

In a report dated July 9, 2003, Dr. Lyle A. Norwood, a Board-certified orthopedic surgeon, stated that based on his examination appellant had 40 degrees of external rotation and maximum abduction of 90 degrees, with 90 degrees of external rotation. In a report dated August 19, 2003, he determined that appellant had a 10 percent impairment of the right upper extremity based on his rotator cuff tear. Dr. Norwood opined that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*), did not provide good guidelines for rating impairments based on rotator cuff tears.

In an impairment evaluation dated July 9, 2003, an Office medical adviser found that appellant had a four percent impairment of his right upper extremity based on the A.M.A., *Guides*. Relying on Dr. Norwood's range of motion calculation of 90 degrees retention of abduction in his right shoulder, the Office medical adviser found pursuant to Table 16-43, page 530 of the A.M.A., *Guides*, that this yielded an impairment of 4 percent.

On September 15, 2003 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right upper extremity.

In a supplemental report dated November 11, 2003, Dr. Norwood reiterated that appellant had a 10 percent impairment of the right upper extremity based on his rotator cuff tear and subsequent rotator cuff surgery.

The Office determined there was a conflict in the medical evidence between the impairment ratings of Dr. Norwood and the Office medical adviser, and it referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard A. Bagby, Board-certified in orthopedic surgery, for an impartial medical evaluation. In a report dated March 16, 2004, Dr. Bagby determined that appellant had a 10 percent permanent impairment for loss of use of the right upper extremity. He derived this rating by according a 5 percent impairment from loss of range of motion based on retained internal rotation of 10 degrees, 1 percent impairment; retained external rotation, 10 degrees, totaling a 1 percent impairment; retained forward elevation, 5 degrees, 1 percent impairment; retained abduction, 20 degrees, 2 percent impairment. These calculations produced a 5 percent impairment, to which Dr. Bagby added a 5 percent additional impairment based on weakness and atrophy, for a total 10 percent impairment under the Combined Values Chart.

In an impairment evaluation dated April 15, 2004, an Office medical adviser¹ found that appellant had a two percent impairment of his right upper extremity based on the A.M.A., *Guides*. The Office medical adviser found that the A.M.A., *Guides* were not properly applied. He stated:

“[Appellant] injured his right shoulder on August 3, 2002 and sustained rotator cuff tear, had surgical repair on December 20, 2002. The A.M.A., *Guides*, fifth edition, were not properly applied. Appellant has a permanent partial impairment of his right upper extremity based on no loss of motion which equals two percent. No permanent partial impairment can be given for weakness and atrophy, in accordance with the cross usage

¹ This was a different Office medical adviser from the physician who represented one side of the conflict in medical evidence in this case.

chart at Table 17-2, page 526 of the A.M.A., *Guides*. Therefore final impairment of right upper extremity equals two percent. Retention of forward elevation, 175 degrees, yields a 1 percent impairment pursuant to Table 16-40, page 476 of the A.M.A., *Guides*; retention of abduction, 160 degrees, 1 percent impairment, pursuant to Table 16-43, page 477 of the A.M.A., *Guides*, for a total 2 percent impairment.”

On May 3, 2004 the Office granted appellant a schedule award for a two percent permanent impairment of the right upper extremity for the period August 1 to September 13, 2003, for a total of 6.24 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.⁴

ANALYSIS

The Board finds the case is not in posture for decision. In the present case, the Office found a conflict in the medical evidence between the Office medical adviser, and Dr. Norwood, appellant’s treating physician, as to the percentage of permanent impairment to which appellant is entitled based on his accepted right rotator cuff condition. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or “referee” physician, also known as an “impartial medical examiner.”⁵ Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight. However, when the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.⁶

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 5 U.S.C. § 8107(c)(19).

⁴ 20 C.F.R. § 10.404.

⁵ Section 8123(a) of the Federal Employees’ Compensation Act provides in pertinent part, “[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” *See Dallas E. Mopps*, 44 ECAB 454 (1993).

⁶ *Terrance R. Stath*, 45 ECAB 412 (1994).

In the instant case, Dr. Bagby, the impartial specialist, stated that appellant had a 10 percent right upper extremity impairment. The Board, however, finds that Dr. Bagby's opinion is not sufficient to resolve the conflict in medical evidence. While Dr. Bagby did provide physical examination findings and then opined that appellant had a 5 percent loss of motion of the right shoulder, which combined with a 5 percent impairment for weakness and atrophy, for a total impairment of the right upper extremity of 10 percent, Dr. Bagby failed to refer to the applicable tables and standards of the A.M.A., *Guides* to explain how he calculated the award. Instead of requiring that the impartial medical examiner clarify his report, the Office improperly requested that the Office medical adviser provide another second opinion, which was then used as the basis of the schedule award.

The Board further notes that the Office medical adviser improperly ignored the measurements and calculations of Dr. Bagby without explanation and substituted his own findings and conclusions in determining that appellant had a two percent permanent impairment of the right upper extremity. He found that appellant had a 1 percent impairment for 175 degrees of retained forward elevation and another 1 percent impairment for 160 degrees of retained abduction. However, the Office medical adviser did not examine appellant and derived the two percent rating without indicating the source of the measurements he relied on. The Office therefore erred in finding that appellant had a two percent impairment based on the opinion of the Office medical adviser. Accordingly, the Board will set aside the Office's May 3, 2004 schedule award decision and remand the case to the Office for referral to Dr. Bagby for clarification and elaboration of his opinion. On remand, the Office should instruct Dr. Bagby to provide a well-rationalized opinion, to specifically refer to the applicable tables and standards of the A.M.A., *Guides* in making his findings and conclusions and in rendering his impairment rating, and to clearly indicate the specific background upon which he based his opinion. After such development as it deems necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board vacates and remands for further development the Office's determination that appellant has no more than a two percent permanent impairment to her right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2004 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: February 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member