United States Department of Labor
Employees' Compensation Appeals Board

K.F., Appellant	)	
and	)	**Docket No. 08-1129**
	)	**Issued: October 16, 2008**
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT AGENCY, Melbourne, FL, Employer	)	

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 10, 2008 appellant filed a timely appeal of a December 4, 2007 merit decision of the Office of Workers' Compensation Programs finding that he had no more than nine percent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has more than nine percent impairment to his right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On June 6, 2006 appellant, a 57-year-old contracts operations supervisor, hit his right arm against a doorway. He indicated that the shock of hitting the door reinjured his right shoulder which was recovering from tendinitis. On June 20, 2006 appellant filed a claim for benefits,

which the Office accepted for "other specified disorder of bursae and tendons in shoulder region, right."

Appellant stopped work on May 30, 2007 and underwent arthroscopic surgery for right shoulder impingement syndrome and degenerative arthritis of acromioclavicular joint. Following the surgery, he underwent physical therapy. Appellant eventually returned to part-time light-duty work.

On October 1, 2007 appellant underwent a functional capacity evaluation. The following figures were obtained for range of motion findings for the right shoulder: flexion, 139.0 degrees; extension, 33.3 degrees; abduction, 128.3 degrees; adduction, 21.3 degrees; internal rotation, 59.7 degrees; external rotation, 77.0 degrees.

In an October 22, 2007 report, Dr. Anthony Lombardo, a Board-certified orthopedic surgeon, noted that appellant advised that he had good range of motion but pain with extended use of the shoulder. Range of motion findings for the right shoulder revealed: limited passive range of motion; abduction, 135 degrees; flexion, 135 degrees; internal rotation, 90 degrees; external rotation; 60 degrees. Strength findings were normal with no signs of atrophy, deformity, or ecchymosis. Examination revealed a positive subacromial space tenderness and positive painful arc. All other testing was negative. Dr. Lombardo noted the functional capacity evaluation showed appellant was capable of light-duty work. He opined that appellant was at maximum medical improvement and he was capable of light duty with restrictions. Dr. Lombardo further opined that appellant had four percent whole person impairment under the 1996 Florida Workers' Compensation Guidelines.

In a report dated November 14, 2007, an Office medical adviser reviewed the medical record, including Dr. Lombardo's report. He noted that the Florida guidelines noted by Dr. Lombardo were not consistent with the Office's standards. The Office medical adviser used range of motion findings from the functional capacity evaluation and determined that appellant had nine percent right upper extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (the A.M.A., *Guides*). He derived three percent impairment based on 140 degrees flexion pursuant to Figure 16-40 at page 476; one percent impairment based on 30 degrees extension pursuant to Figure 16-40 at page 476; two percent impairment based on 128 degrees abduction pursuant to Figure 16-43 at page 477; one percent impairment based on 21 degrees adduction pursuant to Figure 16-43 at page 477; two percent impairment based on 60 degrees loss of internal rotation pursuant to Figure 16-46 at page 479; and zero percent impairment based on 77 degrees external rotation pursuant to Figure 16-46 at page 479. The Office medical adviser added these figures for a total nine percent right upper extremity impairment.

By decision dated December 4, 2007, the Office granted appellant a schedule award for a nine percent permanent impairment of the right upper extremity for the period October 2, 2007 to April 15, 2008, for a total of 28.08 weeks of compensation.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.404 of the implementing federal regulation,[2] 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*[3] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

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.[5] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[6]

ANALYSIS

The Office medical adviser adopted Dr. Lombardo's date of maximum medical improvement of October 22, 2007 but discarded Dr. Lombardo's report as the physician's impairment estimate did not conform to the A.M.A., *Guides*.[7] It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. In such cases, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[8]

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

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

[4] *See Joseph Lawrence, Jr*., 53 ECAB 331 (2002).

[5] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[6] A.M.A., *Guides* 433-521.

[7] In his October 22, 2007 report, Dr. Lombardo determined that appellant had four percent whole person impairment under the 1996 Florida Workers' Compensation Guidelines. However, the A.M.A., *Guides* is the standard for determining the percentage of impairment under the schedule award provision of the Act. *See Mark A. Holloway*, 55 ECAB 321 (2004). Furthermore, the Act does not authorize schedule awards for permanent impairment of the whole person. *N.D.*, 59 ECAB ___ (Docket No. 07-1981, issued February 1, 2008).

[8] *See John L. McClenic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

The Office medical adviser determined that appellant had nine percent permanent impairment of the right upper extremity by using the range of motion findings contained in the October 1, 2007 functional capacity evaluation. The finding of nine percent impairment of the right upper extremity was based on loss of range of motion findings pursuant to Figures 16-40, 16-43 and 16-46 at pages 476, 477 and 479, respectively. Figure 16-40 at page 476 measures upper extremity motion impairments due to lack of flexion and extension of the shoulder. The Office medical adviser found that appellant's retained flexion of 140 degrees equaled three percent impairment and appellant's retained extension of 30 degrees equaled one percent impairment pursuant to this figure.[9] Figure 16-43 at page 477 measures upper extremity motion impairment due to lack of abduction and adduction of the shoulder. Appellant's retained abduction of 128 degrees represents two percent impairment pursuant to this figure and his retained adduction of 21 degrees produces one percent impairment. Figure 16-46 at page 479 measures upper extremity motion impairments due to lack of internal and external rotation of the shoulder. Appellant's retained external rotation of 77 degrees represents zero percent impairment and his retained internal rotation of 60 degrees represents two percent impairment pursuant to this figure. Therefore, he has a total of nine percent right upper extremity impairment for loss of range of motion of the shoulder.

There is no other probative medical evidence establishing that appellant has greater permanent impairment. While appellant asserts his pain and atrophy should be accounted for in determining his schedule award, neither Dr. Lombardo's examination nor the functional capacity evaluation found pain or atrophy to be a limiting factor. Additionally, as noted above, Chapter 16 of the A.M.A., *Guides* provides the proper framework for determining impairments of the upper extremities. Dr. Lombardo did not explain how, pursuant to the A.M.A., *Guides*, appellant had any greater impairment than that which the Office accepted.

CONCLUSION

The Board finds that appellant has no greater than nine percent right upper extremity impairment for which he received a schedule award.

[9] The Board notes that functional capacity evaluation reported flexion at 139.0 degrees and extension at 33.3 degrees, while the Office medical adviser stated that flexion was 140 degrees and extension was 30 degrees. The misreporting by the Office medical adviser is harmless error; however, as the same impairment values are obtained.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 4, 2007 is affirmed.

Issued: October 16, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board