

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES P. HORGAN and U.S. POSTAL SERVICE,
POST OFFICE, Bayonne, NJ

*Docket No. 03-1365; Submitted on the Record;
Issued July 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On August 14, 2000 appellant, then a 51-year-old letter carrier, filed an occupational disease claim, alleging that factors of employment caused a right shoulder rotator cuff tear and required surgery. On November 21, 2000 the Office of Workers' Compensation Programs accepted that he sustained employment-related rotator impingement syndrome of the right shoulder. Dr. Nicholas P. Diamond, appellant's attending osteopathic physician, provided a report dated July 12, 2001, and in a report dated December 30, 2001, an Office medical adviser reviewed Dr. Diamond's findings. In a decision dated April 26, 2002, appellant was granted a schedule award for a 4 percent permanent impairment of the right upper extremity, for a total of 12.48 weeks of compensation, to run from July 12 to October 7, 2001.

On May 2, 2002 appellant, through his attorney, requested a hearing that was held on December 10, 2002. Subsequent to the hearing, appellant resubmitted Dr. Diamond's July 12, 2001 report, and a July 25, 2000 operative report from Dr. Edward Mastromonaco, an osteopathic physician. In a decision dated February 10, 2003, an Office hearing representative affirmed the prior decision. The instant appeal follows.

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

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.404 of the implementing federal regulation,² schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

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*³ (hereinafter A.M.A., *Guides*) has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

In a report dated July 12, 2001, which was submitted in two versions, Dr. Nicholas P. Diamond, an osteopathic physician, advised that appellant reached maximum medical improvement on that date.⁵ He noted the history of right rotator cuff tear with surgical repair and further diagnosed chronic tenosynovitis of the right shoulder. Specific range-of-motion measurements were reported as forward elevation of 150 degrees with pain, abduction of 170 degrees with pain, cross over adduction of 75 degrees with pain and external rotation of 90 degrees. Internal rotation was abnormal to the L3 spine length, and muscle strength testing revealed a grade of 4-4+/5 involving the supraspinatus muscle. Rotator cuff tenderness was noted. Grip strength testing was performed with the Jamar Hand Dynamometer and revealed 25 kilograms (kg) of force strength in the right hand versus 45 kg of force strength in the left hand. Dr. Diamond advised that, under Figure 16-40 of the fourth edition of the A.M.A., *Guides*, appellant had a flexion deficit of 2 percent and, under Table 16-34, a grip strength deficit of 20 percent. Regarding pain, he stated that appellant was “noted to complain of intermittent ache/pain daily in his right shoulder which increases with overhead lifting and damp and cold weather” and advised that, under Figure 18-1, appellant was entitled to a pain-related impairment of 3 percent, to total a 25 percent impairment of the right upper extremity.

An Office medical adviser then utilized the measurements provided by Dr. Diamond and advised that he applied the fifth edition of the A.M.A., *Guides*, finding that, under Figure 16-40, forward elevation of 150 degrees equaled a 2 percent impairment, under Table 16-43, abduction of 170 degrees and adduction of 75 degrees equaled no impairment, under Table 16-46 external rotation of 90 equaled no impairment and internal rotation of approximately 50 equaled a 2 percent impairment. The Office medical adviser further advised that, as grip strength testing was not done by repeated examination and the pain finding was too subjective, appellant was entitled to a schedule award for range-of-motion deficits only, to total four percent.

Subsequent to the hearing, appellant submitted an updated July 12, 2001 report from Dr. Diamond in which he indicated that he had utilized the fifth edition of the A.M.A., *Guides*. Appellant also submitted an operative report dated July 25, 2000 in which Dr. Mastromonaco, an osteopathic physician, described arthroscopic surgery of appellant’s right shoulder.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁴ See *Joseph Lawrence, Jr.*, *supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ Dr. Diamond initially indicated that he utilized the fourth edition of the A.M.A., *Guides*. His second submission of this report indicates that he utilized the fifth edition. (Compare 113 and 32.)

The Board notes that, other than a change in the wording of one sentence, found in the fifth page which indicates that the fifth, rather than the fourth, edition of the A.M.A., *Guides* was utilized in his analysis, the updated version of Dr. Diamond's July 12, 2001 report, that was submitted subsequent to the formal hearing, is exactly as that submitted previously.⁶ As the references to figures and tables in both reports are to those found in the fifth edition of the A.M.A., *Guides*, the Board finds that he utilized the fifth edition of the A.M.A., *Guides*. The Board, however, finds that Dr. Diamond's report does not comport with the instructions found in the A.M.A., *Guides*. While he properly analyzed appellant's range-of-motion deficits, there is no medical evidence establishing that appellant has greater than a four percent impairment of the right upper extremity, for which he received a schedule award.⁷

Regarding grip strength, the fifth edition of the A.M.A., *Guides* provides that loss of strength should be rated separately only if it is based on an unrelated cause or mechanism, "otherwise the impairment ratings based on objective anatomic findings take precedence."⁸ Moreover, while the doctor provided measurements and indicated that he had used the Jamar Dynamometer, which is compulsory under section 16.8b of the A.M.A., *Guides*, this section also provides that tests should be repeated at intervals to determine reliability. There is nothing in Dr. Diamond's report to indicate that he provided more than one measure. Appellant is, therefore, not entitled to an increased award for loss of grip strength.

Dr. Diamond also advised that appellant was entitled to an additional three percent impairment due to pain. Analysis for pain of the upper extremities under the fifth edition of the A.M.A., *Guides* can be found at section 16.5e.⁹ While Dr. Diamond referred to Figure 18-1¹⁰ in advising that appellant was entitled to a three percent impairment for pain, there is nothing in his report to indicate that he performed a formal pain-related analysis under section 18.3d of the A.M.A., *Guides*. Further, this section of the A.M.A., *Guides* specifically notes that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body impairment rating systems found in the other chapters. Dr. Diamond does not address why appellant's pain could not be adequately addressed under the protocols of Chapter 16. The Board therefore finds that appellant would not be entitled to an increased award due to pain and there is no medical evidence establishing that appellant has

⁶ *Id.*

⁷ The Board notes that Dr. Diamond advised that appellant was entitled to a two percent impairment for range-of-motion deficits, whereas the Office medical adviser properly determined that appellant was entitled to a four percent impairment, the basis for the schedule award. Dr. Diamond, apparently, did not find a numerical impairment for appellant's internal rotation deficit.

⁸ A.M.A., *Guides* (5th ed.), *supra* note 3 at 508.

⁹ *Id.* at 495.

¹⁰ *Id.* at 574.

greater than a four percent impairment of the right upper extremity, for which he received a schedule award.¹¹

The decision of the Office of Workers' Compensation Programs dated April 26, 2002 is hereby affirmed.

Dated, Washington, DC
July 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ 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).