

**United States Department of Labor
Employees' Compensation Appeals Board**

DANIEL L. BIRCH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE, West
Des Moines, IA, Employer**

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**Docket No. 03-1296
Issued: January 23, 2004**

Appearances:
Daniel L. Birch, pro se
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

Appellant filed an appeal on April 28, 2003 of a February 12, 2003 decision of the Office of Workers' Compensation Programs, denying modification of prior decisions granting a schedule award for a four percent permanent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether appellant has established that he sustained greater than a four percent permanent impairment of the left upper extremity, for which he received a schedule award. On appeal, appellant asserted that the left rotator cuff tear requiring surgical repair entitled him to greater than the four percent impairment rating awarded. Appellant asserted that the Office should have relied on the opinion of Dr. Robert Weatherwax, a Board-certified orthopedic surgeon, whom he consulted and not the report of Dr. Charles Denhart, a Board-certified physiatrist, performing a schedule award evaluation for the Office.

FACTUAL HISTORY

The Office accepted that, on or before August 1, 1999 appellant, then a 46-year-old rural carrier, sustained left shoulder impingement syndrome due to work factors. On January 18, 2000 Dr. Kyle S. Galles, an attending Board-certified orthopedic surgeon, performed an arthroscopic acromioplasty, Mumford procedure (distal clavicle resection) and repair of a full thickness rotator cuff tear of the left shoulder, using a mini-deltoid splitting approach. Appellant received compensation for work absence from November 1999 to February 2000. After a period of limited duty, Dr. Galles released appellant to full duty with no restrictions as of January 23, 2001.

On January 12, 2002 appellant claimed a schedule award. The Office then referred appellant, the medical record and a statement of accepted facts to Dr. Charles Denhart, a Board-certified physiatrist, to obtain a schedule award rating according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In an April 15, 2002 report, Dr. Denhart found normal strength, sensation, flexion, extension and internal rotation of the left upper extremity. He noted 150 degrees of abduction equaling a 1 percent impairment of the left upper extremity, 30 degrees of adduction equaling a 1 percent impairment and 60 degrees of internal rotation equaling a 2 percent impairment. Dr. Denhart commented that appellant's occasional discomfort did not warrant an additional impairment due to pain. He totaled the percentages to equal a four percent permanent impairment of the left upper extremity according to the fifth edition of the A.M.A., *Guides*.¹

By decision dated April 30, 2002, the Office issued appellant a schedule award for a four percent permanent impairment of the left upper extremity.² Appellant then requested a review of the written record, but submitted no additional medical evidence. By decision dated and finalized October 24, 2002, an Office hearing representative affirmed the April 30, 2002 decision, noting that appellant did not submit new medical evidence countering Dr. Denhart's opinion.

Appellant disagreed with this decision and in a December 2, 2002 letter requested reconsideration. He submitted a duplicate copy of the January 18, 2000 operative report. Appellant also submitted postoperative notes dated January 18, 2000, photographs of the surgical procedure,³ and the first page of a November 18, 2002 report from Dr. Weatherwax.⁴

¹ In an April 22, 2002 report, an Office medical adviser reviewed Dr. Denhart's report and found the four percent rating "acceptable" according to the A.M.A., *Guides*.

² The award, equivalent to 12.48 weeks of compensation, ran from January 18 to April 15, 2001.

³ A December 6, 2002 file form entitled "Physical Evidence" indicates that appellant submitted "Photocopy of Photograph." In a December 10, 2002 file memorandum, an OASIS (Office of Workers' Compensation Programs Automated System for Imaged Support) coordinator stated that the photographs appellant submitted could not be scanned, but were "retained for the file." There are no images of the photographs of record.

⁴ Appellant noted that Dr. Weatherwax performed an examination for the Office pursuant to another compensation claim not before the Board on the present appeal.

The Office then referred the case record to an Office medical adviser. In a December 28, 2002 report, an Office medical adviser explained that it appeared that the Office “did not receive the entire report from Dr. Weatherwax dated November 18, 2002 (or that it did not get imaged into the OASIS system).” The Office medical adviser stated that as the entire report was not of record, it was not possible to ascertain whether Dr. Weatherwax’s opinion would substantiate an additional percentage of impairment. He concluded that when the Office obtained the entire report, he would again “review the file to see if the additional input” warranted a modification of the previous schedule award.

By decision dated February 12, 2003, the Office denied modification of the prior decision on the grounds that the evidence submitted was insufficient to warrant such modification. The Office found that the January 18, 2000 operative report was repetitious as it was previously of record. The Office explained that an Office medical adviser reviewed the new evidence submitted and found that Dr. Weatherwax’s report was incomplete and, therefore, insufficient to substantiate an increase in the percentage of permanent impairment. The Office concluded that Dr. Denhart’s opinion continued to represent the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees’ Compensation Act and its implementing regulation 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.⁵ The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses. As of February 21, 2001, the Office uses the fifth edition of the A.M.A., *Guides* to calculate new claims for a schedule award, or to recalculate prior schedule awards pursuant to an appeal, request for reconsideration or decision of an Office hearing representative.⁶ Utilization of the A.M.A., *Guides* requires that a description of appellant’s impairment be obtained from appellant’s attending physician,⁷ in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.⁸ The Office’s procedures provide that, when processing the medical evidence in a schedule award claim, “[a]fter obtaining all necessary medical evidence, the file should be routed to the [Office medical adviser] for an opinion concerning the nature and percentage of impairment.”⁹

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404 (1999).

⁶ See FECA Bulletin 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards, which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(c) (August 2002).

⁸ *Noe L. Flores*, 49 ECAB 344 (1998).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(e) (August 2002).

ANALYSIS

In this case, appellant sustained left shoulder impingement syndrome and a rotator cuff tear requiring arthroscopic repair. To obtain a schedule award evaluation, the Office referred appellant to Dr. Denhart, who submitted an April 15, 2002 report, finding a four percent permanent impairment of the left upper extremity. Thus, on April 30, 2002 the Office issued appellant a schedule award for a four percent permanent impairment of the left upper extremity. An Office hearing representative affirmed this percentage of impairment by a decision dated and finalized October 24, 2002.

Appellant then requested reconsideration and submitted new evidence, including photographs of the January 18, 2000 surgery and the first page of a November 18, 2002 report from Dr. Weatherwax. In accordance with its procedures, the Office then referred the record to an Office medical adviser for review. In a December 28, 2002 report, the Office medical adviser found that, as Dr. Weatherwax's report was incomplete, it was not possible to determine if it substantiated an increased percentage of impairment. The Office medical adviser did not review or otherwise mention the surgical photographs. The Office then issued a February 12, 2003 decision denying modification on the grounds that Dr. Weatherwax's report was incomplete and, therefore, insufficient to warrant modification of the prior decision.

The Board finds that the Office failed to adequately consider and develop the evidence appellant submitted on reconsideration prior to issuing the February 12, 2003 decision. As the Board's decisions are final as to the subject matter appealed,¹⁰ it is crucial that all evidence relevant to that subject matter, which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.¹¹

The Board finds that the Office failed to consider the surgical photographs appellant submitted accompanying his December 2, 2002 request for reconsideration. The Office failed to associate these photographs with the case record as they would not scan. While the photographs were apparently "retained for the file," they were not placed in it and thus could not be accessed or reviewed by the Office medical adviser. He did not mention these photographs in his report. The Board notes that these photographs are new evidence, and are relevant as documentation of the permanent impact of the surgery on appellant's left shoulder, including implantation of a metal fixation device. Yet, there is no evidence of record that the Office undertook a review of this new, relevant evidence prior to issuing the February 12, 2003 decision.

The Board notes that it is not possible to ascertain why only the first page of Dr. Weatherwax's November 18, 2002 report is of record. Either the Office failed to scan the entire report, or appellant did not submit a complete copy. Thus, it is not immediately evident as to why the Office medical adviser surmised that the omission was due to a scanning problem.

¹⁰ 20 C.F.R. § 501.6(c).

¹¹ *Willard McKennon*, 51 ECAB 145 (1999); *see William A. Couch*, 41 ECAB 548, 553 (1990).

However, as the report is incomplete, the Office properly found that it could not substantiate an increased percentage of impairment.¹²

As the Office failed to properly consider the evidence appellant submitted pursuant to his December 2, 2002 request for reconsideration, the case must be remanded to the Office for further development. On remand, the Office shall associate the surgical photographs with the case record and submit them to an Office medical adviser for review to determine if they substantiate that appellant sustained greater than a four percent permanent impairment of the left upper extremity. After this and any other development deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding whether appellant established that he sustained greater than a four percent permanent impairment of the left upper extremity, as the Office failed to consider all evidence appellant submitted accompanying his December 2, 2002 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 12, 2003 is set aside and the case remanded to the Office for further development consistent with this decision.

Issued: January 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹² *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).