

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GREGORY FERGUSON and U.S. POSTAL SERVICE,  
POST OFFICE, Albany, NY

*Docket No. 99-2585; Submitted on the Record;  
Issued February 15, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

The issue is whether appellant has established that he has greater than a 13 percent impairment of the right upper extremity, for which he received a schedule award.

On April 19, 1996 appellant, then a 40-year-old letter carrier, while in the performance of duty sustained an injury to his right shoulder.<sup>1</sup> The Office accepted appellant's claim for a right shoulder strain and also authorized surgery for the right shoulder. In a December 6, 1996 operative report, Dr. Richard Saunders, a Board-certified orthopedic surgeon, performed a right neer-type subacromial decompression and resection of the distal clavicle. On April 10, 1998 appellant filed a claim for a schedule award.

In support of his claim, appellant submitted a November 9, 1998 report from Dr. Saunders, who determined that appellant had a 25 percent permanent impairment of the right shoulder. He noted that:

“[Appellant] has internal rotation from 0 degrees to the buttock on the right versus the midlumbar level on the left. He has 0 degrees to 65 degrees of external rotation on the right symmetric with the left which also goes out to 65 degrees of external rotation. Forward elevation is from 0 degrees to 160 degrees bilaterally. Retained backward elevation is from 0 degrees to 25 degrees bilaterally. [Appellant] has an abduction from 0 to 95 degrees on the right and 0 to 120 degrees on the left. External rotation is to 65 degrees, internal rotation is to 15 degrees on the right, according to [the] A[merican] M[edical] A[ssociation], [*Guides to the Evaluation of Permanent Impairment*] (4<sup>th</sup> ed. 1993) measurement

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<sup>1</sup> This claim was originally filed as a recurrence of appellant's October 13, 1994 injury, A2-687981. However, the Office of Workers' Compensation Programs determined that the April 19, 1996 injury was a new injury and assigned case number A2-713900 to this injury. The Office doubled the right shoulder injury claim into the present record, A2-687981. The Office also accepted the case for low back strain.

rules. The joint is not ankylosed. He has no additional impairment based on weakness, atrophy, pain or loss of sensation that I can quantify objectively.”

Dr. Saunders stated that, having reviewed the A.M.A., *Guide[s]*, starting at the section labeled 3/41, progressing through 3/42, 3/43 and 3/44, appellant had a 25 percent impairment of the right shoulder.

The Office subsequently referred the medical evidence of record to an Office medical adviser who in a December 11, 1998 report determined that appellant had a 13 percent impairment of the right upper extremity.

On January 11, 1999 the Office again submitted medical evidence to the Office medical adviser requesting clarification of his December 11, 1998 report. The medical adviser noted in a January 13, 1999 report that Dr. Saunders did not add properly nor did he use the A.M.A., *Guides*, 4<sup>th</sup> edition properly to support his 25 percent rating. He again determined that appellant had a 13 percent impairment of the right upper extremity.

Accordingly, on January 19, 1999, the Office granted appellant a schedule award for a 13 percent permanent loss of use of his right arm. The award covered a period of 40.56 weeks from November 9, 1998 to August 19, 1999.

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

Section 8107 of the Federal Employees’ Compensation Act<sup>2</sup> 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. 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 Office has adopted the A.M.A., *Guides* as an appropriate standard for evaluating schedule losses, and the Board has concurred in such adoption.<sup>3</sup>

Section 8123 of the Act<sup>4</sup> provides that, if there is disagreement between the physician making the examination for the United States and the employee’s physician, the Office shall appoint a third physician who shall make an examination.<sup>5</sup> In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality.<sup>6</sup> This evaluation is based on the opportunity for and thoroughness of, the physical examination; the

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> *James J. Hjort*, 45 ECAB 595 (1994).

<sup>4</sup> 5 U.S.C. § 8123(a).

<sup>5</sup> *James J. Hjort*, 45 ECAB 595, 599 (1994).

<sup>6</sup> *Connie Johns*, 44 ECAB 560, 570 (1993).

accuracy and completeness of the physicians' knowledge of the facts and medical history; the care and skill of the physician's analysis and the medical rationale expressed in support of the physician's opinion.<sup>7</sup>

In the instant case, Dr. Saunders, in his November 9, 1998 report, noted that he had received a copy of the A.M.A., *Guides*. After reviewing the A.M.A., *Guides*, his impression was that appellant had a 25 percent permanent loss of function of the right shoulder. He noted that his conclusion was based upon a series of tests involving internal and external rotation, forwards and backwards elevation and abduction. He described each of the tests and referenced the A.M.A., *Guides* with regard to his impairment rating.

The Office medical adviser reviewed Dr. Saunders' findings and stated that appellant reached maximum medical improvement on November 9, 1998. Regarding the right shoulder, the Office medical adviser stated that based upon figure 44, page 45 of the A.M.A., *Guides*, 4<sup>th</sup> edition, the external rotation was 65 degrees with a 0 percent impairment and that internal rotation was 15 degrees with a 5 percent impairment. The Office medical adviser further stated that, based upon figure 38, page 43 of the A.M.A., *Guides*, 4<sup>th</sup> Edition, the flexion was 160 degrees with an impairment of 1 percent and that extension was 25 degrees with an impairment of 2 percent. In addition, the Office medical adviser noted that, based upon figure 41, page 44 of the A.M.A., *Guides*, abduction was 95 degrees with an impairment of 5 percent.<sup>8</sup> He added the percentages of impairment to 13 percent of the right shoulder for a schedule award of 13 percent to the right upper extremity.<sup>9</sup>

Neither doctor addressed the percentage of impairment for a distal clavicle resection.<sup>10</sup>

The Board finds that a conflict in the medical opinion evidence exists between the 13 percent impairment rating found by the Office medical adviser and the higher impairment rating found by Dr. Saunders.<sup>11</sup>

On remand the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation pursuant to section 8123(a) regarding the extent of the permanent impairment of appellant's right upper extremity. The Office should direct the impartial medical specialist to consider all conditions of appellant's right upper extremity that resulted in a permanent impairment under the A.M.A., *Guides*

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<sup>7</sup> *Melvina Jackson*, 38 ECAB 443, 449 (1987).

<sup>8</sup> It appears that the Office medical adviser should have concluded that the impairment was 4 percent instead of 5 percent as indicated in the chart. See A.M.A., *Guides*, Table 41, page 44 (4<sup>th</sup> ed. 1993) which shows that the percentage for an abduction of 95 degrees should be 4 percent.

<sup>9</sup> A.M.A., *Guides*, p. 45 (4<sup>th</sup> ed. 1993).

<sup>10</sup> A.M.A., *Guides*, p. 61 (4<sup>th</sup> ed. 1993).

<sup>11</sup> See *Joseph D. Lee*, 42 ECAB 172, 181 (1990) (remanding the case because of a conflict in the impairment ratings of appellant's physician and the Office medical adviser).

including the right distal clavicle resection as well as the other applicable charts and tables regarding the upper extremity and right shoulder impairment.

The decision of the Office of Workers' Compensation Programs dated January 18, 2000 is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC  
February 15, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member