

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

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**GLORIA P. WHITE, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 04-1270  
Issued: November 23, 2004**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On April 13, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit schedule award decision dated December 15, 2003, in which an Office hearing representative found that she had no more than a 10 percent permanent impairment of her left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award.

**ISSUE**

The issue is whether appellant has more than a 10 percent impairment of the left upper extremity for which she received a schedule award.

**FACTUAL HISTORY**

On September 25, 1997 appellant, then a 55-year-old mail handler, filed a traumatic injury claim alleging that she sustained injuries to her neck and left arm while in the performance of duty on September 24, 1997. The Office accepted the claim for a headache, cervical and thoracic strain, left shoulder strain and impingement, and authorized left shoulder arthroplasty,

and paid appropriate compensation. Appellant returned to part-time light duty on November 19, 1997 and full-time light duty on February 1, 1998. The Office authorized left shoulder surgery on April 14, 1998, although appellant chose not to undergo the procedure. On April 23, 1998 Dr. Thomas A. Corcoran, appellant's Board-certified orthopedic surgeon, noted that her work restrictions "without surgery" were permanent. In a report dated October 20, 1999, Dr. Victor R. Frankel, a Board-certified orthopedic surgeon,<sup>1</sup> stated that appellant's soft tissue injuries had resolved but that she remained symptomatic with left shoulder impingement. He noted that appellant had deferred left shoulder surgery. But he also stated that her impingement was "associated with acromioclavicular (AC) joint arthroplasty that is not post[-]traumatic in origin."

Appellant then filed a CA-7 claim form for a schedule award. In a report dated February 17, 2000, an Office medical adviser stated that, upon review of Dr. Frankel's report, which noted a left shoulder resection arthroscopy, appellant had a 10 percent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) 61, Table 27. He noted that Dr. Frankel found no motor or sensory impairment. By decision dated March 8, 2000, the Office awarded appellant a 10 percent schedule award for permanent impairment of the left arm.

On March 29, 2000 appellant filed a request for reconsideration. In support of her request, appellant submitted a March 27, 2000 report from Dr. Corcoran who stated that appellant had "progressive, unrelenting left shoulder pain," and symptoms supportive of progressive left rotator cuff disease. On June 1, 2000 the Office denied modification of its March 8, 2000 decision on the grounds that the evidence failed to establish that appellant had more than a 10 percent impairment for the left arm for which she received a schedule award. The Office also noted that appellant declined to undergo authorized left shoulder surgery.

On August 16, 2002 appellant, through counsel, filed a claim for a supplemental schedule award and submitted a June 18, 2002 report from Dr. David Weiss, her attending osteopath, who stated that based on a physical examination appellant had a work-related 12 percent left upper extremity impairment. Dr. Weiss based his recommendation on his range of motion findings which included a finding of 100 degrees of flexion for a 5 percent impairment based on the A.M.A., *Guides* (5<sup>th</sup> ed. 2001), Figure 16-40, page 476, and 90 degrees of abduction, Figure 16-43 page 477, for a 4 percent impairment, and a 3 percent impairment due to pain on circumduction based on Figure 18-1, page 574 of the A.M.A., *Guides* for a total of 12 percent left upper extremity impairment. Dr. Weiss found that appellant had reached maximum medical improvement on that date. On October 21, 2002 the Office medical adviser stated that appellant's prior 10 percent schedule award was based on a "surgical procedure, resection [sic] acromioplasty, performed." He noted that Dr. Weiss' June 18, 2002 report was based on several unaccepted diagnoses, and that the left shoulder loss of motion occurred after the consultant's report and thus "cannot be established as due to the work injury." The Office medical adviser also noted that appellant's pain was "considered a component of the diagnosis-based estimate for the arthroplasty" and recommended no increase from the prior award. By decision dated

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<sup>1</sup> Although there is reference in the record to Dr. Frankel being selected to act as an impartial medical examiner, there does not appear to have been a medical conflict at the time of the Office's August 27, 1999 referral. See 5 U.S.C. § 8123(a). Thus, the Board will not view Dr. Frankel as an impartial specialist. See *Cleopatra McDougal-Sadler*, 47 ECAB 480, 489-90 (1996).

January 29, 2003, the Office denied appellant's claim for a supplemental schedule award. The Office based its decision on the Office medical adviser's report finding that the evidence failed to establish a schedule award of more than 10 percent for the left arm which the Office had awarded previously.

On February 3, 2003 appellant, through counsel, requested an oral hearing. At the September 23, 2003 hearing, appellant's counsel contended that, since the Office medical adviser appeared to have found a 10 percent left arm impairment based on a resection arthroplasty, and since the A.M.A., *Guides* provides for an impairment rating based on either a diagnostic or functional finding, appellant was entitled to a rating based on the higher of the two rating procedures. Since Dr. Weiss recommended a 12 percent impairment as a result of appellant's functional loss of motion, the Office should award appellant an additional 2 percent impairment to her prior 10 percent award. On November 28, 2003 another Office medical adviser reviewed Dr. Weiss' June 18, 2002 report and determined that appellant had a nine percent left upper extremity impairment based on loss of left shoulder flexion and abduction. He noted that appellant was not entitled to an additional impairment for pain, and also noted that she was not entitled to an impairment for "resection arthroplasty as it was apparently not done."

In a December 15, 2003 decision, the hearing representative reviewed Dr. Weiss' and the Office medical adviser's reports and determined that the Office medical adviser correctly found no more than a 9 percent left upper extremity impairment, and thus affirmed the Office's January 29, 2003 decision finding that appellant had no more than a 10 percent left upper extremity impairment.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</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* (5<sup>th</sup> ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

### **ANALYSIS**

In this case, the Office accepted appellant's claim for cervical and thoracic sprain and left shoulder impingement and authorized a left shoulder resection arthroplasty that appellant declined to undergo. The Office then referred the record to Dr. Frankel who stated that appellant

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> See *Jacqueline S. Harris*, 54 ECAB \_\_\_\_ (Docket No. 02-303, issued October 4, 2002).

remained symptomatic with left shoulder impingement which was associated with AC joint arthroplasty. An Office medical adviser reviewed Dr. Frankel's report and determined that appellant had a 10 percent left upper extremity impairment as a result of her AC joint resection arthroplasty. The Office subsequently awarded appellant a 10 percent schedule award of the left upper extremity.

Appellant's treating osteopath, Dr. Weiss, subsequently opined that appellant's loss of range of motion and pain equated to left upper extremity impairment of 12 percent. An Office medical adviser relied on Dr. Weiss' data and, based on the A.M.A., *Guides*, noted that left shoulder forward flexion of 100 degrees equaled a 5 percent impairment and left shoulder abduction of 90 degrees equaled a 4 percent impairment, which, when combined, resulted in a 9 percent impairment. The Office medical adviser noted that there was no additional impairment based on pain. The Board notes that, in finding three percent impairment to the left shoulder for pain, Dr. Weiss cited to Chapter 18 of the A.M.A., *Guides*, page 574. But FECA Bulletin No. 01-05 and section 18.3b of the A.M.A., *Guides* provide that Chapter 18 should not be used to rate pain-related impairment when conditions are adequately rated in the other chapters of the A.M.A., *Guides*.<sup>5</sup> Dr. Weiss had not explained why appellant's condition was not adequately rated under other chapters such that Chapter 18 would apply.

Thus, there is no medical evidence in the record, conforming with the A.M.A., *Guides*, establishing that appellant has more than a 10 percent impairment to her left upper extremity. No physician opined that, pursuant to the A.M.A., *Guides*, appellant had a greater impairment than that for which she received an award.

### **CONCLUSION**

The Board finds that appellant has failed to establish that she is entitled to more than a 10 percent schedule award for the left upper extremity.

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<sup>5</sup> See FECA Bulletin No. 01-05 (issued January 29, 2001); A.M.A., *Guides*, section 18.3b, p. 571 (5<sup>th</sup> ed. 2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 15, 2003 is affirmed.

Issued: November 23, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member