

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NAOMI KASUYI and U.S. POSTAL SERVICE,  
POST OFFICE, Cincinnati, OH

*Docket No. 02-2166; Submitted on the Record;  
Issued January 6, 2003*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for a schedule award.

On April 18, 2000 appellant, then a 35-year-old clerk, injured his right shoulder when throwing mail. The Office accepted the claim for right rotator cuff tendinitis; right shoulder impingement; and right rotator cuff tear. Appellant stopped work on April 17, 2000 and returned on April 29, 2000 to a limited-duty position.

In support of his claim, appellant submitted various medical records from Dr. Berthold Pembaur, a Board-certified internist, dated April 20, 2000 and Dr. Joseph D. Thomas, a Board-certified orthopedist. Dr. Pembaur noted a history of appellant's work-related injury indicating that appellant was treated for right shoulder tendinitis. Dr. Thomas noted treating appellant for impingement syndrome related to her right shoulder work injury. He diagnosed appellant with acromioclavicular (AC) joint arthropathy and a partial tear of the rotator cuff. In an operative report dated March 27, 2001, Dr. Thomas noted performing an arthroscopic subacromial decompression with arthroscopic debridement rotator cuff tear and open distal clavicular resection. Dr. Thomas diagnosed appellant with impingement syndrome; right shoulder with AC joint arthropathy; and a partial rotator cuff tear, supraspinatus. In his July 10, 2001 note, he indicated that appellant was healing properly with excellent range of motion but experienced weakness in abduction external rotation.

On March 17, 2001 appellant filed a CA-2a form, notice of recurrence of disability indicating that she experienced a recurrence of shoulder pain on March 27, 2001. The Office accepted the recurrence of disability on April 4, 2001 and paid appropriate compensation.

In a letter dated November 13, 2001, the Office notified appellant that she may be eligible for a schedule award. The Office requested that appellant's treating physician submit a report in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (fifth edition 2001).

Thereafter appellant submitted medical reports from Dr. Thomas dated September 24 and November 21, 2001. Dr. Thomas' September 24, 2001 report noted that appellant had reached maximum medical improvement. He indicated that appellant had weak external rotation. Dr. Thomas' report of November 21, 2001 noted range of motion figures of -5 degrees forward elevation; -5 degrees for external rotation; and -5 degrees internal rotation.

Dr. Thomas' report's and the case record were referred to the Office's medical adviser who determined in accordance with the A.M.A., *Guides* that appellant sustained a zero percent impairment of the right shoulder. The medical adviser noted that the range of motion figures for extension, abduction and adduction were not evident on Dr. Thomas' reports of September 24 and November 21, 2001 and therefore were not considered for rating purposes.

In a decision dated June 5, 2002, the Office denied appellant's claim for a schedule award on the grounds that appellant's right upper extremity injury is not severe enough to be considered ratable under the A.M.A., *Guides*.

The Board finds that this case is not in posture for decision regarding appellant's entitlement to a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> 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.

The Board has carefully reviewed the Office medical adviser's report dated May 29, 2002 and notes that, while Dr. Thomas found a zero percent ratable impairment, it is not clear how he came to this conclusion. For example, the Office medical adviser referred to Dr. Thomas's reports of September 24 and November 21, 2001 which provided specific findings for range of loss of external rotation of -5 degrees<sup>3</sup>; the rating for loss of internal rotation of -5 degrees<sup>4</sup>; and the rating for loss of flexion of -5 degrees.<sup>5</sup> The Board notes that the A.M.A., *Guides* provide a range of degrees for flexion from 0 to 180 degrees; and external rotation and internal rotation from 0 to 90 degrees; and therefore Dr. Thomas figures for external rotation, internal rotation; and flexion were not in conformance with the fifth edition of the A.M.A., *Guides*. Moreover, the Board finds that the medical advisers report is likewise deficient as it is unclear from his report

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404 (1999).

<sup>3</sup> See page 479, Figure 16-46 (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*).

<sup>4</sup> *Id.*

<sup>5</sup> See page 476, Figure 16-40 (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*).

how he determined that the loss of external rotation of -5 degrees of the right shoulder was the equivalent of 75 degrees and rated at 0 percent<sup>6</sup>; how internal rotation of -5 degrees was considered the equivalent of 75 degrees and rated at 0 percent<sup>7</sup>; and how the loss of flexion of -5 was considered the equivalent of 175 degrees rated at 0 percent.<sup>8</sup> The Board notes that neither the Office medical advisers report nor Dr. Thomas's report were in conformance to the fifth edition of the A.M.A., *Guides*.

In view of the disparity in the evaluations of the Office medical adviser and Dr. Thomas and the failure of the Office medical adviser to fully explain his calculations using the medical evidence of record, specifically Dr. Thomas' range of motion figures, the Office should refer the matter to an Office medical adviser to determine whether appellant has any ratable impairment in the right shoulder.<sup>9</sup>

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>10</sup> Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.

Therefore, the Board finds that the case must be remanded to the Office for referral of the matter to a specialist consistent with Office procedures, to determine whether appellant sustained any permanent impairment of right upper extremity in accordance with the A.M.A., *Guides*. Following this, and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's schedule award claim.

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Supra* note 5.

<sup>9</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

<sup>10</sup> *John W. Butler*, 39 ECAB 852 (1988).

The decision of the Office of Workers' Compensation Programs dated June 5, 2002 is hereby set aside and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, DC  
January 6, 2003

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member