

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of REBECCA L. NIEVES and U.S. POSTAL SERVICE,  
POST OFFICE, San Diego, CA

*Docket No. 03-848; Submitted on the Record;  
Issued May 19, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant has more than a 15 percent impairment of her right upper extremity for which she received a schedule award.

This case has been on appeal once previously.<sup>1</sup> In a July 2, 2002 decision, the Board affirmed the Office of Workers' Compensation Programs' October 15 and April 12, 2001 decisions finding that appellant had no more than a 12 percent permanent impairment of her right upper extremity.<sup>2</sup>

On August 20, 2002 appellant submitted a Form CA-7 claim for an additional schedule award due to her worsening condition. In support of her claim, appellant submitted a July 10, 2002 report from Dr. Wesley R. Smidt, her treating Board-certified orthopedic surgeon, who stated that there had been a decrease in appellant's range of motion since his May 10, 2001 report and that testing of the right shoulder revealed 80 degrees of abduction, 130 degrees of forward flexion, 30 degrees of external rotation and 40 degrees of extension.<sup>3</sup> Dr. Smidt further stated that appellant had increased irritability around the right shoulder, with tenderness globally over the anterior aspect of the shoulder and at all end ranges of motion. Appellant also had tenderness to palpation in the upper arm musculature, as well as the forearm musculature. Dr. Smidt further reported that appellant had diminished strength with elbow flexion and extension as well as wrist flexion and extension, associated with discomfort with stressing against resistance. He also noted appellant's grip strength, tested in pounds with a Jamar

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<sup>1</sup> The Office accepted appellant's claim for right shoulder subluxation and tear and authorized surgical repair. On June 23, 2000 appellant underwent a right shoulder capsular shift.

<sup>2</sup> Docket No. 02-268 (issued July 2, 2002). The history of the case as contained in the prior appeal is incorporated by reference.

<sup>3</sup> In his report dated May 10, 2002, Dr. Smidt stated that testing of the right shoulder revealed 90 degrees of abduction, 160 degrees of forward flexion, 30 degrees of external rotation and 40 degrees of extension.

dynamometer, measured 39/35/35 on the right and 75/65/70 on the left, with a pain on the right side.<sup>4</sup> Dr. Smidt diagnosed shoulder instability, status post anterior stabilization and chronic right shoulder pain. He concluded that appellant's work restriction as outlined in his April 26, 2001 report remained in effect and that her right upper extremity impairment was considered to be a loss of 50 percent of her preinjury capacity for lifting with her right arm. Dr. Smidt did not reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), in support of his conclusions.

In an October 20, 2002 memorandum, an Office medical adviser reviewed Dr. Smidt's findings, as set forth in his July 10, 2002 report and, applying the standards outlined in the fifth edition of the A.M.A., *Guides*, determined that appellant had a total of 15 percent permanent impairment of her right upper extremity.<sup>5</sup> In arriving at this figure, the Office medical adviser initially calculated that appellant had a 3 percent impairment in her right upper extremity based on 130 degrees of forward flexion in accordance with Figure 16-40, page 476 of the A.M.A., *Guides*; extension of 40 degrees, which equated to a 1 percent impairment in accordance with Figure 16-40, page 476 of the A.M.A., *Guides*; a 5 percent impairment based on 80 degrees abduction in accordance with Figure 16-43, page 477 of the A.M.A., *Guides*; and a 1 percent impairment for 30 degrees external rotation in accordance with Figure 16-46, page 479 of the A.M.A., *Guides*. In addition, the Office medical adviser found that appellant had a six percent impairment of the right upper extremity based on shoulder instability pattern in accordance with Table 16-26, page 505 of the A.M.A., *Guides*. Using the Combined Values Chart at page 604 of the A.M.A., *Guides*, the Office medical adviser concluded that appellant's cumulative impairment for loss of motion of 10 percent, combined with the 6 percent impairment for shoulder instability, yielded a total permanent impairment of the right upper extremity of 15 percent. This equated to an additional three percent over the previous impairment rating.

In a decision dated November 19, 2002, the Office awarded appellant an additional 3 percent, for a total schedule award of 15 percent.

The Board finds that the Office properly determined that appellant is entitled to an additional three percent impairment rating due to decreased range of motion and greater instability of the right upper extremity.

The schedule award provisions of the Federal Employees' Compensation Act<sup>6</sup> and its implementing regulation<sup>7</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,

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<sup>4</sup> On May 10, 2001 Dr. Smidt reported that appellant's grip strength was 25/17/23 on the right, and 75/70/74 on the left.

<sup>5</sup> FECA Bulletin No. 01-05 issued January 29, 2001 provides that all claims examiners and hearing representatives should begin using the fifth edition of the A.M.A., *Guides* effective February 1, 2001.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404 (1999).

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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>8</sup>

In the instant case, the Office determined that appellant had an additional three percent permanent impairment of her right upper extremity by adopting the findings of the Office medical adviser, who determined the precise impairment rating by gauging the loss of flexion, extension, abduction, external rotation and instability pattern in appellant's right upper extremity, based on the applicable figures and tables of the A.M.A., *Guides*. The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* to the measurements and findings provided by Dr. Smidt in determining that appellant has a total of 15 percent permanent impairment of the right upper extremity due to loss of range of motion and instability. Because Dr. Smidt did not use the uniform standards adopted by the Office and approved by the Board, it was proper for an Office medical adviser to apply the A.M.A., *Guides* to the findings reported by Dr. Smidt on examination.<sup>9</sup> While the Office medical adviser did not accord appellant any additional impairment for loss of grip strength, the A.M.A., *Guides* provides that because strength measurements are functional tests influenced by subjective factors, impairment ratings based on objective anatomic findings, where applicable, take precedence.<sup>10</sup>

The Board further finds that this case is not in posture as to whether appellant has any additional ratable impairment due to chronic pain.

In contrast to his earlier reports of record, in his report dated July 10, 2002, Dr. Smidt stated that appellant now suffers from chronic right shoulder pain. The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain, and provides a qualitative method for evaluating impairment due to chronic pain in Chapter 18. While Dr. Smidt did not rate appellant's pain pursuant to the fifth edition of the A.M.A., *Guides*, he did describe at considerable length how he arrived at his conclusion that appellant suffers from a moderately severe pain-related impairment. However, the Office medical adviser did not address Dr. Smidt's conclusions regarding the disabling effects of appellant's pain, and the Office offered no reason to support that appellant should not be entitled to a schedule award for loss of motion, instability and chronic pain.

Because Dr. Smidt's clinical findings and the A.M.A., *Guides* suggest that appellant may be entitled to a schedule award greater than that given solely for loss of range of motion and instability, the Board will affirm in part and set aside in part the Office's November 19, 2002

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<sup>8</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); Joseph Lawrence, Jr., 53 ECAB \_\_\_\_ (Docket No. 01-1361, issued February 4, 2002).

<sup>9</sup> John L. McClenic, 48 ECAB 552 (1997); Lena P. Huntley, 46 ECAB 643 (1995).

<sup>10</sup> See A.M.A., *Guides* at Chapter 16.8, pages 508-09, which provides: "If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.*" (Emphasis in the original.)

decision and remand the case for proper consideration of this issue, such further development as may be necessary, and an appropriate final decision on appellant's entitlement to schedule compensation.

The November 19, 2002 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case remanded for further action consistent with this opinion.

Dated, Washington, DC  
May 19, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member