United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 08-1907**
	)	**Issued: March 13, 2009**
DEPARTMENT OF HOMELAND SECURITY, TSA -- FEDERAL AIR MARSHAL SERVICE, West Orange, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 1, 2008 appellant filed a timely appeal from a June 4, 2008 merit decision of the Office of Workers' Compensation Programs concerning a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

ISSUE

The issue is whether appellant has established more than a three percent left upper extremity impairment, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In a February 20, 2008 decision, the Board set aside the Office's July 10, 2007 schedule award for a three percent left upper extremity impairment.[1] The Board noted that an Office medical adviser failed to provide sufficient

[1] Docket No. 07-2034 (issued February 20, 2008).

reasoning to support application of a pain-related impairment under Chapter 18 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[2] based on the December 27, 2006 report of Dr. Joseph Corona, a Board-certified orthopedic surgeon. The Board further found that the Office medical adviser failed to consider all material information in the case record, such as the March 6, 2007 report of Dr. George L. Rodriguez, a Board-certified physiatrist, who found range of motion impairments, or provide rationale for selecting one medical report over another. The law and the facts of the previous Board decision are incorporated herein by reference.

On remand, the Office requested that Dr. Morley Slutsky, an Office medical adviser, provide a supplemental report addressing appellant's permanent impairment taking into account the evaluations of both Drs. Corona and Rodriguez. The reports of Drs. Corona and Rodriguez are summarized below.

In a December 27, 2006 report, Dr. Corona noted the history of injury and appellant's complaints of persistent discomfort in the left shoulder. Examination of the left shoulder revealed full shoulder motion in all planes including elevation, internal rotation, external rotation, adduction, extension and abduction. Normal strength of the supraspinatus, infraspinatus and subscapularis muscles were noted with a slight anterolateral tenderness on palpation of the cuff. Impingement signs were trace positive with no tenderness at the left acromioclavicular joint. Postoperative objective tests were also negative. Dr. Corona concluded that appellant had achieved maximum medical improvement. Based on the A.M.A., *Guides*, Dr. Corona opined that appellant had no measurable objective findings and no ratable impairment. In a December 28, 2006 supplemental report, Dr. Corona opined that, based on appellant's left shoulder pain, he had a three percent permanent impairment of the left arm based on Chapter 18, Tables 18-3, 18-4, 18-5, 18-6 and 18-7 of the A.M.A., *Guides*.

In a March 6, 2007 report, Dr. Rodriguez advised that appellant had left shoulder impingement syndrome and chronic pain due to the March 18, 2004 work injury. He noted that appellant complained of constant pain with decreased range of motion and weakness in the left shoulder. Range of motion of the left shoulder revealed 160 degrees abduction, 160 degrees flexion, normal adduction, 20 degrees extension, 20 degrees external rotation and 45 degrees internal rotation. Dr. Rodriguez noted that a reduced range of motion, compared to a July 30, 2004 examination by Dr. David E. Gross, a Board-certified orthopedic surgeon, was consistent with appellant's description of pain avoidance. He advised that the neurological examination was within normal limits but strength could not be tested due to the presence of pain. Pursuant to the A.M.A., *Guides*, Dr. Rodriguez opined that appellant had a 21 percent left upper extremity impairment. Under Figure 16-40, page 476 of the A.M.A., *Guides*, he found that 160 degrees flexion equaled one percent impairment and a 20 degree extension equaled three percent impairment. Under Figure 16-43 of the A.M.A., *Guides*, Dr. Rodriguez found that 160 degrees abduction equaled one percent impairment and a normal or 50 degree adduction equaled zero percent impairment. Under Figure 16-46, page 479 of the A.M.A., *Guides*, he found that 20 degrees of external rotation equaled one percent impairment and 20 degrees internal rotation equaled four percent impairment. Dr. Rodriguez added the range of motion impairments to

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

arrive at a 10 percent total impairment. Under Table 16-27, page 506 of the A.M.A., *Guides*, he found that appellant's resection arthroplasty of the distal clavicle (isolated) equaled a 10 percent upper extremity impairment. Dr. Rodriguez also opined that, under section 18.3d, A & C, page 573 of the A.M.A., *Guides*, appellant had a three percent whole person impairment due to pain, which he converted a five percent upper extremity impairment under Figure 16-2, page 441 of the A.M.A., *Guides.* He then added the impairment ratings and arrived at a 21 percent total left upper extremity impairment.

In an April 7, 2008 report, Dr. Slutsky reviewed the medical evidence of record.[3] He advised that the final left upper extremity impairment rating was three percent, based on Dr. Corona's evaluation. Dr. Slutsky stated that Dr. Rodriguez incorrectly rated appellant for undergoing a distal clavicle resection (which appellant did not undergo) and provided range of motion findings influenced by appellant's pain, which did not provide the greatest active arc of motion as required for impairment rating purposes by A.M.A., *Guides*. He noted that both Dr. Corona and Dr. Gross found appellant had full range of motion and strength of the left shoulder at maximum medical improvement. Dr. Slutsky advised those findings were reliable because they were consistent and, thus, valid for impairment rating purposes. He stated that the A.M.A, *Guides* used maximum active range of motion and, since those physicians indicated that appellant had normal active range of motion, the A.M.A., *Guides* criteria of maximum range of motion was met.[4] While Dr. Rodriguez found significant left shoulder range of motion deficits, Dr. Slutsky noted that Dr. Rodriguez also stated that the "reduction in range of motion measured today, as compared to the examination of Dr. Gross of July 30, 2004, is consistent with [appellant's] description of pain avoidance." He advised that Dr. Rodriguez's measurements did not reflect objective active range of motion by appellant, as the physician clearly pointed out that range of motion inhibition was due to pain avoidance by appellant. Dr. Slutsky opined that appellant's input was significant as it produced a significant deficit in left shoulder range of motion measurements and was inconsistent with the other physician's findings at maximum medical improvement. He opined that Dr. Rodriguez's range of motion findings should not be used for impairment rating purposes as they did not reflect maximum active left shoulder range of motion which the A.M.A., *Guides* requires. Dr. Slutsky further stated that the surgical note of July 26, 2004 did not show that appellant underwent a distal clavicle resection as Dr. Rodriguez stated.[5] Therefore, he stated that appellant was not eligible for an impairment rating for this procedure. Dr. Slutsky concluded that the only valid impairment rating was for pain. He stated that, based on Dr. Corona's evaluation, appellant had excess pain in the context of a verifiable medical condition (left shoulder impingement status post arthroscopic decompression and debridement of an anterior labral tear) that caused pain, which had not been addressed by other impairment methods used in the A.M.A., *Guides*. Under section 18.3a of the A.M.A., *Guides,*

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[3] In his October 22, 2004 report, Dr. Gross noted that appellant reached maximum medical improvement. On examination, he was noted to have full range of motion, with no instability, excellent strength and no neurovascular deficit.

[4] Dr. Slutsky noted that neither of these physicians documented their range of motion measurements.

[5] In a July 26, 2004 surgical note, Dr. Gross indicated that appellant underwent left shoulder arthroscopy, acromioplasty and resection of torn labrum.

Dr. Slutsky opined that appellant had three percent left arm impairment, the maximum allowed for pain. The medical adviser asserted that this was consistent with Office procedures.

By decision dated June 4, 2008, the Office denied appellant's claim for an additional schedule award. It found that the medical evidence did not support any increase in impairment for which he had previously been rated for and compensated.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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. The Act, however, does not specify the manner in which the percentage loss of a member 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.) has been adopted by the Office for evaluating schedule losses.[8]

Section 18.3d(c) of the A.M.A., *Guides* provides that an additional three percent impairment may be granted for pain that slightly increases the burden of a condition.[9] The A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in the other chapters.[10]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with the Office medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS

Appellant previously received a schedule award for a three percent impairment of his left upper extremity for his work-related conditions. The Board found that the reports of the Office medical adviser and Drs. Corona and Rodriguez were not a proper basis for determining

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *See* 20 C.F.R. § 10.404; *see also David W. Ferrall*, 56 ECAB 362 (2005).

[9] *Supra* note 2 at 573.

[10] *Id.* at 571. *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (November 2002). *See A.G.*, 58 ECAB ___ (Docket No. 07-677, issued June 21, 2007).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

impairment under the A.M.A., *Guides*. The Board directed the Office to obtain a supplemental report which should provide a detailed reasoned medical opinion on the extent of appellant's permanent impairment pursuant to the A.M.A., *Guides*. On remand, the Office requested Dr. Slutsky, its Office medical adviser, to provide an updated impairment rating taking into account the evaluations of Drs. Corona and Rodriguez.

In his April 7, 2008 supplemental report, Dr. Slutsky reviewed the reports of record and concluded that appellant had three percent impairment due to pain under Chapter 18.3 of the A.M.A, *Guides*. The medical adviser provided a detailed review of the pertinent medical evidence and explained why he selected Dr. Corona's evaluation findings over that of Dr. Rodriguez for impairment rating purposes. He advised that Dr. Rodriguez incorrectly rated appellant for undergoing a distal clavicle resection, which appellant did not undergo, and had provided range of motion findings influenced by pain avoidance on appellant's part which did not reflect maximum active shoulder range of motion which the A.M.A., *Guides* required. In contrast, the medical adviser noted that range of motion findings by Drs. Gross and Corona both confirmed that appellant had normal active range of motion and were consistent with one another. The Board finds that Dr. Slutsky provided sound reasoning for why he did not use Dr. Rodriguez's findings regarding range of motion and distal clavicle resection.

Dr. Slutsky concluded that appellant had three percent impairment due to pain, there is nothing in his report to indicate that he performed a formal pain-related analysis under section 18.3d of the A.M.A., *Guides*. As noted, the A.M.A., *Guides* specifically notes that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the rating systems found in other chapters, including Chapter 16. The medical adviser noted provisions from that section of the A.M.A., *Guides* and from Office procedures[12] regarding use of Chapter 18 but he gave no reasoning explaining why appellant's pain impairment could not be properly evaluated under Chapter 16 of the A.M.A., *Guides* which pertains to the upper extremities and contains provisions for rating impairment caused by pain.[13] While there may be a sound explanation for why provisions of Chapter 16 would not adequately rate appellant's pain impairment, Dr. Slutsky did not articulate it.

Because Dr. Slutsky's impairment rating is insufficient to establish the extent of appellant's permanent impairment of his left arm, the case is remanded to the Office to further develop the medical evidence regarding this matter. After such further development of the record as deemed necessary, the Office shall issue a *de novo* decision concerning appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision.

[12] *See supra* note 10.

[13] *See e.g.*, A.M.A, *Guides* 482, Table 16-10 (determining impairment of the upper extremity due to sensory deficits or pain).

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: March 13, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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