United States Department of Labor
Employees' Compensation Appeals Board

ROBERT J. TERRONES, Appellant	)	
and	)	**Docket No. 04-1890**
	)	**Issued: May 4, 2005**
DEPARTMENT OF JUSTICE, PENITENTIARY, Lompoc, CA, Employer	)	

Appearances:
Robert J. Terrones, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 21, 2004 appellant filed a timely appeal from a May 21, 2004 schedule award from the Office of Workers' Compensation Programs finding eight percent impairment of his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than an eight percent impairment of his right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On December 7, 2002 appellant, then a 35-year-old correctional officer, sustained injury to his right shoulder while controlling an inmate during a fight at the employing establishment. He received medical treatment that day and was found to have decreased range of motion of the right shoulder with supraspinatous pain. Appellant was diagnosed as having a right shoulder

strain of the rotator cuff and cleared for return to light-duty work.[1] The Office accepted his claim for a right shoulder strain and authorized a period of physical therapy.

Appellant came under the treatment of Dr. C. Clay Wellborn, a Board-certified orthopedic surgeon, who requested that a magnetic resonance imaging (MRI) scan be obtained of the right shoulder. He was found to have a partial thickness tear of the rotator cuff. On May 8, 2003 appellant underwent arthroscopic surgery for labral debridement with subacromial decompression. Appellant received appropriate compensation benefits for wage loss related to the surgical procedure. He returned to limited duty on June 25, 2003 and to full duty on July 30, 2003.

On February 18, 2004 appellant filed a claim for a schedule award. On March 1, 2004 the Office sought a medical opinion from Dr. Wellborn as to the extent of permanent impairment of appellant's right upper extremity. However, his office advised that the physician did not provide impairment ratings.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Margaret Elfering, a Board-certified orthopedic surgeon, who was asked to provide an examination and estimate of the degree of right upper extremity impairment by applying the protocols of the A.M.A., *Guides.* She examined appellant on March 25, 2004 and noted his complaint of intermittent right shoulder pain. Dr. Elfering reviewed appellant's medical history and provided findings on examination of the right shoulder. On range of motion, the physician reported forward elevation of 160 degrees, backward elevation of 40 degrees, abduction of 130 degrees, adduction of 0 degrees, internal rotation of 60 degrees and external rotation of 70 degrees. In response to a question concerning the date of maximum medical improvement, she replied: "would not be [permanent and stationary] for three months." Dr. Elfering noted that there was no atrophy or weakness of the upper extremities.

On May 6, 2004 the case record was reviewed by an Office medical adviser. He noted that Dr. Elfering addressed appellant's subjective complaints of pain and provided range of motion findings. The medical adviser calculated the impairment for sensory deficit (pain) by identifying the axillary nerve for which Table 15, page 492, notes a maximum of five percent impairment. He graded the sensory deficit under Table 16-10, page 482, allowing Grade 3 (60 percent) for intermittent right shoulder pain rated by Dr. Elfering as 5/10. He noted that 60 percent of the 5 percent maximum allowed for sensory deficit would be 3 percent. The medical adviser noted that range of motion revealed that flexion to 160 degrees would be 1 percent impairment,[2] extension to 20 degrees would be 2 percent impairment,[3] abduction to 130 degrees would be 2 percent impairment,[4] adduction to 90 degrees was 0 percent impairment,[5] internal

[1] X-rays obtained on December 7, 2002 were reported negative for fracture, dislocation or other abnormality.

[2] Figure 16-40, page 476.

[3] *Id.*

[4] Figure 16-43, page 477.

[5] *Id.*

rotation to 90 degrees was 0 percent impairment,[6] and external rotation to 90 degrees was 0 percent impairment. He added these values to find a total of five percent impairment due to loss of range of motion. The medical adviser noted that Dr. Elfering had found no atrophy or weakness and stated that motor deficit impairment would be zero percent. Utilizing the Combined Values Chart, the Office medical adviser combined the three percent sensory deficit with the five percent loss of range of motion to find a total impairment of eight percent to the right upper extremity.[7] He concluded that maximum medical improvement was reached as of the date of Dr. Elfering's examination of March 25, 2004, approximately 10 months following surgery.

On May 21, 2004 the Office granted appellant a schedule award for eight percent impairment of his right upper extremity.[8] The period of the award ran for 24.96 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[9] and its implementing regulation[10] 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 implementing regulation as the appropriate standard for evaluating schedule losses.[11] A medical opinion regarding permanent impairment that is not based upon application of the A.M.A. *Guides*, the standard adopted by the Office and approved by the Board as appropriate for evaluating schedule losses, is of diminished probative value in determining the extent of a claimant's permanent impairment.[12]

It is the claimant's burden of proof to establish that he or she sustained permanent impairment of a schedule member or function as a result of an employment injury.[13]

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[6] Figure 16-46, page 479.

[7] Combined Values Chart, page 604.

[8] The case record contains medical evidence submitted after the date of the Office's May 21, 2004 decision. The Board is limited to a review of the evidence that was before the Office at the time of the final decision. *See* 20 C.F.R. § 501.2(c). The Board may not review evidence for the first time on appeal.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] 20 C.F.R. § 10.404.

[12] *Carolyn E. Sellers*, 50 ECAB 393 (1999).

[13] *Tammy L. Meehan*, 53 ECAB 229 (2001).

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement. The Board has held that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[14] The determination of the date of maximum medical improvement is factual in nature and based on the medical evidence of record.[15]

ANALYSIS

Appellant's claim was accepted for a right shoulder injury which resulted in the surgical repair of a torn rotator cuff on May 8, 2003. As his attending surgeon, Dr. Wellborn, did not provide impairment ratings for schedule award purposes, appellant was referred to Dr. Elfering for an examination and impairment rating. She provided findings based on a March 25, 2004 examination, noting limitations due to sensory deficit and loss of range of motion of the right shoulder. Dr. Elfering indicated that appellant did not exhibit any atrophy or weakness (motor deficit) of the right upper extremity. She did not state an estimate of impairment under the A.M.A. *Guides*. She indicated that appellant's shoulder condition would not be permanent and stationary for three months following surgery.

The case was referred to an Office medical adviser who applied the fifth edition of the A.M.A. *Guides* to the findings made on examination by Dr. Elfering. He calculated a total of five percent impairment based on loss of range of motion of the right shoulder due to 160 degrees of flexion (1 percent), 20 degrees of extension (2 percent) and 130 degrees of abduction (2 percent). The medical adviser determined the impairment due to sensory loss or pain by identifying the five percent maximum impairment allowed for the axillary nerve under Table 16-15. He graded the impairment under Table 16-10 as Grade 3, or 60 percent for pain which interfered with some activity. This resulted in three percent impairment for pain. The medical adviser applied the Combined Values Chart to combine the sensory deficit (three percent) with the loss of range of motion impairment (five percent) to find a total eight percent impairment of the right upper extremity. He noted that maximum medical improvement was reached as of the date Dr. Elfering examined appellant.[16] The Board finds that the Office medical adviser based his opinion on the extent of permanent impairment based on a review of the relevant findings of Dr. Elfering. He properly applied the tables of Chapter 16 of the fifth edition of the A.M.A. *Guides* to support his conclusion that appellant has an eight percent impairment of the right shoulder.

On appeal, appellant contends that he has greater impairment than the eight percent awarded by the Office, noting that he still has ongoing shoulder problems. However, the weight of medical opinion which provides an explanation of the A.M.A. *Guides* is represented by the report of the Office medical adviser. Dr. Wellborn noted that he did not provide impairment

[14] *James E. Earle*, 51 ECAB 567 (2000).

[15] *See Franklin L. Armfield*, 28 ECAB 445 (1977).

[16] The A.M.A. *Guides* note that, in evaluating impairment due to loss of strength, maximum strength is usually not regained until a year has passed since the time of injury or surgery. In this case, Dr. Elfering noted that appellant did not have any impairment to due loss of strength of his right shoulder, finding no atrophy or weakness of the upper extremities.

ratings and Dr. Elfering did not apply to the A.M.A., *Guides* to the physical findings made on examination of appellant.

CONCLUSION

The Board finds that appellant has no more than eight percent impairment of his right shoulder, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member