United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 08-1076**
	)	**Issued: November 17, 2008**
DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTER FOR DISEASE CONTROL, Atlanta, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 27, 2008 appellant filed a timely appeal from a December 27, 2007 decision of the Office of Workers' Compensation Programs regarding a schedule award and a February 12, 2008 decision regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant sustained greater than an eight percent impairment of the left upper extremity, for which he received a schedule award; (2) whether the Office properly determined that appellant received an overpayment of $16,553.46 in compensation; and (3) whether the Office properly determined that the overpayment was not subject to waiver.

FACTUAL HISTORY

The Office accepted that on May 16, 2003 appellant, then a 48-year-old gardener leader, sustained a cervical strain, aggravation of cervical spinal stenosis, an aggravation of herniated

C6-7 discs and left shoulder impingement syndrome while moving a safe from one truck to another. He was followed by Dr. Shevin Pollydore, an attending Board-certified physiatrist, through 2003.[1] Dr. Lee A. Kelley, an attending Board-certified orthopedic surgeon, performed a C6-7 anterior diskectomy and fusion with plate fixation on April 27, 2004, approved by the Office. He submitted progress notes in June 2004.

On June 8, 2005 appellant claimed a schedule award. He submitted a September 1, 2005 report from Dr. Kelley finding a 25 percent whole person impairment due to left shoulder impairment according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In an October 7, 2005 report, an Office medical adviser stated that there was no basis for Dr. Kelley's impairment rating.

In a January 26, 2006 report, Dr. Kelley opined that appellant had no neurologic or motor abnormalities in the left upper extremity, but had left arm pain. He stated that appellant had a 25 percent permanent impairment of the left upper extremity unrelated to the cervical spine. In a March 26, 2006 report, Dr. Kelley explained that the 25 percent rating was based on 15 percent for restricted motion and 10 percent for weakness, atrophy or pain. He noted the following ranges of left shoulder motion: 40 degrees internal rotation; 45 degrees external rotation; 100 degrees forward elevation; 45 degrees backward elevation; 100 degrees abduction; 30 degrees adduction. Dr. Kelley did not refer to specific tables or grading schemes of the A.M.A., Guides.

In an April 11, 2006 report, an Office medical adviser reviewed Dr. Kelley's reporta and opined that according to Figure 16-40, page 476,[2] Figure 16-43, page 477[3] and Figure 16-46, page 479[4] of the A.M.A., Guides, appellant had a 15 percent impairment of the left upper extremity due to restricted motion, as follows: 3 percent for internal rotation limited to 30 degrees; 1 percent for external rotation limited to 45 degrees, 5 percent for forward elevation limited to 100 degrees, 0 percent for backward elevation at 45 degrees; 4 percent for abduction limited to 100 degrees; 2 percent for adduction limited to 30 degrees. He found Dr. Kelley improperly applied the A.M.A., Guides by providing a rating for pain and weakness in conjunction with restricted motion.

The Office found a conflict between Dr. Kelley for appellant, and the Office medical adviser. It referred appellant, the medical record and a statement of accepted facts, to Dr. William Craven, a Board-certified orthopedic surgeon, who submitted a July 19, 2006 report relating appellant's complaints of left-sided neck pain, but no left shoulder pain. He found that appellant reached maximum medical improvement as of September 1, 2005. Dr. Craven noted

[1] In a March 7, 2004 report, Dr. Harold Alexander, a Board-certified orthopedic surgeon and second opinion physician, diagnosed left shoulder impingement and cervical radiculitis related to the May 16, 2003 incident.

[2] Figure 16-40, page 476 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder."

[3] Figure 16-43, page 477 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder."

[4] Figure 16-46, page 479 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Impairments Due to Lack of Internal and External Rotation of Shoulder."

the following ranges of left shoulder motion and accompanying impairment ratings: 4 percent for internal rotation limited to 30 degrees; 1 percent for external rotation limited to 40 degrees; 6 percent for forward elevation limited to 90 degrees, 2 percent for backward elevation limited to 20 degrees; 4 percent for abduction limited to 4 percent; 2 percent for adduction limited to 30 degrees. He opined that appellant had a 22 percent permanent impairment of the left upper extremity, 19 percent due to restricted motion, an additional 3 percent for weakness, pain or loss of sensation.

In an August 23, 2006 report, an Office medical adviser reviewed Dr. Craven's report and noted several errors. He explained that according to page 508 of the A.M.A., *Guides*, that Dr. Craven should not have provided a rating for weakness in conjunction with the rating for restricted motion. Also, according to Table 16-43, adduction limited to 30 degrees equaled a 1 percent impairment, but Dr. Craven noted a 2 percent impairment. The Office medical adviser opined that appellant had a 15 percent impairment of the left upper extremity.

By decision dated September 20, 2006, the Office issued appellant a schedule award for a 15 percent permanent impairment of the left upper extremity. The period of the award ran from September 1, 2005 to July 25, 2006.

Appellant requested an oral hearing. He asserted that the C6-7 diskectomy caused pain, clumsiness and paresthesias in his left arm and hand. By decision dated and finalized February 9, 2007, an Office hearing representative vacated the September 20, 2006 schedule award decision. The hearing representative found that Dr. Craven's report was insufficiently rationalized to resolve the conflict of opinion. The hearing representative directed the Office to request a supplemental report from Dr. Craven regarding the percentage of impairment for limited adduction under Figure 16-43, page 477 and addressing the specific tables and grading schemes used to calculate the impairment rating.

The Office sent Dr. Craven February 15 and March 21, 2007 requests for clarification. As Dr. Craven did not respond by April 6, 2007, the Office sought a second impartial medical examiner. The Office selected Dr. Jeffrey Nugent, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion.

Subsequently, Dr. Craven submitted an April 13, 2007 report, received by the Office on April 18, 2007. He advised that appellant had an 18 percent permanent impairment of the left upper extremity, agreeing with the Office medical adviser that Figure 16-43 allowed a 1 percent impairment for adduction limited to 30 degrees. Dr. Craven stated that according to Table 16-35, page 510,[5] appellant was entitled to an additional 3 percent impairment for weakness and atrophy. The Office referred Dr. Cravens' report to an Office medical adviser for review. In an April 23, 2007 report, an Office medical adviser explained that according to page 508 of the A.M.A., *Guides*, Dr. Craven erred by assessing an additional impairment for weakness and atrophy in conjunction with range of motion impairments. The medical adviser opined that

[5] Table 16-35, page 510 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment of the Upper Extremity Due to Strength Deficit From Musculoskeletal Disorders Based on Manual Muscle Testing of Individuals Units of Motion of the Shoulder and Elbow."

appellant had no more than a 15 percent impairment of the left upper extremity due to restricted motion.

In a May 2, 2007 report, Dr. Nugent provided a history of injury and treatment. He related appellant's account of pain and weakness in the left upper extremity. Dr. Nugent observed the following ranges of motion in the left shoulder: 130 degrees forward elevation; 45 degrees backward elevation; 120 degrees abduction; 40 degrees adduction; 70 degrees internal rotation; 40 degrees external rotation. On neurologic examination, he noted mild hypoesthesia in the ring and little fingers of the left hand. Dr. Nugent diagnosed left shoulder impingement syndrome, cervical spondylosis, cervical radiculopathy affecting the left upper extremity and status post diskectomy and fusion. He stated that according to Figures 16-40, 16-43 and 16-46, appellant had a three percent impairment due to restriction of forward elevation, three percent for limited abduction, one percent for internal rotation and one percent for external rotation, totaling eight percent. Dr. Nugent opined that appellant had reached maximum medical improvement as of May 2, 2007 as his range of motion had improved since prior examinations. He also assessed a 25 percent whole person impairment due to residuals of the cervical diskectomy and fusion.

The Office referred to Dr. Nugent's report to an Office medical adviser for review. In a May 21, 2007 report, an Office medical adviser opined that appellant reached maximum medical improvement as of September 1, 2005, the date of Dr. Kelley's initial schedule award rating, who concurred with Dr. Nugent's assessment of an eight percent permanent impairment of the left upper extremity. The Office medical adviser noted that the Employees' Compensation Act did not provide for whole person impairments or impairments for the spine.

By decision dated May 23, 2007, the Office found that appellant sustained an 8 percent impairment of the left upper extremity, less than the 15 percent previously awarded. It noted that although the Act did not provide for schedule awards for spinal impairments, the effect on the extremities from such impairments could be considered.

By notice dated June 5, 2007, the Office advised appellant of its preliminary determination that an overpayment of $16,552.46 was created in his case as he received $34,855.38 in compensation for a 15 percent left upper extremity impairment whereas he only had an 8 percent impairment, entitling him to $18,301.92. Appellant was afforded the opportunity to submit financial information and request a prerecoupment hearing.

In a June 14, 2007 letter, appellant requested an oral hearing regarding the May 23, 2007 schedule award decision, held on October 9, 2007. At the hearing, he described his symptoms and their impact on activities of daily living. Appellant submitted a statement asserting that the diskectomy and fusion caused chronic radiculopathy into both upper extremities.

By decision dated and finalized December 28, 2007, an Office hearing representative affirmed in part and set aside in part the May 23, 2007 decision. The hearing representative affirmed Dr. Nugent's assessment of an eight percent impairment of the left upper extremity. The hearing representative further found that the Office medical adviser did not offer sufficient justification for selecting September 1, 2005 as the date of maximum medical improvement whereas Dr. Nugent selected May 2, 2007 as appellant's condition had improved. The hearing representative directed the Office to obtain a supplemental report from the Office medical

adviser regarding the appropriate date of maximum medical improvement. The hearing representative also found that Dr. Nugent improperly rated impairment of the spine.

By decision dated February 12, 2008, the Office finalized its preliminary determination of a $16,552.46 overpayment of compensation. It found that appellant was not at fault in creation of the overpayment. The Office further found that the overpayment was not subject to wavier as appellant did not contest the overpayment or provide financial information indicating eligibility for waiver. It directed recovery through a lump sum payment of the entire amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of the Act[6] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[7] As of February 1, 2001 schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[8]

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[9] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation, or loss of strength.[10]

The Board notes that, although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[11] In 1960, however, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.[12]

---

[6] 5 U.S.C. §§ 8101-8193.

[7] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

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

[9] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[10] A.M.A. *Guides*, Ch. 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

[11] *Pamela J. Darling*, 49 ECAB 286 (1998).

[12] *Tommy R. Martin*, 56 ECAB 273 (2005).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of a herniated C6-7 disc, an aggravation of cervical spinal stenosis, a cervical strain and left shoulder impingement syndrome. It also authorized a C6-7 discectomy and fusion. Initially, the Office granted appellant a schedule award for a 15 percent permanent impairment of the left upper extremity due to restricted motion, based on a review by an Office medical adviser of a July 19, 2006 examination performed by Dr. Craven, a Board-certified orthopedic surgeon and impartial medical examiner. It vacated the schedule award, finding that Dr. Craven's report contained errors and required clarification. As Dr. Craven did not timely submit a report as requested, the Office selected Dr. Nugent, a Board-certified orthopedic surgeon, as the new impartial medical examiner in the case.

Dr. Nugent submitted a May 2, 2007 report finding restricted left shoulder motion equaling an eight percent permanent impairment of the left upper extremity. He also found hypoesthesia in the fourth and fifth fingers of the left hand and diagnosed cervical radiculopathy affecting the left upper extremity. Dr. Nugent assessed a 25 percent whole person impairment due to sequelae of the cervical injuries and surgery. An Office medical adviser reviewed Dr. Nugent's report on May 21, 2007. He noted that, as the Act did not provide for whole person or spinal impairments, any residuals of the accepted cervical injuries could not be considered in determining the percentage of impairment. On May 23, 2007 the Office found that appellant had only an eight percent impairment of the left upper extremity. The Board finds, however, that this decision was in error.

The Office medical adviser correctly noted that there is no provision for a whole person impairment under the Act.[13] However, he improperly failed to consider Dr. Nugent's findings of cervical radiculopathy and hypoesthesia in calculating the schedule award. While the Act does not allow schedule awards for impairment of the spine itself, schedule awards may be granted where an impairment originates in the spine, but affects the functioning of a scheduled member.[14] In this case, the Office accepted aggravations of a herniated C6-7 disc and cervical spinal stenosis as well as a C6-7 discectomy and fusion. Dr. Nugent diagnosed left-sided cervical radiculopathy with diminished sensation of the fourth and fifth fingers of the left hand. The Office medical adviser did not explain why these findings were not ratable. The Office did not request clarification from Dr. Nugent regarding whether the diagnosed radiculopathy and loss of sensation were included in his 25 percent "whole person" rating for cervical spine impairment. The Board will remand the case for further development on this issue. The Office should request a supplemental report from Dr. Nugent clarifying the percentage of permanent impairment to the left upper extremity due to cervical radiculopathy. After such other development as deemed necessary, it will issue an appropriate decision on the extent of permanent impairment.

[13] *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008).

[14] *Tommy R. Martin*, *supra* note 10.

LEGAL PRECEDENT -- ISSUES 2 and 3

The Office determined that appellant received an overpayment based on a schedule award for a 15 percent impairment of the left upper extremity. It found that he was entitled to only eight percent. However, as set forth above, the percentage of impairment remains in question. For this reason, the fact of overpayment is not in posture for decision pending further adjudication of appellant's left upper extremity impairment.

As the case is not in posture for a decision on the overpayment issue, the issue of waiver is moot.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the schedule award or overpayment issues. The case will be remanded to the Office for appropriate development.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 12, 2008 and December 27, 2007 are set aside and the case remanded for further development consistent with this decision and order.
Issued: November 17, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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