United States Department of Labor
Employees' Compensation Appeals Board

THOMAS E. DILLARD, Appellant	)	
and	)	**Docket No. 04-868**
	)	**Issued: June 25, 2004**
DEPARMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, VETERINARY SERVICES, Austin, TX, Employer	)	

Appearances:
Montez Patterson, Esq., for the appellant.
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 17, 2004 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated December 15, 2003, wherein the Office issued appellant a schedule award for a nine percent impairment to his left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this schedule award case.

ISSUE

The issue is whether appellant has more than a nine percent impairment to his left upper extremity.

FACTUAL HISTORY

On September 21, 2000 appellant, then a 57-year old animal health technician, filed a traumatic injury claim alleging that on that date he sustained a "severe blow to left shoulder" when a wild horse hit the gate and the gate hit him in the left shoulder. By letter dated December 12, 2000, the Office accepted his claim for sprain of the rotator cuff, impingement

syndrome (left shoulder), shoulder arthroscopy and other physical therapy therapeutic procedures. On January 4, 2001 appellant had surgery, specifically, an arthroscopy of the left shoulder, anterior and inferior acromioplasty left shoulder and a repair of massive rotator cuff tear. The Office paid appropriate compensation benefits.

On January 29, 2002 appellant filed a claim for a schedule award. By letter dated April 12, 2002, the Office asked his treating Board-certified orthopedic surgeon, Dr. Ramon M.G. Soriano, to determine if appellant had reached maximum medical improvement and to indicate an impairment rating. In response, his office forwarded results of testing done by a physical therapist on July 27, 2001 for an impairment rating which was interpreted as showing a 35 percent whole person impairment due to the left upper extremity and a two percent whole person impairment due to the right upper extremity or a 36 percent final whole person impairment pursuant to the third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[1] In a note dated August 20, 2001, Dr. Soriano indicated that the maximum medical improvement rating was 36 percent of the whole person. He noted that appellant's wounds were healed, that he had no tenderness and that his forward flexion is from 0 to 150 degrees and abduction is from 0 to 135 degrees.

By letter dated July 23, 2003, the Office forwarded Dr. Soriano's report to the Office medical adviser and requested that he determine appellant's impairment pursuant to the A.M.A., *Guides*. On August 5, 2003 the Office medical adviser responded that Dr. Soriano's report was inadequate for the medical adviser to determine a schedule award for the left upper extremity as it contained disparate degrees of shoulder range of motion figures and the final figures includes consideration for a brachial plexus injury. The Office medical adviser requested that the Office refer appellant to another Board-certified physician for an impairment rating pursuant to the A.M.A., *Guides* (5th ed.).

By letter dated October 24, 2003, the Office referred appellant to Dr. Walter Del Gallo, a Board-certified orthopedic surgeon. In a medical report dated November 13, 2003, he determined that appellant had an impairment to his left upper extremity of 15 percent. Dr. Del Gallo reached his conclusion as follows:

> "The affected extremity is the left shoulder due to left shoulder rotator cuff tear, subacromimial impingement. For specific disorders of [appellant's] left shoulder injury he receives a zero percent impairment. Please refer to [s]ection 16.7 of [the] fifth edition of the [A.M.A., *Guides*]. Range of motion measurements were made of his left shoulder based on the [A.M.A., *Guides*]. Left shoulder forward flexion 120 degrees, left shoulder extension 60 degrees, left shoulder abduction 140 degrees, left shoulder adduction 60 degrees, left shoulder external rotation 90 degrees and left shoulder internal rotation 70 degrees. Therefore, [appellant] receives four percent upper extremity impairment due to loss of forward flexion

[1] This rating was determined by noting an impairment in range of motion in the left upper extremity of 17 percent and a left side strength loss of 50 percent (Grade 3) during shoulder flexion with involvement of the brachial plexus (C5-8, T1 nerve). The impairment to the right upper extremity was determined by taking the right upper extremity range of motion of three percent and combining it with a loss of zero percent during shoulder flexion with involvement of the brachial plexus nerve.

and two percent upper extremity impairment due to loss of abduction and a one percent upper extremity impairment due to loss of internal rotation. These are added to a value of seven percent upper extremity impairment for range of motion loss. Please refer to Figure 1640, 1643 [and] 1646 on pages 476, 477 [and] 479 respectively. Inspection of [appellant's] left shoulder reveals a well-healed anterolateral incision as well as a small posterior incision from surgical arthroscopy of his shoulder. There is no crepitus with range of motion of his shoulder. [Appellant] does have some tenderness in the anterolateral tip of his acromion. There is no evidence of atrophy of his deltoid musculature. There is no atrophy of [appellant's] biceps or other musculature in his left upper extremity. However, he does have weakness of left shoulder musculature including abduction and forward flexion, which is [G]raded 4/5. In other words [appellant] exhibits some resistance, but not full resistance and this demonstrates a weakness compared to the opposite side. Therefore, he has a definite motor deficit left shoulder deltoid musculature. Left shoulder internal rotation strength 5/5, external rotation strength 5/5, adduction strength 5/5, extension strength 5/5. Sensory exam[ination] reveals sensation to light touch intact left upper extremity with no sensory deficits or paresthesias. Strength distally in the left upper extremity is 5/5 including elbow flexion, extension, pronation, supination, wrist flexion, extension, grip strength, finger extension, flexion, abduction, adduction and thumb strength 5/5 on all planes of motion. Therefore, [appellant] does have a motor impairment due to loss of strength to the deltoid musculature. He has no sensory deficits or sensory impairments. Please refer to Table 16-15, [p]age 492. The maximum allowable deficit is 35 percent for the axillary nerve, which innervates the deltoid musculature, which is the muscle that is weak in [appellant]. Please refer to Table 16-11. He has a Grade [4] strength deficit. I have assigned him a 25 percent deficit based on the severity of his strength loss. He does have strength against gravity, but does have significant deficit on testing and compared to the opposite side. Multiplying this 25 percent Grade [4] strength loss times the maximum allowable of 35 percent for the axillary nerve multiples to a value of 8.75 percent upper extremity. This rounds to a value of 9 percent upper extremity. Combing this value with his 7 percent upper extremity impairment due to range of motion loss combines a value of 15 percent. Therefore, appellant's upper extremity impairment is 15 percent."

By letter dated November 24, 2003, the Office asked the Office medical adviser to assess the functional loss of use and percentage of impairment. The Office medical adviser responded on December 2, 2003 that appellant's maximum motor deficit pursuant to Table 16-15 on page 492 was 35 percent, that pursuant to Dr. Del Gallo, he had a [G]rade 4 muscle function pursuant to Table 16-11, page 484 and that 25 percent of 35 percent equaled at 9 percent impairment. He noted that Dr. Del Gallo made the same calculation for motor deficit. However, the Office medical adviser also noted that page 526 of the A.M.A., *Guides* prohibits combining impairment due to motor deficit with impairment due to diminished motion. Since only one of the two probative factors could be used, he chose the one most beneficial to appellant, *i.e.*, motor deficit.

By decision dated December 15, 2003, the Office issued a schedule award of nine percent impairment of the left upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 regulation as the appropriate standard for evaluating schedule losses.[4]

ANALYSIS

In the instant case, the Office properly determined appellant's entitlement to a schedule award based on the opinion of the Office medical adviser. The report of appellant's treating physician, Dr. Soriano, can not be used as a basis for the schedule award. First, the treating physician notes appellant's disability as whole person impairment. However, no person may receive a schedule award for permanent impairment of the "whole person."[5] Second, the treating physician utilizes the third edition of the A.M.A., *Guides.* However, the Office began using the fifth edition of the A.M.A., *Guides* effective February 1, 2001.[6] Third, Dr. Soriano, in his August 20, 2001 note, referred to a July 27, 2001 impairment rating done by a physical therapist as showing the degree of permanent impairment,[7] but also provided measurements of range of motion that were markedly different from those in the July 27, 2001 report. Accordingly, the Office medical adviser properly determined that another evaluation was necessary. Appellant was sent to Dr. Del Gallo. In his November 13, 2003 report, Dr. Del Gallo determined that appellant had a 15 percent impairment of his left upper extremity. He determined this based on appellant having seven percent impairment for upper extremity impairment for range of motion loss and nine percent impairment for motor deficit. However, as properly noted by the Office medical adviser, page 526 of the fifth edition of the A.M.A., *Guides* prohibits combining impairment due to motor deficit with impairment due to diminished motion. The Office medical adviser then determined that the rating most helpful to appellant was the nine percent motor deficit. Both Dr. Del Gallo and the Office medical adviser determined that appellant had an impairment of nine percent due to motor deficit. The Office medical adviser (and also Dr. Del Gallo) properly noted that pursuant to the A.M.A., *Guides* 492, Table 16-15, the maximum allowable deficit is 35 percent for the axillary nerve, which is the muscle that is weak in

[2] 5 U.S.C. § 8107(a)-c).

[3] 20 C.F.R. § 10.404.

[4] *See Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

[5] *Ernest P. Govednick*, 27 ECAB 77 (1975).

[6] FECA Bulletin No. 01-05 (issued January 29, 2001).

[7] As a physical therapist is not a "physician" as defined by section 8101(2) of the Act, the July 27, 2001 impairment rating does not constitute competent medical evidence and cannot form the basis of a schedule award. *Jerre R. Rinehart*¸ 45 ECAB 518 (1994).

appellant. Then the Office medical adviser looked at the A.M.A., *Guides* 484, Table 16-11 and noted that Dr. Del Gallo had determined that appellant had a Grade 4 muscle function and indicated that this allowed a maximum 25 percent impairment of motor deficit. The Office medical adviser then determined that 25 percent of 35 percent was equal to 9 percent impairment. The Office medical adviser's calculations coincided directly with the same calculations made by Dr. Del Gallo. Accordingly, the Office properly determined that appellant was entitled to a nine percent impairment of his left upper extremity.

CONCLUSION

The Office properly issued a schedule award for a nine percent impairment to appellant's left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2003 is hereby affirmed.

Issued: June 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member