

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES McLEER and U.S. POSTAL SERVICE,
SOUTH SHORE ANNEX, Staten Island, NY

*Docket No. 02-1657; Submitted on the Record;
Issued January 2, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has more than a 24 percent impairment of the right upper extremity for which he received a schedule award.

On February 5, 2000 appellant, then a 52-year-old letter carrier, sustained an employment-related fracture of the right humerus when he slipped and fell on ice. On April 9, 2001 he filed a schedule award claim. Dr. John P. Reilly, appellant's treating Board-certified orthopedic surgeon, provided a report dated May 2, 2001 and in a report dated November 5, 2001, an Office of Workers' Compensation Programs medical adviser reviewed Dr. Reilly's findings. In a decision dated November 15, 2001, appellant was granted a schedule award for a 24 percent loss of use of the right upper extremity, for a total of 74.88 weeks of compensation, to run from May 2, 2001 to October 8, 2002.

In a letter stamped received by the Office on March 25, 2002, appellant requested reconsideration and submitted reports dated March 4 and 7, 2002 from Dr. Reilly. By report dated March 26, 2002, an Office medical adviser reviewed Dr. Reilly's March 2002 reports and determined that appellant was entitled to an impairment rating of 24 percent for partial loss of use of the right upper extremity, for which he had received a schedule award. In a March 29, 2002 decision, the Office denied modification of the prior decision. The instant appeal follows.¹

The Board finds that appellant has not established that he has more than a 24 percent impairment of the right upper extremity for which he has received a schedule award.

¹ The Board notes that the record also contains a decision dated February 28, 2002 in which the Office determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. Appellant did not file an appeal of this decision with the Board.

Under section 8107 of the Federal Employees' Compensation Act² and section 10.404 of the implementing federal regulations,³ schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁵

The relevant medical evidence includes a report dated March 8, 2001 in which Dr. Reilly, appellant's treating Board-certified orthopedic surgeon, advised that appellant reached maximum medical improvement in March 2000. The physician provided range of motion measurements for appellant's right shoulders⁶ and recommended an impairment rating of 30 percent. An Office medical adviser then utilized the measurements provided by Dr. Reilly and advised that he applied the relevant figures of the A.M.A., *Guides*, finding that under Figure 16-46, appellant had a 1 percent impairment for internal rotation and no impairment for external rotation⁷ and, under Figure 16-40 had a 23 percent impairment for elevation.⁸ The Office medical adviser then added the respective impairment values due to abnormal shoulder motion and concluded that appellant had a permanent impairment of 24 percent of the right upper extremity.

With his request for reconsideration, appellant submitted reports dated March 4 and 7, 2002 in which Dr. Reilly advised that his shoulder motion had deteriorated with elevation of 85 degrees and external rotation of 10 degrees with weakness in abduction and rotation rated at 4/5. By report dated March 26, 2002, a second Office medical adviser reviewed Dr. Reilly's March 2002 measurements and applied the relevant tables of the A.M.A., *Guides*. He found that, under Figure 16-46, appellant had a 2 percent impairment for external rotation and a 4 percent impairment for internal rotation.⁹ The Office medical adviser further found that under Figure 16-

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ The A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁵ See *Joseph Lawrence, Jr.*, supra note 5; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁶ Dr. Reilly advised that appellant had right shoulder range of motion of 110 degrees of elevation, internal rotation to the beltline and external rotation of 20 degrees. He further advised that crepitus and mild atrophy of the deltoid with weakness in the deltoid and rotator cuff strength with pain when attempting to go above 90 degrees and some subjective weakness and fatigability.

⁷ A.M.A., *Guides* at 479.

⁸ *Id.* at 476.

⁹ *Id.* at 479.

40 had a 6 percent impairment for 85 degrees of elevation¹⁰ and that, under Table 16-35, appellant's loss of strength equaled a 12 percent impairment.¹¹ The Office medical adviser then added the respective impairments due to abnormal shoulder motion and loss of strength and concluded that appellant had a permanent impairment of 24 percent of the right upper extremity.

The Board initially notes that, in his report dated November 5, 2001, in reviewing the range of motion finding of 110 degrees of elevation under Figure 16-40, the Office medical adviser inadvertently used an extension factor rather than an elevation (flexion) value in finding that appellant had a 23 percent impairment. Under Figure 16-40, the proper finding for 110 degrees of elevation would be a 5 percent impairment.¹²

The Board further finds that Dr. Reilly's reports do not comport with the instructions found in the A.M.A., *Guides*. In his March 26, 2002 report, the Office medical adviser applied the relevant standards of the A.M.A., *Guides* to Dr. Reilly's March 2002 findings in order to determine that appellant had a 24 percent impairment of the right upper extremity. It is appellant's burden to submit sufficient evidence to establish his claim.¹³ While Dr. Reilly indicated that appellant had a 30 percent right upper extremity impairment, he did not indicate what tables and/or figures he utilized to reach this conclusion. There is, therefore, no medical evidence establishing that appellant has greater than a 24 percent impairment of the right upper extremity, for which he received a schedule award.¹⁴

¹⁰ *Id.* at 476.

¹¹ *Id.* at 510.

¹² *Id.* at 476.

¹³ See *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁴ The Board notes that a claimant may seek an increased schedule award if the evidence establishes that progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

The decisions of the Office of Workers' Compensation Programs dated March 29 and February 28, 2002 are hereby affirmed.

Dated, Washington, DC
January 2, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member