

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GREGORY KELLEY and DEPARTMENT OF JUSTICE,  
U.S. BORDER PATROL, Calexico, CA

*Docket No. 02-2197; Submitted on the Record;  
Issued January 10, 2003*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether appellant is entitled to more than an eight percent permanent impairment of the left upper extremity for which he received a schedule award.

On May 18, 2001 appellant, then a 29-year-old border patrol agent, filed a notice of traumatic injury alleging that on May 17, 2001 he strained his left shoulder during baton training. The Office of Workers' Compensation Programs accepted appellant's claim for left shoulder strain with surgery on July 27, 2001. Appellant stopped work on August 9, 2001, the date of his surgery.

Appellant returned to his regular duties on September 27, 2001 and filed a claim for a schedule award on January 28, 2002. He submitted a November 21, 2001 report from Dr. Thomas W. Harris, his attending physician, who measured range of motion of appellant's left upper extremity and found that appellant had reached permanent and stationary status on November 21, 2001. Examination demonstrated limited range of motion with extension of 30 degrees, flexion 170 degrees, internal rotation 55 degrees, external rotation 80 degrees, abduction 170 degrees and adduction 20 degrees. He stated:

“In my opinion, the patient has a ratable impairment using the A.M.A., [American Medical Association,] ‘*Guides to the Evaluation of Permanent Impairment to the Evaluation*’, [f]ifth [e]dition. Using paragraph 16.67, page 503, the patient has a 15 percent left upper extremity impairment secondary to his labral debridement, rotator cuff debridement and thermal capsulorrhaphy.”

By letter dated June 24, 2002, the district medical adviser found:

“For the purposes of [s]chedule [a]ward, the claimant has a one percent impairment for loss of shoulder flexion (Figure 16-40/[p]age 476). The claimant has one percent impairment for loss of shoulder extension (Figure 16-40/[p]age 476). The claimant has a one percent impairment for loss of shoulder adduction

(Figure 16-43/[p]age 477). The claimant has a two percent impairment for loss of shoulder internal rotation (Figure 16-46/[p]age 479). This results in five percent impairment for loss of motion.

“The claimant has a Grade 3 pain/decreased sensation that interferes with some activity 60 percent (Table 16-10/[p]age 482) of the axillary nerve/deltoid muscle [5] percent (Table 16-15/[p]age 492), resulting in 3 percent impairment of the left upper extremity for pain that interferes with some activity.

“Utilizing combined values for five percent impairment for loss of motion and three percent impairment for pain that interferes with function, this results in eight percent impairment of the left upper extremity.”

By decision dated August 1, 2002, the Office granted appellant a schedule award for an eight percent impairment of the left upper extremity.

The Board finds that appellant is not entitled to more than an eight percent permanent impairment of the left upper extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> 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*<sup>3</sup> has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

In this case, Dr. Harris examined appellant on November 21, 2001 and opined that appellant had reached maximum medical improvement. He performed tests of range of motion of appellant's left shoulder and concluded that appellant had a 15 percent permanent impairment of the left upper extremity. Dr. Harris stated that according to paragraph 16.67, page 503 of the A.M.A., *Guides*, appellant had a 15 percent upper extremity impairment secondary to his labral debridement, rotator cuff debridement and thermal capsulorrhaphy. The district medical adviser, however, used tables from the A.M.A., *Guides* to measure loss of range of motion and pain or decreased sensation of appellant's left shoulder. The Board finds that the district medical adviser correctly applied the A.M.A., *Guides* to determine appellant's level of impairment, based on the measurements and descriptions in Dr. Harris's November 21, 2001 report. Dr. Harris only mentioned paragraph 16.67, page 503 of the A.M.A., *Guides*, which is an example of how to

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404 (1999).

<sup>3</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>4</sup> *Supra* note 2.

apply Table 16-25 and did not utilize any tables to measure range of motion and pain or decreased sensation to arrive at his findings.

In applying Table 16-40, page 476 of the fifth edition of the A.M.A., *Guides*, 170 degrees of shoulder flexion equals a 1 percent impairment and 30 degrees of shoulder extension also equals a 1 percent impairment. Using Table 16-43, page 477, 20 degrees of shoulder adduction equals a one percent impairment and 170 degrees of shoulder abduction equals a 0 percent impairment. Using Table 16-46, page 479, 55 degrees of internal shoulder rotation equals a 2 percent impairment and 80 degrees of external shoulder rotation equals a 0 percent impairment. The percentages of impairment for shoulder flexion, extension, adduction and internal rotation are then added together, equaling a five percent loss of motion.

In measuring pain or decreased sensation by applying Table 16-10, page 482, appellant has a Grade 3 level of sensory deficit or pain, which equals a 60 percent impairment. Finally, in applying Table 16-15, page 492, impairment due to sensory deficit or pain for the axillary nerve is five percent. The A.M.A., *Guides* indicate on page 494 that 60 percent, for percentage of sensory deficit, is then multiplied by the 5 percent impairment of the axillary nerve, resulting in a 3 percent impairment of the left upper extremity for pain that interferes with some activity. Finally, using the Combined Values Chart on page 604, five percent loss of motion and three percent pain or decreased sensation equals a total permanent impairment of eight percent. The Board finds that the district medical adviser correctly applied the A.M.A., *Guides* and that appellant has no more than an eight percent permanent impairment of the left upper extremity.

The August 1, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
January 10, 2003

Michael J. Walsh  
Member

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member