United States Department of Labor
Employees' Compensation Appeals Board

FLORA M. MARTIN, Appellant	)	
and	)	**Docket No. 04-1084**
	)	**Issued: August 3, 2004**
DEPARTMENT OF DEFENSE, DEFENSE SUPPLY CENTER, Columbus, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 15, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated February 18, 2004 in which the Office denied appellant's claim for an increased schedule award for the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination in this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has greater than an 11 percent permanent impairment of the right upper extremity for which she has received schedule awards.

FACTUAL HISTORY

On April 16, 1996 appellant filed a Form CA-1, claim for compensation, alleging that on that day she injured her right wrist and hand when the employing establishment van she was riding in pulled away before she was seated. She stopped work that day and returned on

August 19, 1996. By letter dated September 17, 1996, the Office accepted that appellant sustained an employment-related right wrist contusion. Following further development by the Office, the claim was later expanded to include strains of the right wrist and elbow and right rotator cuff tendinitis for which appellant underwent authorized right shoulder arthroscopic acromioplasty on November 13, 1997. Appellant received all appropriate compensation and returned to work four hours per day, gradually increasing to eight hours per day. She retired effective July 31, 1998.[1]

By letter dated November 17, 1998, appellant's attorney requested that her case be evaluated for entitlement to a schedule award. In an undated report, Dr. Shereen Hashmi, appellant's attending Board-certified internist, advised that maximum medical improvement had been reached in June 1998. The physician provided range of motion findings for appellant's right shoulder, indicating that forward flexion was to 150 degrees, extension to 40 degrees, abduction to 150 degrees, adduction to 30 degrees, internal rotation to 30 degrees and external rotation to 90 degrees. In a report dated January 12, 1999, an Office medical adviser reviewed Dr. Hashmi's range of motion measurements and advised that, under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had a nine percent impairment of the right upper extremity. The Office medical adviser concluded that under Figure 38, 150 degrees of forward flexion equaled a 2 percent impairment and 40 degrees of extension equaled a 1 percent impairment, that under Figure 41, 150 degrees of abduction and 30 degrees of adduction equaled a 1 percent impairment each, and that under Figure 44, internal rotation of 30 degrees equaled a 4 percent impairment and 90 degrees of external rotation equaled no impairment.[3] He agreed that maximum medical improvement had been reached in June 1998.

By decision dated January 20, 1999, appellant was granted a schedule award for a 9 percent permanent impairment of the right upper extremity, for a total of 28.08 weeks, to run from June 27, 1998 to January 9, 1999.

Appellant thereafter underwent a second surgical procedure on her right shoulder and on August 16, 1999 filed a claim for an increased schedule award. In a report dated October 8, 1999, Dr. Hashmi advised that maximum medical improvement had been reached in September 1999. She stated that examination of the thumbs, fingers, wrists, and elbows was normal and provided range of motion measurements for appellant's right shoulder, advising that forward flexion was 135 degrees, extension 25 degrees, abduction 135 degrees, adduction 20 degrees, internal rotation 20 degrees and external rotation 80 degrees. The physician further advised that appellant suffered with pain and a feeling of instability in her right shoulder with use and occasionally at rest.

[1] The record indicates that appellant took an early retirement incentive bonus of $25,000.00.

[2] A.M.A., *Guides* (4th ed. 1993). The fourth edition of the A.M.A., *Guides* became effective November 1, 1993. *See* FECA Bulletin No. 94-4 (issued November 1, 1993); *Theresa J. Gill*, 47 ECAB 763 (1996).

[3] A.M.A., *Guides* (4th ed.), *supra* note 2 at 43-45.

By report dated October 20, 1999, an Office medical adviser reviewed Dr. Hashmi's October 8, 1999 report, advising that under the fourth edition of the A.M.A., *Guides* appellant had an eleven percent impairment of the right upper extremity. The Office medical adviser concluded that under Figure 38, 135 degrees of forward flexion equaled a 3 percent impairment and 25 degrees of extension equaled a 2 percent impairment, that under Figure 41, 135 degrees of abduction equaled a 2 percent impairment and 20 degrees of adduction equaled a 1 percent impairment, and that under Figure 44, internal rotation of 20 degrees and 80 degrees of external rotation equaled 4 percent and no impairment respectively.[4] He added the impairment percentages and advised that appellant had a total 11 percent impairment of the right upper extremity and agreed that maximum medical improvement had been reached in June 1998.

By decision dated November 15, 1999, appellant was granted a schedule award for an additional 2 percent permanent impairment of the right upper extremity, for a total of 6.24 weeks, to run from September 1 to October 14, 1999.[5]

On October 2, 2002 appellant submitted a schedule award claim, and attached an October 1, 2002 report in which Dr. Hashmi advised that appellant had reached maximum medical improvement. In an undated report, Dr. Hashmi advised that maximum medical improvement had been reached in 2000 and noted examination findings of right shoulder tenderness with decreased abduction and internal rotation and shoulder pain with range of motion. The physician further advised that she was not trained to do impairment evaluations.[6]

The Office thereafter referred appellant to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for evaluation under the fifth edition of the A.M.A., *Guides* regarding her entitlement to an increased schedule award.[7] In a report dated March 7, 2003, Dr. Rutherford noted appellant's chief complaint of constant aching pain in her right shoulder and findings of tenderness on examination of the right shoulder. He advised that she had no ratable impairment of her right elbow or wrist and that maximum medical improvement had been reached in May 1998. The physician provided range of motion measurements of appellant's right shoulder and advised that, under the fifth edition of the A.M.A., *Guides*, Figure 16-40 provided that 120 degrees of forward flexion equaled a 4 percent impairment, Figure 16-43 provided that 90 degrees of abduction equaled a 4 percent impairment, and Figure 16-46 provided that 45 degrees

[4] A.M.A., *Guides* (4th ed.), *supra* note 2 at 43-45.

[5] On September 27, 2000 appellant submitted a Form CA-2a, recurrence claim, alleging that she sustained a recurrence of disability when she retired. By decision dated January 26, 2001, the Office denied the October 27, 2000 recurrence claim. Appellant, through counsel, requested a hearing that was held on June 27, 2001. At the hearing appellant's attorney conceded that she was not entitled to permanent total disability but was perhaps entitled to an increased schedule award. In a September 19, 2001 decision, an Office hearing representative affirmed the January 26, 2001 decision. Appellant did not file an appeal with the Board of this decision.

[6] This report was appended to a December 12, 2002 letter of inquiry from the Office.

[7] Dr. Rutherford had provided a second opinion evaluation for the Office in 1997 to particularly address the need for surgery on appellant's shoulder. The fifth edition of the A.M.A., *Guides* became effective on and after February 1, 2001. *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

of external rotation and 50 degrees of internal rotation equaled 1 percent and 2 percent impairments respectively, for a total impairment of 11 percent.[8]

By report dated March 26, 2003, an Office medical adviser concurred with Dr. Rutherford's impairment rating. In a decision dated April 8, 2003, the Office found that appellant was not entitled to a schedule award greater than the 11 percent she had received. On April 13, 2003 appellant, through counsel, requested a hearing and submitted a March 6, 2003 report in which Dr. Charles J. Kistler, a Board-certified osteopath specializing in family practice, noted his findings on examination and advised that appellant had significant pain and constant discomfort with motion. He stated that the right shoulder showed diminished flexion and extension by 20 percent, diminished abduction and adduction by 10 percent and diminished internal rotation by 5 percent. He opined that she reached maximum medical improvement on May 2, 2001 and concluded that, under Table 16-3 of the fifth edition of the A.M.A., *Guides*, appellant had a 35 percent right upper extremity impairment.[9]

At the hearing, held on November 18, 2003, appellant's attorney argued that Dr. Kistler's report indicated that appellant was entitled to an increased schedule award.[10] By decision dated February 18, 2004, an Office hearing representative affirmed the April 8, 2003 decision, finding that Dr. Kistler did not provide sufficient rationale for his 35 percent impairment rating. The hearing representative specifically noted that Table 16-3 merely provides for the conversion of an upper extremity rating to a whole person rating.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[11] and section 10.404 of the implementing federal regulation,[12] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not 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 A.M.A., *Guides*[13] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[14]

[8] A.M.A., *Guides* (5th ed.), *supra* note 7 at 476-77, 479.

[9] *Id*. at 439.

[10] Appellant did not appear at the hearing.

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] A.M.A., *Guides, supra* note 2 and 7.

[14] *See Joseph Lawrence, Jr., supra* note 7; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[15]

Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[16] Section 16.4 provides that in evaluating abnormal motion both active and passive motion measurements are necessary to evaluate the joint motion under the appropriate charts and these should be added to obtain the total motion impairment.[17] Section 18.3b provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*. Office procedures provide that, if the conventional impairment adequately encompasses the burden produced by pain, the formal impairment rating is determined by the appropriate section of the A.M.A., *Guides.* In some situations, however, an impairment rating can be increased by up to three percent if pain increases the burden of the employee's condition.[18]

Proceedings under the Act are not adversarial in nature, and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[19]

ANALYSIS

The Board finds that this case is not in posture for decision regarding appellant's entitlement to an increased schedule award. The Board initially notes that the Office medical adviser's report dated October 20, 1999 contains an addition error. When impairments of 3 percent for forward flexion, 2 percent for extension, 2 percent for abduction, 1 percent for adduction and 4 percent for internal rotation are added, a total impairment of 12 percent is found.[20] The Board further finds that the hearing representative properly found Dr. Kistler's report insufficient to establish further impairment because his rating was not made in accordance with the A.M.A., *Guides*.[21] Nonetheless, the Board finds Dr. Rutherford's report incomplete as

[15] *Robert V. Disalvatore*, 54 ECAB ____ (Docket No. 02-2256, issued January 17, 2003).

[16] A.M.A., *Guides* (5th ed.), *supra* note 7 at 433-521.

[17] *Id.* at 451-52.

[18] *Richard B. Myles*, 54 ECAB ___ (Docket No. 02-1663, issued January 24, 2003).

[19] *Claudio Vazquez*, 52 ECAB 496 (2001).

[20] The fifth edition of the A.M.A., *Guides* provide total motion impairment is obtained by adding the impairment values contributed by each unit of motion. A.M.A., *Guides* (5th ed.), *supra* note 7, section 16.4c at 452.

[21] *Robert V. Disalvatore, supra* note 15.

he did not provide range of motion measurements for extension and adduction of appellant's right shoulder. In fact, he did not mention these movements at all to indicate whether they were normal or abnormal. As the Office referred appellant to Dr. Rutherford for an evaluation of appellant's upper extremity impairment, the Office has the responsibility to see that a complete report is forthcoming.[22] Finally, while the A.M.A., *Guides* note that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*, in the case at hand Drs. Hashmi, Rutherford and Kistler noted complaints of pain, and it did not appear that the Office made a determination regarding whether appellant's pain was adequately rated. For these reasons, the case must be remanded to the Office for further evaluation of appellant's entitlement to an increased schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant is entitled to a schedule award greater than the 11 percent she has been awarded.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2004 be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: August 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[22] *Id.*