United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 09-1853**
	)	**Issued: March 15, 2010**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Wilmington, DE, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2009 appellant, through his attorney, filed a timely appeal from an April 28, 2009 merit decision of the Office of Workers' Compensation Programs granting him a schedule award. 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 has more than a 10 percent permanent impairment of the left upper extremity.

FACTUAL HISTORY

The Office accepted that on May 22, 2007 appellant, then a 38-year-old pipelineman, sustained a sprain of the acromioclavicular joint of the left shoulder and an upper arm sprain in the performance of duty. On September 10, 2007 appellant underwent a left shoulder arthroscopic subacromial decompression with acromioplasty and a distal clavical excision.

On November 4, 2008 appellant filed a claim for a schedule award. By letter dated December 29, 2008, the Office referred appellant to Dr. Steven J. Valentino, an osteopath, for a second opinion examination.

In a report dated November 18, 2008, received by the Office on January 20, 2009, Dr. Daisy A. Rodriguez, a Board-certified internist, discussed appellant's history of a dislocated left shoulder on May 22, 2007 and subsequent surgery on September 10, 2007. She noted that he complained of continual left shoulder pain, left hand weakness and abnormal sensation and paresthesias and dysesthesias. Dr. Rodriguez measured left shoulder flexion of 90 degrees, extension of 45 degrees, abduction of 80 degrees, adduction of less than 5 degrees, external rotation of 10 degrees external rotation and full internal rotation. On examination she found crepitus of the left shoulder and atrophy of the left hand with diminished sensation. Dr. Rodriguez provided grip strength measurements.

On December 27, 2008 Dr. Rodriguez opined that appellant had reached maximum medical improvement on May 31, 2008. She related that he had "severe restriction and loss of function of the left shoulder, moderate pain in the left shoulder and upper extremity, paresthesias of the left hand and dysfunction." Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), Dr. Rodriguez opined that, for the left shoulder, 90 degrees flexion constituted a 6 percent impairment,[1] 45 degrees extension constituted a 1 percent impairment,[2] 80 degrees abduction constituted a 5 percent impairment,[3] 5 degrees adduction constituted a 2 percent impairment,[4] 90 degrees internal rotation constituted no impairment[5] and 10 degrees external rotation constituted a 2 percent impairment,[6] which she added to find a 16 percent impairment due to loss of range of motion of the left upper extremity. She additionally found that appellant had a Grade 2 sensory loss and a Grade 4 motor loss of the median nerve below the forearm. Dr. Rodriguez multiplied the 80 percent graded sensory loss by 39 percent, the maximum impairment of the median nerve due to pain, to find a 31 percent left upper extremity impairment.[7] She multiplied the 25 percent graded motor impairment by 10 percent, the maximum impairment of the median nerve due to motor loss, to find a 3 percent impairment.[8] Dr. Rodriguez combined the impairments due to sensory and motor loss to find a 33 percent left upper extremity impairment. She next combined appellant's 16 percent impairment due to loss of range of motion with the 33 percent impairment due to sensory and motor loss to find a 44 percent permanent impairment.

[1] A.M.A., *Guides* 476, Figure 16-40.

[2] *Id*.

[3] *Id*. at 477, Figure 16-43.

[4] *Id*.

[5] *Id*. at 479, Figure 16-46.

[6] *Id*.

[7] *Id*. at 482, 492, Tables 16-10, 16-15.

[8] *Id*. at 484, 492, Tables 16-11, 16-15.

On March 2, 2009 Dr. Valentino examined appellant's shoulder and determined that his reflexes were intact and that he had no motor or sensory loss. He found that appellant's condition had resolved without any residual findings. Dr. Valentino stated, "There is no restriction of movement in terms of degrees of retained active motion. There is no evidence of decrease of strength, atrophy, ankylosis or sensory changes." He concluded that appellant had no permanent impairment under the A.M.A., *Guides*.

On April 7, 2009 an Office medical adviser reviewed the medical evidence. He discussed Dr. Rodriguez' finding that appellant had a 44 percent left upper extremity impairment due to loss of range of motion and motor and sensory loss of the median nerve but noted that Dr. Valentino did not find such impairment on examination. The Office medical adviser found that appellant had a 10 percent impairment under the A.M.A., *Guides* for a resection arthroplasty of the left distal clavicle.

By decision dated April 28, 2009, the Office granted appellant a schedule award for a 10 percent permanent impairment of the left upper extremity. The period of the award ran for 31.2 weeks from March 11 to October 15, 2009.

On appeal appellant's attorney asserts that the Office should have based his schedule award on the rating by Dr. Rodriguez.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[9] and its implementing federal regulations,[10] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12]

Section 8123(a) 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.[13] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id.* at § 10.404(a).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). As of May 1, 2009, the sixth edition will be used. FECA Bulletin No. 09-03 (issued March 15, 2008).

[13] 5 U.S.C. § 8123(a).

physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14]

ANALYSIS

The Office accepted that appellant sustained a sprain of the acromioclavicular joint of the left shoulder and an upper arm sprain. Appellant underwent a distal clavicle resection and subacromial decompression with acromioplasty on September 10, 2007. On November 4, 2008 he filed a claim for a schedule award.

In impairment evaluations dated November 18 and December 27, 2008, Dr. Rodriguez applied the A.M.A., *Guides* and found that appellant had a 16 percent impairment due to loss of range of motion of the left shoulder.[15] She further found that he had a 33 percent impairment due to sensory and motor loss of the median nerve.[16] Dr. Rodriguez combined the impairments due to loss of range of motion and sensory and motor loss to find a 44 percent left upper extremity impairment.

Dr. Valentino provided a second opinion examination on March 2, 2009. He asserted that appellant had no loss of range of motion, strength or sensation of the left upper extremity on examination. Dr. Valentino further found no atrophy or ankylosis. He concluded that appellant had no permanent impairment of the left upper extremity.

The Board finds that a conflict exists between Dr. Rodriguez, who found that he had a 44 percent left upper extremity impairment and Dr. Valentino, who found that he had no impairment. Section 8123(a) provides that, if there is a 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.[17] The case will be remanded to the Office to refer appellant for an impartial medical examination regarding the extent, if any, of his left upper extremity impairment.[18]

CONCLUSION

The Board finds that the case is not in posture for decision.

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[14] 20 C.F.R. § 10.321.

[15] A.M.A., *Guides* at 476, 477, 479, Figures 16-40, 16-43, 16-46.

[16] *Id*. at 482, 484, 492, Tables 16-10, 16-11, 16-15.

[17] 5 U.S.C. § 8123(a); *Alfred R. Anderson*, 54 ECAB 179 (2002).

[18] An Office medical adviser reviewed the evidence and concluded that appellant had a 10 percent left upper extremity impairment due to his resection arthroplasty of the left distal clavicle. An Office medical adviser, however, may create a conflict in medical opinion but generally may not resolve the conflict. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.801.7(g) (April 1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 28, 2009 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 15, 2010
Washington, DC

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

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

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