

**United States Department of Labor
Employees' Compensation Appeals Board**

HENRY BICHLER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
La Crosse, WI, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 04-260
Issued: June 15, 2004**

Appearances:
Henry Bichler, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 20, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 5, 2003, wherein the Office found that appellant had not established that he was entitled to a schedule award of greater than 14 percent for his left upper extremity and 12 percent for his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to a schedule award greater than 14 percent for impairment to his left upper extremity and 12 percent for impairment to his right upper extremity.

FACTUAL HISTORY

Appellant a distribution clerk, filed three claims for occupational disease from July 7, 1991 through July 20, 1992 which were combined. The Office accepted appellant's claims for bilateral epicondylitis and shoulder and neck sprains. As a result of these accepted conditions,

the Office issued a schedule award on June 14, 1993 for a five percent impairment of the right arm and a seven percent impairment of the left arm.

In a medical report dated January 18, 1999, Dr. Michael D. Plooster, the Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion, opined that appellant's "increased activity beyond the previous restrictions set ... have caused an acceleration of a cumulative trauma disorder which is now primarily involving the shoulders, neck and upper back area, which are causing [appellant's] current complaints."

On May 5, 2000 appellant filed a claim for an increase in his schedule award.

In a medical report dated September 13, 2000, Dr. Brenda J. Dierschke, a physiatrist, evaluated appellant pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4th ed. 2001). She stated that she believed appellant's persisting symptoms in the neck and upper back were related to the cumulative trauma condition. Dr. Dierschke rated appellant's impairment as follows:

"1. A 5 percent whole person impairment applies based on [diagnosis related estimate] Cervical Thoracic Category II, page 104 of the guide. This rating was also outlined on May 12, 1999.

"2. Shoulder range of motion was evaluated. On the right, 1 percent is assigned for forward flexion of 160 degrees, 2 percent for abduction of 130 degrees and 4.5 percent for 15 degrees of internal rotation. This translates into a 7.5 percent of the upper extremity or 4.5 percent of the whole person. The left shoulder 160 degrees of forward flexion is assigned 1 percent, 140 degrees of abduction 2 percent and 10 degrees of internal rotation is assigned 5 percent for a total of 8 percent of the upper extremity, which translates to 5 percent of the whole person. This is similar to the impairment rating to the shoulders outlined on May 12, 1999 when 5 percent impairment of the whole person of the right shoulder was assigned and 5 percent impairment of the whole person of the left shoulder was assigned. A copy of that note from May 12, 1999 is included for your reference.

"3. Range of motion of the elbow was evaluated at 135 degrees of flexion on the right is assigned at .5 percent upper extremity impairment which translates to a .5 percent whole person impairment. On the left elbow, 130 degrees of flexion is assigned 1 percent impairment of the upper extremity, which translates into 1 percent impairment of the whole person.

"4. Based on your request to evaluate impairment related to the tables described above, the following information is presented: Reduced sensation along the radial aspect of the right forearm in the area of the lateral brachial cutaneous nerve based on Table 11 and 15 of the guide. A 5 percent upper extremity impairment is identified due to sensory deficit or pain. According to Table 1, Grade 3 applies indicating up to a 60 percent sensory deficit, 60 percent of 5 = 3 percent

impairment of the upper extremity. According to Table [3] on page 20, this translates into 2 percent to the whole person.”

Dr. Dierschke also noted that there was no loss of grip strength in appellant’s left, nondominant hand, but appellant’s grip strength was below average on the right hand, specifically he had a 9.2 percent impairment of the upper extremity due to his loss of grip strength in his right hand.

Based on the medical opinions of Drs. Dierschke and Plooster, the claim was expanded to include cumulative trauma condition bilateral shoulders. The Office then referred this case to the Office medical adviser to determine if there was any additional impairment to appellant’s upper extremities in light of the fact that the claim had now been accepted for a permanent bilateral shoulder condition.

The Office medical adviser, after reviewing the reports of Drs. Plooster and Dierschke, noted that appellant continued to complain of intermittent discomfort in both shoulders especially with overhead activity allowing 2 percent permanent impairment for Grade 3 pain in the distribution of the suprascapular nerve according to Table 16-5, page 492 and Table 16-10, page 482 of the A.M.A., *Guides* (5th ed. 2001). He noted that strength was excellent and that there was no atrophy. He then noted range of motion for the right shoulder showed a 7 percent impairment.¹ He then calculated that appellant had an 8 percent impairment to his left shoulder.² Using the Combined Value Charts on page 604 of the A.M.A., *Guides*, he determined that appellant had a 12 percent right upper extremity permanent impairment. Using the same table he determined that appellant had a 14 percent left upper extremity impairment.³

By decision dated September 20, 2002, the Office issued an award for an additional seven percent impairment of the right upper extremity and seven percent for the left upper extremity.⁴

On October 5, 2000 appellant requested an oral hearing, which was held on May 14, 2003. On August 5, 2003 the hearing representative found that appellant failed to meet his burden of proof that he was entitled to greater than a 14 percent schedule award to the left

¹ Pursuant to Figure 16-43, page 477 of the A.M.A., *Guides*, appellant was allowed 2 percent impairment for abduction of 130 degrees. Pursuant to Figure 16-46, page 479, appellant was allowed 4 percent impairment based on 15 degrees of internal rotation. Appellant was also allowed 1 percent for 160 degrees of flexion, Figure 16-40, page 476. Combined, these figures indicate 7 percent impairment for right shoulder.

² For abduction of 140 degrees, the Office medical adviser allowed 2 percent pursuant to Figure 16-43, page 477. For internal rotation of 5 degrees he allowed 5 percent pursuant to Figure 16-46, page 479. Finally, for flexion of 160 degrees he allowed 1 percent pursuant to Figure 16-40, page 476. The total accounts for eight percent impairment to the left shoulder.

³ He noted 7 percent for lateral epicondylitis and 8 percent for impingement syndrome.

⁴ The Office explained that the total impairment of the left upper extremity was 14 percent and that as appellant had previously been paid for 7 percent, he was therefore entitled to an additional 7 percent. The Office further explained that appellant had an impairment to the right upper extremity of 12 percent and that as he was previously paid for a 5 percent impairment, he was entitled to an additional 7 percent.

upper extremity and a 12 percent schedule award to the right upper extremity. Accordingly, she affirmed the Office's September 20, 2002 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act⁵ and section 10.404 of the implementing federal regulation,⁶ schedule awards are payable for permanent impairment of specified body members, functions or organs. However, the Act does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*⁷ has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁸ The fifth edition of the A.M.A., *Guides* was required on all medical opinions dated after February 1, 2001.⁹

ANALYSIS

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* in reaching his conclusion that appellant sustained a 14 percent impairment to his left shoulder and a 12 percent impairment to his right shoulder. The Office medical adviser applied the proper tables and figures of the A.M.A., *Guides* (5th ed. 2001), explained how he applied these tables and figures and properly calculated the amount of impairment. The Board notes that the Office medical adviser used the measurements and findings from Dr. Dierschke's report in making his conclusion. He noted that appellant continued to complain of intermittent discomfort in both shoulders especially with overhead activity and that this indicated a 2 percent permanent impairment for Grade 3 pain in the distribution of the subprascapular nerve according to Table 16-5 page 492 and Table 16-10, page 482 of the A.M.A., *Guides*. He noted that range of motion for the right shoulder showed a 7 percent impairment pursuant to Figure 16-43, page 477, which allowed 2 percent impairment for abduction of 130 degrees and Figure 16-46 on page 479 of the A.M.A., *Guides*, which allowed 4 percent impairment based on 15 degrees of internal rotation. He noted that appellant was allowed 1 percent for 160 degrees of flexion pursuant to Figure 16-40, page 476. The Office medical adviser properly combined these figures and noted that appellant had a seven percent impairment for the right shoulder. The Office medical adviser then properly determined that appellant had an eight percent impairment to his left shoulder. Specifically, he noted that for abduction of 140 degrees, 2 percent impairment was allowed based on Figure 16-42, page 477. For internal rotation of 5 degrees he allowed 5 percent pursuant to

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (2002).

⁷ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁸ See *Joseph Lawrence, Jr.*, *supra* note 7; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁹ FECA Bulletin No. 01-05 (issued January 29, 2001).

Figure 16-46, page 479. Finally, for flexion of 160 degrees, he allowed 1 percent pursuant to Figure 16-40, page 476. This total accounts for an eight percent impairment of the left shoulder. The Office medical adviser noted seven percent impairment for lateral epicondylitis and eight percent for impingement syndrome. Using the Combined Value Charts from the A.M.A., *Guides*, he determined that appellant had a 12 percent right upper extremity permanent impairment. Using the same table, he noted that appellant had a 14 percent left upper extremity impairment. The Office then took the figures with regard to impairment for each shoulder and subtracted from that the amount that appellant was already awarded to determine that appellant was entitled to an additional seven percent impairment for each extremity. The Board also notes that the Office properly utilized the opinion of the Office medical adviser instead of that of Dr. Dierschke, as the Office medical adviser applied the fifth edition of the A.M.A., *Guides*, whereas Dr. Dierschke applied the 4th ed. 2001. While the fourth edition of the A.M.A., *Guides* was the appropriate reference for Dr. Dierschke's September 13, 2000 report, the Office medical adviser was compelled to apply the more recent 5th ed. 2001.¹⁰

CONCLUSION

Under the circumstances as described above, the Board finds that appellant has not established that he is entitled to a schedule award greater than 14 percent for the left upper extremity and 12 percent for the right upper extremity.

¹⁰ The Office began using the fifth edition of the A.M.A., *Guides* effective February 1, 2001. See *Richard F. Williams*, 55 ECAB ____ (Docket No. 03-1176, issued February 23, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 5, 2003 is affirmed.

Issued: June 15, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member