

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL ACOSTA and U.S. POSTAL SERVICE,
POST OFFICE, El Paso, TX

*Docket No. 00-1493; Submitted on the Record;
Issued May 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a greater than 12 percent impairment of right upper extremity for which he has received a schedule award.

On May 30, 1997 appellant, then a 43-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on May 13, 1997 he first realized that his right shoulder problems were due to the weight of the mail satchel he carried. The Office of Workers' Compensation Programs accepted the claim for right shoulder rotator cuff tear. Appellant returned to limited-duty work effective November 25, 1997.

On January 27, 1998 Dr. Randy J. Pollet, a second opinion Board-certified physician, concluded that appellant had a four percent impairment of the right upper extremity.

In reports dated May 12 and 13, 1998, Dr. Johan J. Penninck, an attending Board-certified orthopedic surgeon, concluded that appellant had a 29 percent permanent impairment of his right upper extremity.

The Office referred appellant to Dr. Kevin J. Sandberg, a physician Board-certified in physical medicine and rehabilitation, to resolve the conflict in the medical opinion evidence between Drs. Pollet and Penninck.

In a September 4, 1998 report, Dr. Sandberg concluded that appellant had a 12 percent permanent impairment of the right upper extremity. Dr. Sandberg noted that appellant's right upper trapezius and cervical paraspinal muscles were mildly tender and mildly tight. Regarding his range of motion, Dr. Sandberg noted:

“[Appellant's] right upper extremity has a full range of motion at the elbow, wrists and fingers. His right shoulder active range of motion is 55 degrees in extension and 90 degrees in flexion, 70 degrees in abduction, 40 degrees in external rotation, 90 degrees in internal rotation and 40 degrees of adduction.

Passive range of motion in flexion and abduction were 120 and 110 degrees respectively. This range of motion could be performed only when the patient was completely relaxed. Upper extremity sensation is intact to pinprick and light throughout. Deep tendon reflexes are 2+ and summetric bilaterally.”

Dr. Sandberg determined that, for appellant’s right shoulder, 90 degrees flexion constituted 6 percent impairment;¹ 55 degrees of extension constituted 0 percent impairment;² 70 degrees abduction constituted a 5 percent impairment;³ 40 degrees external rotation constituted a 1 percent impairment;⁴ and 90 degrees of internal rotation constituted a 0 degree impairment,⁵ which when added up totaled a 12 percent impairment of the right upper extremity for loss of range of motion.

On September 23, 1998 appellant filed a claim for a schedule award.

On October 14, 1998 the Office issued appellant a schedule award for a 12 percent permanent impairment of the right shoulder.

In an October 8, 1998 report, the Office medical adviser concurred with Dr. Sandberg’s determination that appellant had a 12 percent impairment of his right upper extremity due to loss of range of motion.

On November 6, 1998 appellant requested an oral hearing, which was held on August 26, 1999.

In a report dated August 9, 1999, Dr. Gerald A. Halaby, an attending physician, concluded that appellant had a 24 percent impairment of his right shoulder. Using the A.M.A., *Guides*, he concluded that flexion of 125 degrees constituted 4 percent impairment;⁶ 40 degrees extension constituted a 1 percent impairment;⁷ 75 degrees abduction constituted a 5 percent impairment;⁸ 25 degrees of adduction constituted a 1 percent impairment;⁹ 25 degrees of internal rotation constituted a 4 percent impairment;¹⁰ 55 degrees external rotation constituted a 0 percent

¹ A.M.A, *Guides* at 43, Figure 38.

² *Id.*

³ *Id.* at 44, Figure 41.

⁴ *Id.* at 45, Figure 44.

⁵ *Id.*

⁶ *Id.* at 43, Figure 38.

⁷ *Id.*

⁸ *Id.* at 44, Figure 41.

⁹ *Id.*

¹⁰ *Id.* at 45, Figure 44.

impairment¹¹ which when added up totaled a 12 percent impairment of the right upper extremity. Dr. Halaby then added 12 percent impairment for crepitation¹² for a total impairment of 24 percent of the right upper extremity.

In a report dated December 7, 1999, Dr. Neven A. Popovic, a Board-certified orthopedic surgeon and Office medical adviser, concurred with Dr. Sandberg's opinion that appellant had a 12 percent impairment. Dr. Popovic noted that Dr. Halaby erroneously applied the tables for both crepitation and range of motion as these tables are not to be used in conjunction with each other. He noted that use of these tables results in duplication in the estimate of impairment.

In a decision dated January 5, 2000, the Office hearing representative affirmed the October 14, 1998 schedule award. The hearing representative explained that the impartial medical examiner's reports resolved the conflict regarding the extent of appellant's permanent impairment. He also noted that both Dr. Sandberg and the Office medical adviser indicated that Dr. Halaby incorrectly utilized the American Medical Association, *Guide to the Evaluation of Permanent Impairment* when he used both range of motion and crepitation in his calculation of appellant's impairment.

The Board finds that appellant is not entitled to a greater than 12 percent impairment of right upper extremity for which he has received a schedule award.

Section 8107 of the Federal Employees' Compensation Act¹³ provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹⁴ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.¹⁵

Section 8123(a) of the Act 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.¹⁶

¹¹ *Id.*

¹² *Id.* at 58, Table 18 and at 59, Table 19.

¹³ 5 U.S.C. §§ 8101-8193, 8107.

¹⁴ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

¹⁵ *Theresa Goode*, 51 ECAB ____ (Docket No. 99-1831, issued September 12, 2000); *A. George Lampo*, 45 ECAB 441, 443 (1994).

¹⁶ 5 U.S.C. § 8123(a); *see also Charles S. Hamilton*, 52 ECAB ____ (Docket No. 99-1792, issued October 13, 2000); *Leonard M. Burger*, 51 ECAB ____ (Docket No. 98-1532, issued March 15, 2000); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

In the present case, Dr. Penninck and appellant's treating physician, determined that appellant had a 29 percent permanent impairment of the left lower extremity, while Dr. Pollet determined that appellant had a 4 percent permanent impairment of the right upper extremity. As a conflict existed in the medical opinion evidence between Drs. Penninck and Pollet, the Office properly referred appellant to Dr. Sandberg for an impartial medical examination.

When 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.¹⁷

In his September 4, 1998 medical report, Dr. Sandberg provided a history of appellant's right arm injury and medical treatment. He also provided his findings on physical examination, which included detailing appellant's range of motion in his right upper extremity. Dr. Sandberg further indicated a review of medical records and a description of appellant's work duties.

Inasmuch as Dr. Sandberg's medical report is rationalized and based on an accurate factual and medical background, the Board finds that his opinion constitutes the weight of the medical opinion evidence in this case. Furthermore, the Office medical adviser concurred in this determination. Therefore, the Office properly determined that appellant was not entitled to more than a 12 percent permanent impairment of the right upper extremity, for which he has already received a schedule award.

Although Dr. Halaby concluded that appellant had additional impairment due to crepitation of the right upper extremity, he did not adequately explain the basis for rating this impairment. The A.M.A., *Guides* emphasize that the disorders considered in the upper extremity joints are usually estimated by using other criteria and cautions the evaluator to avoid duplication of impairment when other findings, such as limited motion, are present.¹⁸ For this reason, the Board finds that Dr. Halaby's medical report does not conform with the A.M.A., *Guides* and is of diminished probative value.

¹⁷ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

¹⁸ A.M.A., *Guides* at 58.

The decision of the Office of Workers' Compensation Programs January 5, 2000 is hereby affirmed.

Dated, Washington, DC
May 21, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member