United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
	)	**Docket No. 09-458**
and	)	**Issued: November 9, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, 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 December 5, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 29, 2008 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than a 16 percent permanent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On June 27, 2005 appellant, then a 55-year-old training technician, filed an occupational disease claim alleging that she injured her right shoulder at work while carrying and replacing water bottles. The Office accepted her claim for right shoulder sprain and strain and tear of the supraspinatus muscle and tendon. It authorized arthroscopic surgery, which was performed on February 10 and December 8, 2005.

A December 16, 2004 magnetic resonance imaging (MRI) scan of the right shoulder showed tendinitis in the distal aspect of the supraspinatus tendon with a small full thickness tear, inflammation of the subacromial and subdeltoid bursa, arthropathic lesion involving the humeral head and bicipital tenosynovitis. Appellant came under the treatment of Dr. Daniel O'Connor, a Board-certified orthopedic surgeon, from January 8 to December 8, 2005. Dr. O'Connor treated her conservatively with little improvement and recommended surgery. On February 10, 2005 he performed arthroscopic acromioplasty with arthroscopic distal clavical resection and open rotator cuff repair. Dr. O'Connor diagnosed right shoulder impingement syndrome with acromioclavicular joint arthritis and rotator cuff tear. On October 10, 2005 he noted appellant's complaints of persistent right shoulder pain and stiffness and recommended a repeat arthroscopy for evaluation and possible debridement. On December 8, 2005 Dr. O'Connor performed an acromioplasty and debridement of the right shoulder and diagnosed impingement, right shoulder.

On July 26, 2006 appellant requested a schedule award. On August 18, 2006 Dr. O'Connor noted that appellant would reach maximum medical improvement in December 2006. He stated that right shoulder examination revealed forward elevation of 135 degrees, abduction of 90 degrees, internal rotation of 45 degrees and external rotation of 45 degrees. Dr. O'Connor opined that appellant had 35 percent impairment of the right upper extremity.

On January 11, 2007 an Office medical adviser reviewed the medical report from Dr. O'Connor based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.MA., *Guides*).[1] Appellant had 20 percent permanent impairment of the right arm. Loss of range of motion totaled 11 percent based on flexion of 135 degrees for three percent impairment; abduction of 90 degrees for four percent impairment; external rotation of 45 degrees for one percent impairment and internal rotation of 45 degrees for three percent impairment. The medical adviser noted that appellant also had 10 percent impairment for acromioplasty. He combined these values to find a total of 20 percent impairment to the right arm. The medical adviser noted that Dr. O'Connor did not provide sufficient information to support the 35 percent impairment rating.

In a March 13, 2007 report, Dr. Norman M. Heyman, a Board-certified orthopedic surgeon opined that appellant had 56 percent impairment to the right upper extremity. He noted right shoulder flexion of 100 degrees, or five percent impairment; extension of 30 degrees or one percent impairment; abduction of 90 degrees, or four percent impairment; adduction of 30 degrees, or one percent impairment; external rotation of 45 degrees or one percent impairment and internal rotation of 60 degrees, two percent impairment a total of 14 percent impairment of the right shoulder. Appellant also had 6 percent impairment for decreased motion of the right wrist, 2 percent impairment for decreased motion of the thumb, 14 percent impairment for decreased motion of the right hand and 20 percent impairment for loss of grip strength for a total impairment of 56 percent to the right upper extremity.

The Office found a conflict in medical opinion arose between Dr. O'Connor and the Office medical adviser regarding the extent of appellant's permanent impairment. On July 11,

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

2007 it initially referred appellant to Dr. Jack Choueka, a Board-certified orthopedic surgeon, selected as the impartial medical specialist, who provided a report on July 25, 2007.

On September 6, 2007 an Office medical adviser reviewed the medical report from Dr. Heyman and opined that, based on the A.M.A., *Guides*, appellant had 20 percent permanent impairment of the right upper extremity. He noted that Dr. Heyman provided a 56 percent impairment of the right upper extremity; however, his findings for finger, wrist and grip strength were not related to appellant's accepted work-related conditions.

On December 18, 2007 the Office requested a supplemental report from Dr. Choueka to his impairment rating. On February 21, 2008 Dr. Choueka reiterated the findings in his July 25, 2007 report and that appellant had a 31 percent impairment of the right upper extremity.

On March 7, 2008 an Office medical adviser reviewed the medical report from Dr. Choueka and opined that based on the A.M.A., *Guides* appellant had 22 percent permanent impairment of the right arm. The medical adviser noted that Dr. Choueka misread charts in the A.M.A., *Guides* which provided for 13 percent impairment for loss of range of motion. Additionally, he noted that Dr. Choueka recommended a 31 percent impairment of the right upper extremity based on a combination of loss of range of motion and loss of strength; however, the A.M.A., *Guides* specifically prohibit impairment calculations for strength be made in the presence of decreased motion and painful conditions. The medical adviser further noted that Dr. Choueka did not provide an impairment rating for distal clavicle resection arthroplasty, for which appellant was entitled to 10 percent impairment rating.

On April 30, 2008 the Office determined that Dr. Choueka's evaluation was inadequate to resolve the conflict in medical opinion. It subsequently referred appellant to Dr. Ronald Richman, a Board-certified orthopedic surgeon, for an impartial evaluation.

In a report dated May 13, 2008, Dr. Richman noted reviewing the record and appellant's history. He noted her history and findings on examination. Dr. Richman diagnosed status post two operations to repair a rotator cuff tear and opined that appellant reached maximum medical improvement. On examination, he noted the right shoulder revealed well-healed arthroscopic wounds, flexion of 90 to 95 degrees for 6 percent impairment,[2] extension of 30 degrees for 5 percent impairment,[3] abduction of 45 degrees for 4 percent impairment,[4] he provided no measurement for adduction but noted 1 percent impairment,[5] external rotation of 25 degrees for 2 percent impairment,[6] internal rotation of 20 degrees for 7 percent impairment,[7] and 2 percent for the "different movements" for 31 percent impairment of the right arm. Dr. Richman opined

[2] *Id.* at 476, Figure 16-40.

[3] *Id.*

[4] *Id.* at 477, Figure 16-43.

[5] *Id.*

[6] *Id.* at 479, Figure 16-46.

[7] *Id.*

that based on the New York State Workers' Compensation Board Guidelines appellant had 90 degrees loss of use of the arm. He noted that a rotator cuff tear with or without surgery was 10 to 15 percent loss of use of the arm, abduction of 90 degrees for 40 percent loss of use of the arm, flexion of 90 degrees for a 40 percent loss of use of the arm and 10 to 15 percent for marked defects of rotation and muscle atrophy.

On June 1, 2008 an Office medical adviser stated that he reviewed the medical report from Dr. Richman and opined that based on the A.M.A., *Guides* appellant had 16 percent permanent impairment of the right arm. The medical adviser noted that Dr. Richman utilized the New York State Workers' Compensation Board Guidelines and not the A.M.A., *Guides* in support of his impairment evaluation. He noted flexion of 95 degrees for 6 percent impairment,[8] extension of 30 degrees for 1 percent impairment,[9] abduction of 45 degrees for 4 percent impairment,[10] external rotation of 25 degrees for 1 percent impairment[11] and internal rotation of 20 degrees for 4 percent impairment[12] for 16 percent impairment due to loss of range of motion. The medical adviser further noted that Dr. Richman documented loss of strength with atrophy of the shoulder area but he did not objectively quantify the loss for impairment calculation purposes. He determined that maximum medical improvement occurred on May 13, 2008.

The Office requested Dr. Richman objectively qualify his findings of loss of strength and atrophy of the shoulder area and provide an impairment determination in accordance with the A.M.A., *Guides*. In a supplemental report dated August 28, 2008, Dr. Richman noted that pursuant to section 16.8a of the A.M.A., *Guides* decreased strength cannot be rated in the presence of decreased motion, painful conditions and therefore appellant would not be entitled to a separate impairment for loss of strength.

On September 8, 2008 an Office medical adviser stated that he reviewed the August 28, 2008 medical report from Dr. Richman and opined that based on the A.M.A., *Guides* appellant had 16 percent permanent impairment of the right upper extremity due to range of motion deficit of the right shoulder.

In an October 29, 2008 decision, the Office granted appellant a schedule award for 16 percent permanent impairment of the right upper extremity. The period of the award was from May 13, 2008 to April 27, 2009.

[8] *Id.* at 476, Figure 16-40.

[9] *Id.*

[10] *Id.* at 477, Figure 16-43.

[11] *Id.* at 479, Figure 16-46.

[12] *Id.*

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[13] and its implementing regulations[14] 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 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

ANALYSIS

On appeal, appellant contends that she has more than 16 percent permanent impairment of the right upper extremity. The Office accepted her claim for right shoulder sprain and strain and tear of the supraspinatus muscle and tendon and authorized arthroscopic surgery on February 10 and December 8, 2005. It found that a conflict in the medical evidence existed between appellant's attending physicians, Drs. O'Connor and Heyman, who disagreed with the Office medical adviser concerning the extent of appellant's impairment of the right upper extremity. Consequently, the Office properly referred appellant to Dr. Richman to resolve the conflict.[15]

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[16]

The Board finds that, the referee physician, Dr. Richman, in reports dated May 13 and August 28, 2008, did not provide a sufficiently reasoned opinion and impairment rating in conformance with the A.M.A., *Guides.* Rather, he appears to utilize the New York State Workers' Compensation Board Guidelines to calculate impairment. Dr. Richman determined that appellant had a 31 percent impairment of the right upper extremity; however, he failed to explain how rated impairment using the specific tables and figures in the A.M.A., *Guides* and the impairment values he did list do not correspond with the values found in the A.M.A., *Guides*. He stated that extension of 30 degrees equated to five percent impairment,[17] but the A.M.A.,

[13] 5 U.S.C. § 8107.

[14] 20 C.F.R. § 10.404.

[15] Appellant was initially referred to Dr. Choueka, an impartial specialist. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office or if the physician is unable to clarify or elaborate on the original report, or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial medical specialist for a rationalized medical opinion on the issue in question. *See Margaret M. Gilmore*, 47 ECAB 718 (1996); *Terrence R. Stath*, 45 ECAB 412 (1994); *Nathan L. Harrell*, 41 ECAB 402 (1990); *John I. Lattany*, 37 ECAB 129 (1985).

[16] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

[17] A.M.A., *Guides*, 476, Figure 16-40.

Guides provide for one percent impairment;[18] he noted abduction of 45 degrees equated to 4 percent impairment,[19] but the A.M.A., *Guides* provide for six percent impairment; he noted external rotation of 25 degrees equated to two percent impairment,[20] but the A.M.A., *Guides* provide for one percent impairment; and he stated that internal rotation of 20 degrees was seven percent impairment,[21] but the A.M.A., *Guides* provide for four percent impairment. Additionally, he provided no measurement for adduction but found one percent impairment. Similarly, Dr. Richman found two percent impairment for "different movements" of the right upper extremity; however, this notation is not in conformance with measurements on which ratings are based in the A.M.A., *Guides*. Dr. Richman also did not indicate whether he considered additional impairment for the distal clavicle resection arthroplasty which was performed on February 10, 2005. He did not demonstrate any familiarity with the A.M.A., *Guides*, in either his initial report or in the supplemental report requested by the Office.

The Board has held that an impartial medical specialist should provide a reasoned opinion as to the extent of permanent impairment in accordance with the A.M.A., *Guides.* An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[22] As noted, the initial and supplemental reports of the impartial specialist, Dr. Richman, are insufficient to resolve the medical conflict regarding the degree of permanent impairment of appellant's right arm pursuant to the A.M.A., *Guides*.

When the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office or if the physician is unable to clarify or elaborate on the original report or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial medical specialist for a rationalized medical opinion on the issue in question.[23] The Board will set aside the Office's October 29, 2008 decision and remand the case for referral of appellant to another impartial specialist to resolve the conflict in the medical evidence regarding her permanent impairment pursuant to the A.M.A., *Guides.* After such further development as may be required, the Office shall issue an appropriate final decision on appellant's entitlement to schedule compensation for the right arm.

[18] *Id.* at 477, Figure 16-43.

[19] *Id.*

[20] *Id.* at 479, Figure 16-46.

[21] *Id.*

[22] *Richard R. LeMay*, 56 ECAB 341 (2005).

[23] *See supra* note 15.

CONCLUSION

The Board finds that this case is not in posture due to an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: November 9, 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