

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDSON V. SPRING and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, BORDER PATROL,
Laredo, TX

*Docket No. 01-1825; Submitted on the Record;
Issued October 29, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant had more than a 14 percent permanent impairment of the right upper extremity for which he received a schedule award.

On August 31, 1983 appellant, then a 34-year-old special agent, filed a traumatic injury claim alleging that he injured his right hand, shoulder and both knees while making an arrest. His claim was accepted for a right shoulder impingement.¹

On July 1, 1999 the Office accepted appellant's claim for a recurrence of disability and the condition of right shoulder anteroinferior instability. The Office also authorized right shoulder surgery.

On November 15, 1999 appellant underwent right shoulder arthroscopy with subacromial decompression and distal clavicle resection.

On May 22, 2000 the Office authorized surgery consisting of C5-6 anterior cervical discectomy and fusion. The surgery was performed on June 16, 2000.

On October 4, 2000 appellant filed a claim for a schedule award.

In a letter dated October 4, 2000, appellant stated that he developed migraine headaches due to his severe neck pain and also had continuing neck pain and loss of range of motion, loss of sensation in his fingers and a scar on the right side of his neck.

¹ The record shows that appellant had previously sustained a work-related injury to his right hand, a fracture of the fifth metacarpal, on August 2, 1982. By decision dated July 7, 1987, the Office of Workers Compensation Programs granted appellant a schedule award based on a 14 percent permanent impairment of the right hand. The case records for the 1982 and 1983 injuries were consolidated on April 8, 1999.

In a report dated November 2, 2000, Dr. Henry H. Herrera stated that appellant had a 16 percent permanent impairment of the right upper extremity according to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² He stated:

“[Appellant] has a shoulder extension of 50 degrees bilaterally. Flexion on the right is 170 degrees and on the left is 180 degrees. Abduction on the right is 120 degrees and on the left is 180 degrees. Adduction is 50 degrees bilaterally. Internal and external rotation are 90 degrees bilaterally.”

* * *

“[Appellant] has a well-healed scar in his cervical region in addition to the well-healed scar in his shoulder region for his anterior cervical discectomy and fusion. His cervical range of motion, cervical flexion, ... [is] 42 degrees. For cervical extension, ... 50 degrees. For cervical right lateral flexion, ... 32 degrees. For cervical left lateral flexion, ... 40 degrees. Cervical right rotation is ... 52 degrees. Cervical left rotation is ... 52 degrees.”

* * *

“[Appellant’s] flexion of 170 degrees according to Figure 38 [of the A.M.A., *Guides*] would give him a 1 percent upper extremity impairment. His abduction of 120 [degrees] according to Figure 41 would give him a 3 percent upper extremity impairment. Adding these together gives [appellant] a 4 percent upper extremity impairment and then utilizing Table 2 that gives him a 2 percent whole person impairment for his shoulder.

“[A]ccording to the [A.M.A.] *Guides* under Table 75 IIE, [appellant] would be granted a 9 percent whole person impairment for his cervical discectomy to be combined with any loss of range of motion. His maximum cervical flexion angle of 42 [degrees] would give him a 1 percent impairment. [Appellant’s] maximum cervical extension angle of 50 degrees would give him a 1 percent impairment. His maximum cervical right lateral flexion angle of 32 degrees would give him a 1 percent impairment. [Appellant] would not be entitled to any impairment for his 40 degrees of maximum cervical left lateral flexion angle. His maximum cervical right rotation angle of 52 degrees would grant him a 1 percent impairment and his maximum cervical left rotation angle of 54 degrees would grant him a 1 percent impairment.³

“Adding these up, 1 percent for cervical flexion, 1 percent for cervical extension, 1 percent for cervical right lateral flexion, 1 percent for right rotation, and 1

² The report was submitted by Dr. Ralph J. Curtis, Jr., who indicated that he concurred with the 16 percent permanent impairment determination of Dr. Herrera.

³ The Board notes that the Office has not accepted any left shoulder condition in this case.

percent for left rotation, gives [appellant] a 5 percent whole person impairment for loss of range of motion in the cervical region. That is combined with the 9 percent from Table 75 IIE, giving [appellant] a 14 percent whole person impairment in the neck region. Then we combine the 14 percent for the neck with the 2 percent for the shoulder, giving [appellant] a 16 percent whole person impairment.”

In a memorandum dated May 14, 2001, Dr. Mobley, the Office’s district medical adviser, found, based on the report of Dr. Herrera and the fourth edition of the A.M.A., *Guides*, that appellant had a 14 percent permanent impairment of the right upper extremity that included a 4 percent impairment for loss of range of motion and a 10 percent impairment for the distal clavicle resection surgery. He stated:

“Dr. Herrera reports s/p [status post] right shoulder arthroscopy with distal clavicle resection, s/p anterior cervical discectomy and fusion at C5-6, shoulder ROM [range of motion] as below, full sensation in the upper extremity dermatomes, no weakness, a four percent RUE [right upper extremity] (two percent whole person) impairment based upon limited shoulder ROM, a five percent whole person impairment for limited cervical ROM, and a nine percent whole person impairment based upon a specific cervical spinal disorder.

“Based upon the 4th ed. [of the A.M.A.] *Guides* and the report from Dr. Herrera, I am able to make the following determination:

Shoulder ROM (pages 43, 44, 45 -- Figures 38, 41, 44) -- Right

Flexion	170 degrees	1 percent
Extension	50 degrees	0 percent
Abduction	120 degrees	3 percent
Adduction	50 degrees	0 percent
Internal rotation	90 degrees	0 percent
External rotation	90 degrees	0 percent

Add 4 percent RUE

Arthroplasty (page 61-table 27)

Distal clavicle -- Resection -- 10 percent RUE

Combine (page 322) 10 percent and 4 percent is 14 percent RUE

“Dr. Herrera does not report upper extremity nerve damage from the cervical disorder. The difference between his rating and mine is that I included consideration for the clavicle resection.”

By decision dated May 22, 2001, the Office granted appellant a schedule award for 43.68 weeks based on a 14 percent permanent impairment of the right upper extremity.

The Board finds that appellant sustained no more than a 14 percent permanent impairment of the right upper extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees’ Compensation Act⁴ and its implementing regulation⁵ 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 to all claimants, good administrative practice necessitates 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 implementing regulation as the appropriate standard for evaluating schedule losses.

In this case, Dr. Herrera determined that appellant had a total permanent impairment of 16 percent of the whole person. However, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person.⁶ He stated that appellant had a five percent permanent impairment of the spine based on loss of range of motion and a nine percent permanent impairment of the spine based on the cervical discectomy. However, a schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulation provides for a schedule award for impairment to the back. Furthermore, the back is specifically excluded from the definition of “organ” under the Act.⁷ Dr. Herrera correctly determined that appellant had a one percent permanent impairment of the right shoulder due to loss of flexion and a three percent permanent impairment due to loss of abduction according to pages 43 and 44 and Figures 38 and 41 of the fourth edition of the A.M.A., *Guides*.

The Office’s district medical adviser, Dr. Mobley, applied the findings in Dr. Herrera’s report to the fourth edition of the A.M.A., *Guides* and determined that appellant had a 14 percent permanent impairment of the right upper extremity. Effective February 1, 2001 the fifth edition of the A.M.A., *Guides* is to be used.⁸ However, upon review of both the fourth and fifth edition of the A.M.A., *Guides*, the Board notes that there is no difference in the impairment rating in appellant’s case. Therefore, any error by the Office in failing to use the fifth edition of the

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

⁷ See *George E. Williams*, 44 ECAB 530, 533 (1993); *James E. Mills*, 43 ECAB 215, 219 (1991).

⁸ FECA Bulletin No. 01-05 (issued January 29, 2001).

A.M.A., *Guides* after February 1, 2001, when it became effective, is harmless. In a memorandum dated May 14, 2001, Dr. Mobley, correctly found that appellant had a 14 percent permanent impairment of the right upper extremity that included a 4 percent impairment for loss of range of motion and a 10 percent impairment for the distal clavicle resection surgery. He stated that appellant had a 1 percent permanent impairment of the right shoulder due to 170 degrees of flexion,⁹ a 3 percent impairment due to 120 degrees of abduction¹⁰ and a 10 percent impairment due to arthroplasty, a distal clavicle resection¹¹. Dr. Mobley combined the 4 percent range of motion impairment and the 10 percent impairment due to arthroplasty according to the Combined Values Chart¹² for a total permanent impairment of 14 percent. He noted that Dr. Herrera's report indicated no right upper extremity loss of sensation or weakness or any upper extremity nerve damage caused by the cervical disorder. The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Herrera's report to conclude that appellant had a 14 percent permanent impairment of the right upper extremity. There is no evidence of record, based on correct application of the A.M.A., *Guides* that establishes that appellant has more than a 14 percent permanent impairment of the right upper extremity.

In his initial request on appeal, appellant argues he is entitled to a schedule award for disfigurement for the scar on his neck as a result of his June 16, 2000 surgery. The Act provides in section 8107(c)(21) that “[f]or serious disfigurement of the face, head or neck of a character likely to handicap an individual in securing or maintaining employment, proper and equitable compensation not to exceed \$3,500.00 shall be awarded in addition to any other compensation payable under this schedule.”¹³ The record shows that the Office did not determine whether appellant was entitled to compensation for disfigurement of his neck.

On remand, the Office should determine whether appellant is entitled to compensation for the scar on his neck. After such further development as the Office deems necessary, it shall issue an appropriate decision.

⁹ See A.M.A., *Guides* (4th ed. 1993) 43, Figure 38; (5th ed.), 476, Figure 16-40.

¹⁰ *Id.*, (4th ed.) 44, Figure 41; (5th ed.) 477, Figure 16-43.

¹¹ *Id.*, (4th ed.) 61, Table 27; (5th ed.) 506, Table 16-27.

¹² *Id.*, (4th ed.) 322; (5th ed.) 604.

¹³ 5 U.S.C. § 8107(c)(21).

The decision of the Office of Workers' Compensation Programs dated May 22, 2001 is affirmed as to the issue of appellant's right upper extremity impairment and the case is remanded for further development on the issue of compensation for disfigurement of the neck.

Dated, Washington, DC
October 29, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member