He underwent a surgical repair of recurrent posterior dislocations on May 18, 1978. In the first appeal, the Board affirmed an Office decision dated December 6, 2005 granting appellant a schedule award for a four percent permanent impairment of his right

upper extremity.[1] The Board noted that both Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon and the attending physician, and the Office medical adviser, determined that appellant had a four percent right upper extremity impairment. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By letter dated March 1, 2007, appellant, through his attorney, requested reconsideration. He submitted an impairment evaluation dated January 19, 2007 from Dr. George L. Rodriguez, a Board-certified physiatrist, who discussed appellant's complaints of continuous mild right shoulder pain which increased with movement and lifting. Appellant measured range of motion for the right shoulder as 50 degrees external rotation, 5 degrees internal rotation, 5 degrees extension, 130 degrees flexion, 150 degrees abduction and 50 degrees adduction. Dr. Rodriguez found that appellant had 4/5 strength in extension and adduction. He added the impairments due to loss of range of motion to find a 13 percent right upper extremity impairment.[2] Dr. Rodriguez next found that appellant had a two percent impairment due to loss of strength for both extension and adduction for a total of a four percent impairment.[3] He opined that appellant reached maximum medical improvement on August 5, 1978. Regarding the difference between his findings and those of Dr. Zamarin, Dr. Rodriguez stated, "First, 21 months have elapsed since Dr. Zamarin evaluated [appellant]. During this time, [he] has been avoiding many painful activities, thereby allowing his range of motion to be further limited." Dr. Rodriguez also noted that Dr. Zamarin did not measure loss of strength, which he found should be rated because it measured appellant's impairment due to shoulder atrophy. Regarding pain, he stated, "The limitations in range of motion that I documented also were not related to the presence of pain. I documented more continuous, as well as activity-related, right shoulder pain. Therefore, rating pain should have been performed on April 11, 2005 and is appropriately performed at this time." Dr. Rodriguez opined that pain should be rated separately for each body or organ system and then expressed as a percentage according to Chapter 3.700.4(c)(2)(b) of the Federal (FECA) Procedure Manual. He asserted, "This 'new' assumption is mathematically sound and follows the [f]ederal principle of separately rating each limb, body and organ system and not combining separate systems."

On March 7, 2007 an Office medical adviser reviewed the January 19, 2007 report of Dr. Rodriguez. He advised that Dr. Rodriguez's application of Chapter 3.700.4(c)(2)(b), which provides a method for converting from whole person impairments to impairments of specific organs,[4] was inconsistent with the A.M.A., *Guides* as only impairments of internal organs are expressed as a whole person impairment. The Office medical adviser opined, "Therefore, it is clear that the only time the percentage should be utilized is when there is a calculation of an impairment of an internal organ in terms of the whole person. Otherwise, it is clear that the calculation should be based upon the extremity as outlined in the [A.M.A., *Guides*]." He found

[1] *E.P.*, Docket No. 06-417 (issued September 28, 2006).

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* 476, 477, 479, Figures 16-40, 16-43 and 16-46.

[3] *Id*. at 510, Table 16-35.

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(2)(b) (August 2002).

that appellant had no more than the four percent right upper extremity impairment for which he had previously received a schedule award. The Office medical adviser asserted, "It is to be noted that Dr. Rodriguez's comment that 21 months have elapsed since Dr. Zamarin's evaluation is irrelevant since the claimant had reached a steady state unchanged clinical picture since the surgery of 1978 and clearly, the claimant has reached maximum medical improvement as stated by Dr. Zamarin in his letter of April 11, 2005."

By decision dated March 21, 2007, the Office denied modification of its prior finding that appellant has no more than a four percent right upper extremity impairment.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act,[5] and its implementing federal regulation,[6] 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[7] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[8]

Regarding loss of strength, the A.M.A., *Guides* states in relevant part:

> "In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the A.M.A., *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (*e.g.,* thumb amputation) that prevent effective application of maximal force in the region being evaluated."[9] (Emphasis in the original.)

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] 20 C.F.R. § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

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

The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[10]

## ***ANALYSIS***

The Board previously affirmed a finding that appellant had a four percent permanent impairment of the right upper extremity due to loss of range of motion based on the opinions of appellant's attending physician, Dr. Zamarin, and the Office medical adviser. On March 1, 2007 he requested an increased schedule award based on the January 19, 2007 report of Dr. Rodriguez.

Dr. Rodriguez graded loss of strength as 4/5 for extension and adduction and concluded that appellant had a four percent impairment due to loss of strength according to Table 16-35 on page 510 of the A.M.A., *Guides*. It states, however, that the use of such a method for calculating impairment is appropriate only in a rare case where the loss of strength represents an impairing factor that has not been considered adequately by other methods.[11] The A.M.A., *Guides* caution that decreased strength cannot be rated in the presence of decreased motion and that an impairment due to loss of strength cannot be combined with any other impairment unless based on unrelated etiologic or pathomechanical causes.[12] Dr. Rodriguez failed to sufficiently explain why he combined a strength deficit and loss of range of motion in determining the impairment rating. He asserted that appellant had atrophy from lack of use of his shoulder due to pain which he measured by manual muscle testing. Dr. Rodriguez did not, however, identify any unrelated etiologic or pathomechanical cause of the loss of strength such that it could be combined with any other impairment.

Dr. Rodriguez further found that appellant had an additional impairment due to pain according to Chapter 18 of the A.M.A., *Guides*. He opined that a rating for pain was proper as appellant's restricted range of motion was not due to pain but he had pain with activity. He utilized a formula which he asserted correctly converted a whole body pain impairment due to pain to an upper extremity impairment. Examiners, however, should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[13] Dr. Rodriguez did not fully explain why appellant's condition could not be adequately rated on the basis of the

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

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

[12] *Id*.

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, *supra* note 10.

body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[14] Further, in calculating the percentage impairment due to pain, he incorrectly utilized a formula outlined in the Office's procedure manual which applies to converting a whole person impairment to an impairment of a particular organ.[15]

However, Dr. Rodriguez measured diminished ranges of motion for appellant's right shoulder in determining the 13 percent impairment due to loss of range of motion. He carefully explained in his January 19, 2007 report how and why the range of motion values had decreased in the 21 months since Dr. Zamarin's April 11, 2005 impairment evaluation because of appellant's limited use of the shoulder and the passage of time. This is in no way inconsistent with an August 5, 1978 date of maximum medical improvement as that date would represent the highest level of recovery and certainly would not preclude a subsequent deterioration of the condition. Dr. Rodriguez's findings on diminished range of motion stand uncontroverted in the record.

The Office medical adviser in his March 7, 2007 report discusses Dr. Rodriguez's calculations and "a new assumption" but does not address Dr. Rodriguez's findings and explanation about range of motion. The Office medical adviser declared the 21 months which "elapsed since Dr. Zamarin's evaluation is irrelevant" because the surgery was in 1978, appellant reached a steady state and maximum medical improvement was on April 11, 2005. However, the passage of time coupled with the medical rationale provided by Dr. Rodriguez makes the opinion on range of motion relevant. Again, a finding by the Office of maximum medical improvement does not preclude a deterioration of the condition. The case will be remanded for the Office to consider Dr. Rodriguez's findings on diminished range of motion.

## ***CONCLUSION***

The Board finds that the decision must be set aside and the case be remanded for the Office to further consider the entitlement to an increased schedule award based on a worsening of range of motion as reported by Dr. Rodriguez.

[14] *Id*.

[15] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(2)(b) (August 2002).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 21, 2007 set aside and remanded for further action consistent with this decision.

Issued: September 25, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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