

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

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**EUGENE A. DAVIS, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Milwaukee, WI, Employer**

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**Docket No. 05-1948  
Issued: December 15, 2005**

*Appearances:*  
*Eugene R. Davis, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On September 21, 2005 appellant filed a timely appeal from a June 22, 2005 decision of the Office of Workers' Compensation Programs, granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant has more than a 6 percent permanent impairment of the left upper extremity and a 15 percent permanent impairment of the right upper extremity.

**FACTUAL HISTORY**

On August 15, 2001 appellant, a 53-year-old mule driver/handler, filed a traumatic injury claim alleging that he injured his right shoulder due to hooking up three mail hampers. The Office accepted his claim for right shoulder rotator cuff tendinitis and subsequently expanded the claim to include aggravation of cervical disc disease and authorized anterior C3, C4-5 and C5-6 decompression and fusion surgery on June 18, 2003. Appellant filed a claim for a recurrence of intermittent disability beginning May 22, 2002, which the Office accepted on May 27, 2003. On

December 3, 2003 the Office authorized shoulder arthroscopic surgery. On October 6, 2003 appellant underwent surgery to repair the right shoulder rotator tear with spur excision and acromioplasty.<sup>1</sup>

On June 22, 2004 appellant filed a claim for a schedule award.

In a January 21, 2005 report, Dr. James R. Lloyd, a treating Board-certified neurological surgeon, concluded that appellant had reached maximum medical improvement as of June 18, 2004. He diagnosed continued cervical radiculopathy secondary to cervical disc disease. Dr. Lloyd noted that appellant's had loss of range of motion in his cervical spine in flexion and extension. With regard to an impairment rating, the physician concluded that appellant had a 30 percent impairment due to his cervical spine surgery. In reaching this determination, Dr. Lloyd noted that appellant had five percent impairment for each level of discs removed and each leave of discs fused.

In a July 30, 2004 report, Dr. Lawrence L. Foster, a Board-certified orthopedic surgeon and an Office referral physician, indicated that appellant reached maximum improvement on July 30, 2004. He noted that appellant had mild hyperesthesia, mild tenderness a mid-distal scar and mild biceps atrophy. With regard to the range of motion of the right shoulder, he noted 170 degrees forward elevation, 45 degrees backward elevation, 60 degrees internal and external rotation, 90 degrees abduction, 30 degrees adduction and 50 degrees extension. Dr. Foster noted that the range of motion for the left shoulder as 180 degrees forward elevation, 50 degrees backward elevation, 70 degrees internal and external rotation, 90 degrees abduction, 30 degrees adduction and 50 degrees extension.

In a report dated April 8, 2005, Dr. Foster used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed.) to calculate appellant's impairment. He stated:

“[Appellant] has a disability of 6 percent to the right shoulder and 2 percent to the left shoulder, which equates to a 3.6 percent disability to the right shoulder as related to the body as a whole and a 1.2 percent disability of the left shoulder related to the body as a whole. It's measurements to the shoulder right/left are abduction 90 degrees/90 degrees, adduction 30 degrees/30 degrees, external rotation 70 degrees/80 degrees, internal rotation 50 degrees/70 degrees, forward flexion 170 degrees/180 degrees, extension backward 45 degrees/50 degrees.

In a May 2, 2005 report, Dr. David H. Garelick, an Office medical consultant, found that appellant had a 15 percent impairment of the right upper extremity and a 6 percent impairment of the left upper extremity based on the July 30, 2004 report of Dr. Foster and the A.M.A., *Guides*. In rating the right shoulder, he advised that under Figure 16-40, 170 degrees of flexion was equal to a 1 percent impairment and 50 degrees of extension was equal to a 0 percent impairment, under Figure 16-43, 90 degrees of abduction was equal to a 4 percent impairment and 30 degrees of adduction was equal to 1 percent impairment and under Figure 16-46, 60 degrees of external rotation was equal to 2 percent impairment and 60 degrees of internal rotation was equal to

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<sup>1</sup> Appellant accepted a modified job as a full-time mail handler on October 23, 2004.

2 percent impairment for a total 8 percent right upper extremity impairment due to loss of range of motion. With regard to the left shoulder, he advised that under Figure 16-40, 180 degrees of flexion was equal to a 0 percent impairment and 50 degrees of extension was equal to a 0 percent impairment, under Figure 16-43, 90 degrees of abduction was equal to a 4 percent impairment and 30 degrees of adduction was equal to 1 percent impairment and under Figure 16-46, 70 degrees of external rotation was equal to 0 percent impairment and 70 degrees of internal rotation was equal to 1 percent impairment, for a total 6 percent left upper extremity impairment due to loss of range of motion. Dr. Garelick noted:

“[Appellant] continues to complain of activity related pain in the right shoulder award 3 [percent] [right] [upper] [extremity] [permanent] [impairment] due to [G]rade 3 pain in the distribution of the suprascapular nerve according to table 16-15, p. 492 combined with [T]able 16-10, p[age] 482 of the A.M.A., [sic] *Guides* (sic) 5<sup>th</sup> ed. Physical examination demonstrated mild weakness in the rotator cuff musculature awarding 4 percent [right] [upper] [extremity] [permanent] [impairment] for grade 4/5 strength in the distribution of the suprascapular nerve according to [T]able 16-15, p. 492 combined with [T]able 16-11, p[age] 484 of the A.M.A., *Guide[s]*. There was no mention of residual left shoulder pain or weakness.”

Using the Combined Values Chart, Dr. Garelick combined the 8 percent range of motion loss with the 3 percent sensory loss and the 4 percent motor loss to concluded that appellant had a 15 percent impairment of the right upper extremity. He found a 6 percent impairment of the left upper extremity based on loss of range of motion.

By decision dated June 22, 2005, the Office granted appellant a schedule award for 65.62 weeks for the period July 30 to October 31, 2005,<sup>2</sup> based on a 6 percent permanent impairment of the left upper extremity and a 15 percent permanent impairment of the right upper extremity.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> and its implementing regulation<sup>4</sup> sets 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

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<sup>2</sup> The period of the award appears to contain a typographical error as to the ending date. The period of the award is for 65.52 weeks, which would indicate October 31, 2006, not October 31, 2005 as the ending date.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8107.

implementing regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup> Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>6</sup>

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 tables 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.<sup>7</sup>

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained and the A.M.A., *Guides* provides, that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>8</sup> It is understood that an individual's condition is dynamic and maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached maximum medical improvement, a permanent impairment rating may be performed.<sup>9</sup> The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to the date of the evaluation by the attending physician, which is accepted as definitive by the Office.<sup>10</sup>

No schedule award is payable for permanent loss of or loss of use, of anatomical members, functions or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use, of the back or the body as a whole, no claimant is entitled to such an award.<sup>11</sup> Amendments to the Act however modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be

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<sup>5</sup> 20 C.F.R. § 10.404 (2003).

<sup>6</sup> FECA Bulletin No. 01-05 (issued January 29, 2001); *see Jesse Mendoza*, 54 ECAB \_\_\_\_ (Docket No. 03-1516, issued September 10, 2003).

<sup>7</sup> *Robert V. Disalvatore*, 54 ECAB \_\_\_\_ (Docket No. 02-2256, issued January 17, 2003).

<sup>8</sup> *Mark A. Holloway*, 55 ECAB \_\_\_\_ (Docket No. 03-2144, issued February 13, 2004); *see A.M.A., Guides* (5<sup>th</sup> ed. 2001) at 19.

<sup>9</sup> *Patricia J. Penney-Guzman*, 55 ECAB \_\_\_\_ (Docket No. 04-1052, issued September 30, 2004).

<sup>10</sup> *Mark A. Holloway*, *supra* note 8.

<sup>11</sup> The Act specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19); *see Jesse Mendoza*, 54 ECAB \_\_\_\_ (Docket No. 03-1516, issued September 10, 2003); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>12</sup>

### ANALYSIS

Appellant sustained a right shoulder injury and aggravation of cervical disc disease in the performance of duty and subsequently filed a claim for compensation for permanent impairment. In response to appellant's request regarding whole person impairment, the Board notes that while the A.M.A., *Guides*, provide rating schemes for impairment to the whole person, the Act does not provide awards of compensation for permanent impairment of the whole person.<sup>13</sup> Appellant is also not entitled to a schedule award for his cervical spine injury based on the range of motion findings reported by Dr. Lloyd as no schedule award is payable for the back.<sup>14</sup> However, appellant could be entitled to a schedule award for an impairment to an extremity even though the cause of the impairment originated in the spine.<sup>15</sup> In this case, the Office accepted his claim for a cervical condition and Dr. Lloyd diagnosed C6 radiculopathy due to C5-6 and C6-7 disc herniations and advised by providing a check mark yes, that these conditions were caused by the January 6, 1999 motor vehicle accident. While appellant may not receive a schedule award for permanent impairment to his cervical spine, he could be entitled to a schedule award for permanent impairment to his upper extremities if the accepted cervical spine condition caused such impairment.<sup>16</sup> However, Dr. Lloyd did not provide a report that conformed with the protocols of the A.M.A., *Guides*. The Board precedent is well settled however that when an attending physician's report gives an estimate of impairment, but does not indicate that the estimate is based upon the application of the A.M.A., *Guides* or improperly applies the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.<sup>17</sup>

Dr. Garelick, a district medical consultant, correctly determined that appellant had a 15 percent permanent impairment of the right upper extremity and a 6 percent permanent impairment of the left upper extremity based on the July 30, 2004 report of Dr. Foster.<sup>18</sup> He

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<sup>12</sup> See *Tomas Martinez*, 54 ECAB \_\_\_\_ (Docket No. 03-396, issued June 16, 2003); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>13</sup> *Janae J. Triplette*, 54 ECAB \_\_\_\_ (Docket No. 03-1545, issued September 4, 2003); *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

<sup>14</sup> *Supra* note 11.

<sup>15</sup> *Supra* note 12.

<sup>16</sup> See *Tania R. Keka*, 55 ECAB \_\_\_\_ (Docket No. 04-177, issued February 27, 2004).

<sup>17</sup> See *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

<sup>18</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).

applied the A.M.A., *Guides* to Dr. Foster's report and correctly found that appellant had 170 degrees of flexion was equal to a 1 percent impairment and 50 degrees of extension was equal to a 0 percent impairment, under Figure 16-43, 90 degrees of abduction was equal to a 4 percent impairment and 30 degrees of adduction was equal to 1 percent impairment and under Figure 16-46, 60 degrees of external rotation was equal to 2 percent impairment and 60 degrees of internal rotation was equal to 2 percent impairment for a total 8 percent impairment rating of the upper right extremity for loss of range of motion. As to the left shoulder, under Figure 16-40, 180 degrees of flexion and 50 degrees of extension are equal to 0 percent impairment, under Figure 16-43, 90 degrees of abduction is equal to 4 percent impairment and 30 degrees of adduction is equal to 1 percent impairment and under Figure 16-46, 70 degrees of external rotation is equal to 0 percent impairment and 70 degrees of internal rotation is equal to 1 percent impairment, for a total 6 percent impairment rating of the left upper extremity for loss of range of motion. In addition, Dr. Garelick found that under Tables 16-15 and Table 16-10, appellant had a 3 percent impairment of the right upper extremity due to pain of the suprascapular nerve, which he noted as Grade 3 and a 4 percent impairment for motor loss or weakness in the distribution of the suprascapular nerve which he stated was mild and Graded 4/5. Dr. Garelick combined the right upper extremity impairment values to find a total 15 percent impairment. The left upper extremity was rated at 6 percent impairment solely on the basis of loss of range of motion.

### **CONCLUSION**

The Board finds that appellant has no more than a 15 percent permanent impairment of his right upper extremity and a 6 percent permanent impairment of his left upper extremity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 22, 2005 is affirmed.

Issued: December 15, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board