United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 07-1672**
	)	**Issued: January 17, 2008**
U.S. POSTAL SERVICE, SOUTHEASTERN POSTAL & DISTRIBUTION FACILITY, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 5, 2007 appellant filed a timely appeal from a January 8, 2007 decision of the Office of Workers' Compensation Programs denying a schedule award increase. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained greater than a 10 percent impairment of the right upper extremity, for which she received a schedule award. On appeal, appellant asserts that the opinion of an impartial medical examiner, Dr. James M. Nutt, III, a Board-certified orthopedic surgeon, is insufficient to represent the weight of the medical evidence. She contended that Dr. Nutt failed to measure adduction, flexion and extension of the shoulder or provide measurements substantiating his conclusion that there was no muscular atrophy.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision dated January 2, 2003,[1] the Board set aside a decision of the Office dated November 21, 2000 and a decision dated July 13, 2001 and finalized July 17, 2001, finding that appellant sustained a 10 percent impairment of the right upper extremity due to February 19, 1999 resection of the distal clavicle precipitated by accepted bicipital tendinitis of the right shoulder and a right rotator cuff tear. The Board found a conflict of medical opinion between Dr. David Weiss, an attending osteopath, who opined that appellant had a 24 percent permanent impairment of the right upper extremity, and an Office medical adviser, for the government, who found a 10 percent impairment of the right upper extremity. The Board remanded the case for appointment of an impartial medical examiner to resolve the conflict of opinion. The law and the facts of the case as set forth in the prior decision and order are hereby incorporated by reference.

In a March 12, 2003 letter, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Andrew S. Frankel, a Board-certified orthopedic surgeon, for an impartial medical examination. He found that appellant had a one percent impairment of the right upper extremity to a loss of 10 degrees of internal rotation of the shoulder.

By decisions dated June 18, 2003 and July 21, 2004,[2] the Office found that appellant did not have more than a 10 percent permanent impairment of the right upper extremity, based on Dr. Frankel's opinion as impartial medical examiner.

In a July 27, 2004 letter, appellant requested an oral hearing, held on April 7, 2005. At the hearing, appellant, through her attorney representative, asserted that Dr. Frankel's opinion was flawed.

By decision dated and finalized June 27, 2005, the Office hearing representative vacated the June 18, 2003 decision. The hearing representative found that Dr. Frankel's report was insufficiently rationalized to represent the weight of the medical evidence. The hearing representative directed the appointment of a new impartial medical examiner to resolve the conflict of medical opinion.[3]

On September 2, 2005 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Nutt, a Board-certified orthopedic surgeon, for a referee medical examination. Dr. Nutt submitted an October 13, 2005 report reviewing the medical record and statement of accepted facts. He observed no atrophy in the right shoulder, no restricted motion

[1] Docket No. 02-117 (issued January 2, 2003).

[2] The Office reissued the June 18, 2003 decision on July 21, 2004 as the Office failed to provide appellant with a copy of the decision.

[3] In a July 12, 2005 letter, appellant requested to participate in the selection of the impartial medical specialist. In a July 22, 205 letter, the Office advised appellant that impartial medical examiners were selected on a rotational system. The Office stated that if appellant had specific objections to the specialist selected, her reasons would be duly considered. In a September 15, 2005 letter, appellant again requested to participate in selection of the impartial medical examiner but made no objections to Dr. Nutt.

in abduction, internal rotation or external rotation and pain with abduction of the right shoulder beyond 160 degrees. Dr. Nutt noted that appellant was able to "actively and strongly abduct her right arm to 180 degrees to get her arm to her ear." He did not provide measurements or observations regarding adduction, flexion and extension of the right shoulder. Dr. Nutt opined that appellant had "no restriction of strength, range of motion or nerve function" in the right arm. He stated that appellant's discomfort at extremes of abduction were due to post-surgical degeneration in the supraspinatus tendon. Dr. Nutt opined that, according to Figure 18-1 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[4] appellant had a pain-related impairment, classified by Table 18-3 as a mild pain disorder.[5] He noted that, assuming that the "impingement pain cause[d] a functional loss of abduction to approximately 160 degrees," this would equal a 1 percent upper extremity impairment according to Figure 16-43, page 477.[6]

By decision dated November 2, 2005, the Office found that appellant had not established that she sustained greater than a 10 percent permanent impairment of the right upper extremity, for which she received a schedule award. The Office found that the weight of the medical evidence rested with Dr. Nutt, who submitted a well-rationalized opinion explaining that appellant had only a one percent impairment of the right upper extremity, less than the 10 percent previously awarded.

In a November 8, 2005 letter, appellant requested an oral hearing.

By decision dated and finalized January 25, 2006, the Office hearing representative remanded the case. The hearing representative found that Dr. Nutt's opinion was insufficient to resolve the conflict. The hearing representative directed that the Office contact Dr. Nutt, request that he review additional medical evidence, provide his opinion regarding surgery performed and discuss Dr. Weiss' interpretation of the procedure and its impact on appellant's impairment.

In a March 9, 2006 letter, the Office requested that Dr. Nutt review the medical record and discuss the impact of the February 19, 1999 surgery on appellant's condition. The Office also requested that Dr. Nutt clarify his previous opinion regarding the percentage of permanent impairment. The Office emphasized that there was a conflict of medical opinion between Dr. Weiss and the Office medical adviser.

In a March 17, 2006 letter, Dr. Nutt reviewed the surgical report and opined that appellant underwent an "arthroscopic subacromial bursectomy and an acriomioplasty. In this procedure, the undersurface of the acromion bone [was] shaved a few millimeters…. This [was] not an arthroplasty." Dr. Nutt therefore disagreed with Dr. Weiss' opinion that appellant had a 24 percent permanent impairment of the right arm due to shoulder arthroplasty. He opined that

[4] Figure 18-1, page 574 of the fifth edition of the A.M.A., *Guides* is entitled, "Algorithm for Rating Pain-Related Impairment in Conditions Associated with Conventionally Ratable Impairment."

[5] Table 18-3, page 575 of the fifth edition of the A.M.A., *Guides* is entitled, "Impairment Classifications Due to Pain Disorders."

[6] Figure 16-43, page 477 of the fifth edition of the A.M.A., *Guides* is entitled, "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder."

according to Table 16-27, page 506 of the fifth edition of the A.M.A., *Guides*, resection arthroplasty of the distal clavicle equaled a 10 percent impairment of the upper extremity. However, appellant did not undergo resection of the distal clavicle. Dr. Nutt concluded that his schedule award evaluation was "accurate, just and fair."

On May 1, 2006 the Office requested that an Office medical adviser review Dr. Nutt's reports and indicate if his schedule award assessment was accurate. In a May 4, 2006 report, the Office medical adviser reviewed the medical record. He provided a schedule award assessment chart showing that Dr. Nutt submitted no measurements for flexion, extension or adduction of the right shoulder. The medical adviser opined that appellant sustained a one percent impairment of the right upper extremity based on limitation of abduction to 160 degrees. He explained that this was "not in addition to the 10 percent, it [was] the only impairment" based on Dr. Nutt's reports. The medical adviser explained that appellant did not undergo an arthroplasty or resection of the distal clavicle. Therefore, appellant was not entitled to the 10 percent impairment previously awarded.

By decision dated May 10, 2006, the Office found that appellant had not established an additional impairment of the right upper extremity greater than the 10 percent previously awarded. The Office found that Dr. Nutt's opinion as impartial medical examiner, as reviewed by the Office medical adviser, was sufficiently rationalized to represent the weight of the medical evidence. The Office noted that appellant remained entitled to medical benefits to treat the accepted condition.

In a May 12, 2006 letter, appellant requested an oral hearing. On October 27, 2006 appellant's attorney representative amended the request to one for a review of the written record.

By decision dated and finalized January 8, 2007, the Office hearing representative affirmed the May 10, 2006 decision, finding that appellant had not established that she sustained greater than a 10 percent impairment of the right upper extremity. The hearing representative found that the weight of the medical evidence rested with Dr. Nutt and the Office medical adviser's review of his findings. The hearing representative further found that appellant did not submit medical evidence indicating any greater percentage of impairment than that awarded.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.[8] As of February 1, 2001,

[7] 5 U.S.C. §§ 8101-8193.

[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[9]

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[10] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, restricted motion, loss of sensation or loss of strength.[11] Chapter 16 specifies that flexion, extension, abduction, adduction internal rotation and external rotation are all to be considered in evaluating impairments of shoulder motion.[12] The A.M.A., *Guides* provides specific grading schemes for rating upper extremity impairments due to restricted motion, including a lack of flexion and extension of the shoulder.[13]

Section 8123 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 an examination.[14] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15] However, in a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[16]

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[9] *See* FECA Bulletin No. 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[10] *See Paul A. Toms*, 28 ECAB 403 (1987).

[11] A.M.A., *Guides*, Chapter 16, "The Upper Extremities," pages 433-521 (5th ed. 2001).

[12] *Id*. at page 474, paragraph 16.4i, "Shoulder Motion Impairment."

[13] Figure 16-40, page 476 of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder." Figure 16-43, page 477 of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder." Figure 16-46, page 479 of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Internal and External Rotation of Shoulder."

[14] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[15] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[16] *Margaret M. Gilmore*, 47 ECAB 718 (1996).

ANALYSIS

The Office accepted that appellant sustained bicipital tendinitis of the right shoulder and a right rotator cuff tear, requiring surgery on February 19, 1999. The Office awarded appellant a schedule award for a 10 percent impairment to the right upper extremity based on resection of the distal clavicle. Pursuant to the first appeal, the Board found a conflict of medical evidence between an Office medical adviser and Dr. Weiss, an attending osteopath, regarding the percentage of permanent impairment. On remand of the case, the Office obtained an impartial medical opinion from Dr. Nutt, a Board-certified orthopedic surgeon.

Dr. Nutt opined that appellant had a one percent impairment of the right upper extremity due to pain with abduction greater than 160 degrees, according to Figure 18-1 of the A.M.A., *Guides*. He stated that appellant had full abduction, internal and external rotation of the right shoulder. However, Dr. Nutt did not provide range of motion measurements or clinical observations regarding adduction, flexion and extension of the right shoulder. The A.M.A., *Guides* provides that adduction, flexion and extension of the shoulder must be assessed when evaluating range of motion.[17] Thus, Dr. Nutt's report was incomplete and required clarification.[18] But the Office did not request a supplemental report from Dr. Nutt.

The Office did submit Dr. Nutt's report to an Office medical adviser for review. However, the medical adviser did not discuss the incomplete nature of Dr. Nutt's opinion. He indicated in a schedule award assessment chart that Dr. Nutt had not provided measurements for adduction, flexion or extension of the right shoulder. Yet, he concurred with Dr. Nutt's assessment. The Board has held that, while an Office medical adviser may review the opinion of an impartial medical specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility.[19] The Office issued its May 10, 2006 and January 8, 2007 decisions finding a one percent impairment of the right upper extremity based on the Office medical adviser's opinion. The Board finds that the Office should obtain a supplemental report from Dr. Nutt on the extent of permanent impairment to appellant. Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded to the Office for further development.

[17] A.M.A., *Guides*, Chapter 16, "The Upper Extremities," page 474, paragraph 16.4i, "Shoulder Motion Impairment."

[18] *Margaret M. Gilmore*, *supra* note 16.

[19] *See, e.g., Willie C. Howard*, 55 ECAB 564 (2004) (where the Office medical adviser concurred that the impartial medical specialist's impairment rating was appropriate under the fifth edition of the A.M.A., *Guides*).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 8, 2007 is set aside and the case remanded for further action consistent with this opinion.

Issued: January 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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