

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN T. BARRON and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Jacksonville, FL

*Docket No. 02-801; Submitted on the Record;
Issued April 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has more than a five percent permanent impairment of his right upper extremity, for which he received a schedule award.

Appellant's claim filed on August 9, 2000 was accepted for a rotator cuff tear after he strained his right shoulder lifting a large piece of wood, which fell back on him. He stopped work, underwent arthroscopic surgery on September 11, 2000 and returned to light duty on October 25, 2000.

In a December 19, 2000 report, Dr. Fady El-Bahri, a Board-certified orthopedic surgeon, reviewed the medical records, a functional capacity evaluation and his treatment of appellant. Dr. Bahri stated that appellant's shoulder condition had reached maximum medical improvement and released appellant to return to full duty with some lifting restrictions and no crawling or climbing.

On January 22, 2001 the Office of Workers' Compensation Programs asked Dr. El-Bahri to provide a permanent impairment rating for appellant's right shoulder. Dr. El-Bahri responded that appellant had full range of motion of his right shoulder. He recommended an eight percent impairment rating "to the whole person."

On April 26, 2001 appellant filed a recurrence of disability claim, stating that the pain in his right shoulder had gotten progressively worse in the past month. Dr. El-Bahri stated, in an April 26, 2001 report, that appellant had tenderness to palpation of his shoulder, that he could return to light duty with no repetitive overhead activity and no heavy lifting, and that he would begin physical therapy again. He provided rotation, elevation and abduction measurements but failed to recommend an impairment rating for appellant's right shoulder.

The Office medical adviser reviewed Dr. El-Bahri's reports and determined that appellant had a five percent permanent impairment of his right shoulder, based on his motion

measurements. By decision dated January 30, 2002, the Office issued a schedule award for a five percent impairment of appellant's right upper extremity, amounting to \$6,991.92.

The Board finds that appellant is entitled to no more than a five percent impairment rating for his right shoulder, for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act¹ 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.² 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.³ The Act's implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule award losses.⁴

In this case, appellant reached maximum medical improvement on December 19, 2000, according to his treating surgeon, Dr. El-Bahri. However, he provided no impairment rating for appellant's right shoulder. Subsequently, the Office medical adviser used Dr. El-Bahri's measurements and the fourth edition of the A.M.A., *Guides* to find a five percent rating on December 17, 2001.

The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 issued on January 29, 2001 provides that any initial schedule award decision issued by the Office on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*.⁵ Therefore, the Office medical adviser should have used the fifth edition in calculating an impairment rating for appellant's right upper extremity.

However, the Board finds that the Office's use of the fourth edition of the A.M.A., *Guides* is harmless error because a comparison of the impairment percentages in both editions shows that appellant has no more than a five percent rating.

Dr. El-Bahri provided internal and external rotation measurements of 45⁶ and 90 degrees, which, according to Figure 44 on page 3/45 of the fourth edition of the A.M.A., *Guides*, results

¹ 5 U.S.C. §§ 8101-8109.

² 5 U.S.C. § 8107.

³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁴ 20 C.F.R. § 10.404 (1999).

⁵ FECA Bulletin No. 01-05 (issued January 29, 2001) provides that initial schedule award decisions issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date.

⁶ The Office medical adviser rounded the figure of 45 degrees to 40, which results in the greater three percent rating.

in three percent and zero percent impairments. The same ratings are found in Chapter 16 of the fifth edition of the A.M.A., *Guides* at Figure 16-46 on page 479.

The measurement of 170 degrees for flexion results in a one percent rating according to Figure 38 on page 3/43 of the fourth edition and the same according to Figure 16-40 on page 476 of the fifth edition. Similarly, the measurement of 150 degrees for abduction results in a 1 percent impairment according to Figure 41 on page 3/44 of the fourth edition and the same according to Figure 16-43 on page 477 of the fifth edition. Inasmuch as both calculations add up to a five percent impairment, the Office's use of the fourth edition after February 1, 2001 is harmless error.⁷

The January 30, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 14, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁷ See *Irene M. Williams*, 47 ECAB 619 (1996) (finding that the Office's failure to provide appellant's representative with copies of its physician referral letters was harmless error); see also *Louis L. Jackson, Sr.*, 39 ECAB 1158, 1160 (1988) (finding that an error in the calculation of the impairment of a toe was harmless because the overall rating remained the same).