United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 09-1235**
	)	**Issued: April 13, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Olathe, KS, Employer	)	

Appearances:
Edward L. Daniel, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2009 appellant, through her representative, filed a timely appeal of the decisions of the Office of Workers' Compensation Programs dated September 15, 2008 and March 19, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has more than 24 percent impairment of her right upper extremity and 8 percent impairment of her left upper extremity, for which she received schedule awards.

On appeal, appellant's representative notes that there is a dispute between the opinion of appellant's physician and the Office medical adviser and that therefore appellant should be referred to an impartial medical examiner to resolve the conflict.

FACTUAL HISTORY

This is the second time this case has been before this Board. The facts and the law as set forth in the Board's prior decision are hereby incorporated by reference.[1] The relevant facts are set forth below.

The Office accepted appellant's claim for right shoulder tendinitis, right shoulder impingement syndrome and left shoulder impingement syndrome. On August 5, 2002 appellant underwent an arthroscopy with debridement of joint, debridement of labral tear and subacromial decompression with distal clavicle excision of the right shoulder. On August 19, 2003 she underwent an open Bankart repair and anterior glenoid based capsular shift.

On July 18, 2008 appellant filed a claim for a schedule award. In support thereof, appellant submitted a May 19, 2008 report wherein Dr. John W. Ellis, a Board-certified family practitioner, diagnosed appellant with bilateral shoulder strain and tendinitis; bilateral shoulder impingement and rotator cuff syndrome and bilateral brachial plexus impingement. Dr. Ellis opined that these conditions arose out of appellant's employment and that appellant had reached maximum medical improvement in July 2005. He assessed regional impairment due to her combined injuries to her thumb/fingers, wrist, elbow and shoulder as 24 percent for the right upper extremity based on 15 percent impairment due to decreased shoulder range of motion based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) ("A.M.A., *Guides*"), 474-79, Figures 16-38 to 46[2] and 10 percent impairment based on resection arthroplasty distal clavicle, pursuant to the A.M.A., *Guides* 506, Table 16-27. Dr. Ellis then added five percent based on brachial plexus pursuant to page 490, Table 16-14.[3] Using the Combined Values Chart he determined that appellant had 28 percent impairment to her right upper extremity. With regard to the left upper extremity, Dr. Ellis found eight percent decreased shoulder range of motion based on the A.M.A., *Guides* 475-79, Figures 16-38 to 46.[4]

[1] Docket No. 06-609 (issued December 27, 2006).

[2] In accompanying worksheets, Dr. Ellis noted that in appellant's right shoulder she had 116 degrees of flexion for five percent impairment and 41 degrees of extension for one percent impairment or a total impairment of six percent. A.M.A., *Guides* 476, Figure 16-40. Dr. Ellis further noted 29 degrees of adduction for one percent impairment and 101 degrees of abduction for four percent impairment for a total impairment of five percent. A.M.A., *Guides* 477, Figure 16-43. Dr. Ellis then noted 18 degrees of internal rotation for four percent impairment and 81 degrees of external rotation for zero percent impairment for an impairment of four percent. A.M.A., *Guides* 479, Figure 16-46. Adding the sum of these figures (6 percent plus 5 percent plus 4 percent), Dr. Ellis determined that appellant had a 15 percent impairment to the right upper extremity based on decreased range of motion.

[3] In his accompanying worksheets, Dr. Ellis, in evaluating brachial plexus in appellant's right upper extremity, found a Grade 4 impairment due to sensory deficit or pain, A.M.A., *Guides* 482, Table 16-10 and a Grade 4 impairment due to motor/loss of power deficits, A.M.A., *Guides* 484, Table 16-11. He then calculated that, pursuant to the A.M.A., *Guides* 490, Table 16-14, appellant was entitled to three percent impairment for sensory pain and two percent impairment for motor loss for a total impairment of five percent for brachial plexus for her right shoulder.

[4] In accompanying worksheets, Dr. Ellis found 123 degrees of flexion in appellant's left shoulder for four percent impairment and 55 degrees of extension for zero percent impairment. A.M.A., *Guides* 476, Figure 16-40. Dr. Ellis further found 47 degrees of adduction for zero percent impairment and 114 degrees of abduction for three percent impairment. A.M.A., *Guides* 477, Figure 16-43. Dr. Ellis then noted 41 degrees of internal rotation in the left shoulder for three percent impairment and 66 degrees of external rotation for one percent impairment. A.M.A., *Guides* 479, Figure 16-46.

He then found appellant entitled to two percent impairment based on brachial plexus pursuant to page 490, Table 16-14 of the A.M.A., *Guides*.[5] Applying the Combined Values Chart, he determined that appellant had an impairment rating of 10 percent for her left upper extremity.

On August 6, 2008 the Office referred the case to the Office medical adviser to calculate appellant's impairment. In a report dated August 17, 2008, the Office medical adviser calculated appellant's impairment as 24 percent of the right upper extremity and 8 percent of the left upper extremity. He noted that the Office had not accepted appellant's claim for entrapment neuropathies in the peripheral right and left upper extremities. The Office medical adviser opined that the evidence does not support that appellant had any condition affecting either upper extremity except for right and left shoulder impingement syndrome. He found that the right upper extremity impairment was derived by combining the impairment rating for range of motion limitation of 15 percent as shown in Dr. Ellis' report with the 10 percent due to a distal clavicle excision as discussed on pages 505 and 506 of the A.M.A., *Guides.* Combining these two figures using the Combined Values Chart, the Office medical adviser determined that appellant had 24 percent impairment of her right upper extremity. With regard to the left upper extremity, he found that Dr. Ellis' rating of eight percent for decreased shoulder range of motion was appropriate under the A.M.A., *Guides*, and represented appellant's impairment rating for her left upper extremity.

By decision dated September 15, 2008, the Office issued a schedule award for 24 percent impairment of the right upper extremity and 8 percent impairment of the left upper extremity.

On December 22, 2008 appellant, through her representative, filed a request for reconsideration. In support thereof, appellant submitted a December 19, 2008 report wherein Dr. Ellis indicated that the Office medical adviser did not mention the fact that the total combined value was 28 percent to the right upper extremity and 10 percent of the left upper extremity in accordance with the Combined Values Chart of the A.M.A., *Guides,* pages 604-06. The Office forwarded this report to the Office medical adviser on February 5, 2009 and requested that he determine if this report was sufficient to revise the impairment ratings. In a report dated February 16, 2009, the Office medical adviser found that Dr. Ellis' findings for a greater schedule award based on brachial plexus was not substantiated by his examination findings. He noted, "The only possible finding that may have been the basis of the claimed 'brachial plexus' add on was 'gentle pressure' on the [left] trapezius and some tingling in the little and ring fingers." The Office medical adviser noted that based on normal anatomy, this reported subjective response to the assessment process was nonphysiologic. He found that Dr. Ellis provided ratings for brachial plexus weakness, which are not explained in the examination findings as a consequence of weakness due to permanent damage to the motor function of the brachial plexus. Moreover, the Office medical adviser noted that when the resection arthoplasty method is used to offer the impairment rating, the only other factor of assessment permitted according to section 16.76 of the A.M.A., *Guides*, is range of motion. He concluded that appellant was not entitled to an increase in schedule award.

[5] Dr. Ellis noted in his worksheet that appellant had a Grade 4 sensory impairment, A.M.A., *Guides* 482, Table 16-10, and a Grade 4 impairment based on motor loss, A.M.A., *Guides* 484, Table 16-11. He then calculated that appellant had two percent impairment based on brachial plexus in the left upper extremity. A.M.A., *Guides* 490, Table 16-14.

By decision dated March 19, 2009, the Office denied modification of its prior decision.

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 schedule 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make such an examination.[10] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[11]

ANALYSIS

In the instant case, the Office accepted appellant's claim for right shoulder tendinitis, right shoulder impingement syndrome and left shoulder impingement syndrome. The Office issued a schedule award based on 24 percent impairment of appellant's right upper extremity and an 8 percent impairment of appellant's left upper extremity. Appellant contends that she is entitled to a greater award as Dr. Ellis indicated that she had 28 percent impairment to her right upper extremity and 10 percent impairment of her upper left extremity.

The Board finds that this case is not in posture for decision due to an unresolved conflict between Dr. Ellis, appellant's physician, and the Office medical adviser with regard to the degree of impairment in appellant's upper extremities. The Office medical adviser and Dr. Ellis are in basic agreement concerning appellant's impairment based on regional impairment but disagree with regard to whether appellant sustained a peripheral nerve system impairment causally related to her accepted work injury.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a).

[9] *Id.*

[10] 5 U.S.C. § 8123(a).

[11] *Id. See also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan*), 45 ECAB 207 (1993).

The Board notes that both physicians found that appellant established an impairment to her right upper extremity of 24 percent based on regional impairment. The Office medical adviser, using Dr. Ellis' calculations, found that appellant had 15 percent impairment of the right upper extremity based on range of motion limitations. Dr. Ellis noted that in her right shoulder appellant had 116 degrees of flexion for five percent impairment and 41 degrees of extension for one percent impairment or a total impairment of six percent.[12] He further noted 29 degrees of adduction for one percent impairment and 101 degrees of abduction for four percent impairment for a total impairment of five percent.[13] Dr. Ellis then noted 18 degrees of internal rotation for four percent impairment and 81 degrees of external rotation for zero percent impairment for an impairment of four percent.[14] Adding the sum of these figures, he determined that appellant had 15 percent impairment to the right upper extremity based on decreased range of motion. Both Dr. Ellis and the Office medical adviser also agreed that appellant was entitled to 10 percent impairment based on her resection arthoplasty distal clavicle.[15] Using the Combined Values Chart, Dr. Ellis and the Office medical adviser found that appellant was entitled to 24 percent impairment based on loss of range of motion in the right upper extremity.

With regard to range of motion in the left upper extremity, both the Office medical adviser and Dr. Ellis agree that appellant was entitled to an eight percent impairment rating. Dr. Ellis applied the A.M.A., *Guides* when he determined that appellant had 123 degrees of flexion for four percent impairment and 55 degrees of extension for zero percent impairment.[16] He also found that appellant had 47 degrees of adduction for zero percent impairment and 114 degrees of abduction for three percent impairment.[17] Dr. Ellis found appellant had 41 percent internal rotation, which he calculated to be 3 percent impairment.[18] However, he improperly determined that appellant's 66 degrees of external rotation would equal one percent impairment, when the A.M.A., *Guides*, indicate that 66 degrees of external rotation would result in zero percent impairment. Moreover, in adding the figures for impairment due to internal/external rotation together, Dr. Ellis incorrectly added his three percent calculation and his one percent calculation to equal one percent whereas properly adding these figures would yield a total of four percent. Furthermore, because this Board has determined, based on the proper application of the A.M.A., *Guides*, that appellant has zero percent impairment for external rotation, appellant would be entitled to three percent impairment based on internal rotation and no impairment based on external rotation. The Office medical adviser did not discuss these specific calculations and merely agreed with the eight percent determination for loss of range of motion in the left shoulder. The fact that Dr. Ellis improperly calculated the percentage allowed for external rotation and the fact that the Office medical adviser did not discuss this error negatively impacts the probative values of their reports.

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

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

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

[15] *Id.* at 506, Table 16-27.

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

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

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

With regard to the impairment based on peripheral nerve system impairment, the Board finds that there is a conflict between the Office medical adviser and Dr. Ellis with regard to whether appellant is entitled to a schedule award for brachial plexus. Dr. Ellis determined that appellant was entitled to five percent impairment based on brachial plexus in the right shoulder and two percent impairment based on brachial plexus in the left shoulder.[19] The Office medical adviser strongly disagrees with a rating for brachial plexus and contends that Dr. Ellis has not supported his finding that appellant is entitled to an impairment rating for brachial plexus.

Accordingly, the Board finds that the case must be remanded to the Office for an impartial medical examination to resolve the conflict with regard to degree of impairment to both upper extremities including a determination as to whether there is any impairment due to brachial plexus as a result of appellant's accepted injury, followed by an appropriate *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 19, 2009 and September 15, 2008 are set aside and the case is remanded for further action in accordance with the terms of this decision.

Issued: April 13, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[19] *Id.* at 490, Table 16-14.; 482, Table 16-10; 484, Table 16-11.