United States Department of Labor
Employees' Compensation Appeals Board

K.L., Appellant	)	
	)	**Docket No. 10-169**
and	)	**Issued: August 3, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Norfolk, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2009 appellant timely appealed an August 5, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than an eight percent impairment of the right upper extremity.

FACTUAL HISTORY

On November 7, 2003 appellant, a 49-year-old tractor-trailer operator, sustained an injury to his right shoulder while closing the cargo door of a trailer. The Office accepted his claim for retear injury of the right rotator cuff. On October 22, 2007 appellant filed a claim for a schedule award.

In an October 19, 2007 report, appellant's treating physician, Dr. Mark A. Bewley, a Board-certified orthopedic surgeon, diagnosed right shoulder impingement. Examination

revealed pain and weakness in the right shoulder, positive scapular dyskinesia and reduced right shoulder abduction strength. With moderately increased thoracic kyphosis, appellant's right shoulder blade rested more than five centimeters (cm) away from his spine. Without arm motion, the right scapula was abducted and downwardly rotated more than the left, with his inferior angle winging off the rib cage. Range of motion measurements were as follows: flexion -- 144 degrees; extension -- 67 degrees; abduction -- 98 degrees; adduction -- 24 degrees; lateral rotation -- 74 degrees; and extension rotation -- 97 degrees. Dr. Bewley advised that appellant had a 16 percent permanent impairment of his right upper extremity (RUE) and that the date of maximum medical improvement (MMI) was October 19, 2007.

The Office asked a district medical adviser to review the record for a determination as to the degree of appellant's RUE impairment. On July 8, 2009 the medical adviser noted that the only impairment rating of record was the October 19, 2007 report from Dr. Bewley, who opined that appellant had a 16 percent permanent impairment of his right arm. He recommended that a second opinion examination be obtained.

The record contains a form report from Dr. Bewley dated July 17, 2009. Dr. Bewley made a diagnosis-based impairment rating of 16 percent pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Referring to Table 15-5 on page 403, he determined that appellant had a Class 2 impairment of his (RUE) based on a diagnosis of rotator cuff tear. Dr. Bewley identified Grade A as the appropriate grade, using (-2) as a grade modifier for clinical studies (GMCS) pursuant to page 411 of the A.M.A., *Guides*, for a final combined impairment of 16 percent.

The Office again asked the medical adviser to review the record. On July 3, 2009 the medical adviser referenced appellant's July 31, 2003 and July 2004 arthroscopic right shoulder decompression surgeries and concluded that Dr. Bewley's 16 percent impairment rating was incorrect. He stated that "range of motion can be used as the most accurate and fairest impairment in the stand-alone approach for total impairment [of the] RUE." Referencing Table 15-24 at page 475 of the sixth edition of the A.M.A., *Guides*, the medical adviser found that appellant had an eight percent permanent impairment of his right arm, based upon Dr. Bewley's range of motion measurements.[1] He opined that the date of MMI was October 19, 2007, the date Dr. Bewley examined appellant.

By decision dated August 5, 2009, the Office granted appellant a schedule award for an eight percent impairment of the right arm. The award covered a period of 24.96 weeks from October 19, 2007 through April 10, 2008. The Office found that the weight of medical opinion was represented by the Office medical adviser, who had properly applied the A.M.A., *Guides*.[2]

[1] The medical adviser referenced the following range of motion measurements: flexion -- 144 degrees; extension -- 67 degrees; abduction -- 98 degrees; adduction -- 24 degrees; lateral rotation -- 74 degrees; and extension rotation -- 97 degrees.

[2] The Board notes that appellant submitted additional evidence after the Office issued its August 5, 2009 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[3] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[4] Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6th ed. 2008).[5]

ANALYSIS

The Board finds that this case is not in posture for decision as to the extent of appellant's right arm impairment. Therefore, it will be remanded to the Office for further development.

Under the sixth edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15. Diagnosis-based impairment is the primary method of evaluation for the upper limb.[6] Range of motion is used primarily as a physical examination adjustment factor and only to determine actual impairment values when a grid permits its use as an option.[7] When the A.M.A., *Guides* provides more than one method to rate a particular impairment or condition, the method producing the higher rating should be used.[8] In this case, the medical adviser made a range of motion evaluation, which resulted in an 8 percent impairment rating, rather than the diagnosis-based rating used by appellant's treating physician, which resulted in a 16 percent rating. He did not, however, explain why he used the range of motion analysis, rather than the diagnosis-based analysis found under the sixth edition of the A.M.A., *Guides*.

On October 19, 2007 Dr. Bewley noted that appellant had pain and weakness in the right shoulder, positive scapular dyskinesia and reduced right shoulder abduction strength. With moderately increased thoracic kyphosis, appellant's right shoulder blade rested more than five cm away from his spine. Without arm motion, the right scapula was abducted and downwardly rotated more than the left, with his inferior angle winging off the rib cage. Range of motion measurements were as follows: flexion -- 144 degrees; extension -- 67 degrees; abduction -- 98 degrees; adduction -- 24 degrees; lateral rotation -- 74 degrees; and extension rotation -- 97 degrees. Dr. Bewley rated 16 percent permanent impairment of the right arm and that maximum

[3] For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2006).

[4] 20 C.F.R. § 10.404 (2009).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

[6] A.M.A., *Guides* 432, section 15.2.

[7] *Id.*

[8] *Id*. at 20, Table 2-1.

medical improvement had been reached. On July 17, 2009 Dr. Bewley provided a diagnosis-based impairment rating of 16 percent under the sixth edition of the A.M.A., *Guides*. Referring to Table 15-5 on page 403, he determined that appellant had a Class 2 impairment of his RUE based on a diagnosis of rotator cuff tear. He identified Grade A as the appropriate grade, using (-2) as a GMCS pursuant to page 411 of the A.M.A., *Guides*, for a final combined impairment of 16 percent.

On July 3, 2009 the medical adviser concluded that Dr. Brewer's 16 percent impairment rating was incorrect. He stated range of motion could be used as a stand-alone approach for total impairment of the RUE. Referencing Table 15-24 at page 475 of the sixth edition of the A.M.A., *Guides*, he opined that appellant had an eight percent permanent impairment of his RUE, based upon Dr. Brewer's October 19, 2007 range of motion measurements. The medical adviser, however, did not provide any explanation as to why the rating by Dr. Brewer under the sixth edition was deficient or not in conformance with the diagnosis-based protocols.

The Board notes that range of motion may under specific circumstances, be selected as an alternative approach to rating impairment, in which case it is not combined with the diagnosis-based impairment, but rather stands alone as a rating.[9] Rotator cuff injuries are included among those diagnoses in the grid that may be rated using range of motion.[10] The ability to use this method of evaluation does not, however, eliminate the requirement to use the method producing the higher rating.[11] It was incumbent upon the medical adviser to fully explain why he did not use the diagnosis-based estimate.

Accordingly, the Board finds that the case is not in posture for decision. The case is remanded to the Office for further development on the extent of impairment to appellant's right arm under the A.M.A., *Guides* (6th ed. 2008).

CONCLUSION

The Board finds that the case is not in posture for decision as to the extent of appellant's right arm impairment.

[9] *Id*. at 390, section 15.2(a).

[10] *Id*. at 403, Table 15-5.

[11] *Id*. at 20, Table 2-1.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action consistent with this decision.

Issued: August 3, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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