United States Department of Labor
Employees' Compensation Appeals Board

ALAN W. MARSHALL, Appellant	)	
and	)	**Docket No. 06-890**
	)	**Issued: July 20, 2006**
DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL, Tonawanda, NY, Employer	)	

Appearances:
Alan W. Marshall, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 8, 2006 appellant filed a timely appeal from the December 2, 2005 merit decision of the Office of Workers' Compensation Programs, granting a schedule award for an eight percent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

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

FACTUAL HISTORY

On May 9, 2004 appellant, then a 53-year-old border patrol agent, filed a traumatic injury claim alleging that on May 8, 2005 he bruised his right hand, hyperextended his right shoulder and sustained a sore back while investigating a suspicious individual under a bridge. He leapt from a U.S. Coast Guard boat to a flat rock and lost his footing and fell back onto the rocks and

into the water. By letter dated May 19, 2004, the Office accepted appellant's claim for a right shoulder strain/sprain. The Office subsequently authorized arthroscopic subacromial decompression on appellant's right shoulder to repair multiple tears which was performed on December 15, 2004 by Dr. Allan D. Depew, an attending Board-certified orthopedic surgeon. On May 6, 2005 he reported that appellant had returned to his full work duties. Dr. Depew noted, however, that appellant still had difficulty with activities above shoulder level as he lacked strength and endurance. He recommended continued physical therapy twice a week for six more weeks and stated that appellant could continue working with no restrictions.

By letter dated January 3, 2006, the Office advised appellant to make an appointment with his attending physician to determine the extent of any permanent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

On January 26, 2006 Dr. Depew reported constant pain from 3 to 4 out of 10 in the lateral shoulder. He stated that the pain interfered with reaching, lifting and rotating motion. Appellant required two hands to hold and fire a pistol. Dr. Depew reported range of motion findings for the affected shoulder and the opposite shoulder. Forward elevation (or flexion) was 150/170, backward elevation was 30/50, abduction was 160/170, adduction was 35/40, internal rotation was 35/70, external rotation was 90/90 and extension was 30/50. Dr. Depew found no atrophy but reported weakness of 60 percent of normal that could not be localized to any specific muscle group. He stated that appellant did not have any additional factors of disability to the shoulder. Dr. Depew concluded that he reached maximum medical improvement in August 2005.

On February 1, 2006 appellant filed a claim for a schedule award.

On February 9, 2006 an Office medical adviser reviewed Dr. Depew's findings. Utilizing the A.M.A., *Guides* 476, Figure 16-40, he determined that 150 degrees of flexion constituted a 2 percent impairment. He also found that 160 degrees of abduction and 35 degrees of adduction each constituted a 1 percent impairment based on the A.M.A., *Guides* 477, Figure 16-43. Utilizing the A.M.A., *Guides* 479, Figure 16-46, the Office medical adviser further found that 35 degrees of internal rotation constituted a 4 percent impairment and 90 degrees of external rotation resulted in a 0 percent impairment. Lastly, the Office medical adviser determined that 30 degrees of extension resulted in a 0 percent impairment based on the A.M.A., *Guides* 476, Figure 16-40. The Office medical adviser found no evidence of atrophy, weakness or a clavicle resection. Based on the foregoing calculations, the Office medical adviser determined that appellant had an eight percent impairment of the right upper extremity. The Office medical adviser stated that appellant reached maximum medical improvement in August 2005, the date he was seen by an attending physician.

By decision dated February 14, 2006, the Office granted appellant a schedule award for an eight percent impairment of the right upper extremity, based on the Office medical adviser's opinion, for 174.72 days during the period August 1, 2005 to January 22, 2006.[1]

[1] The Board notes that 174.72 days is the equivalent of 24.96 weeks of compensation (312 weeks for an arm lost multiplied by 8 percent). *See* 5 U.S.C. § 8107(c)(1).

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[6]

ANALYSIS

On appeal appellant argues that he is entitled to greater than an eight percent impairment of the right upper extremity because the Office medical adviser omitted Dr. Depew's findings that he had 30 degrees of backward elevation and his weakness was 60 percent of normal. He also contends that the Office medical adviser improperly found that 30 degrees of extension constituted a 0 percent impairment.

On physical examination, Dr. Depew rated appellant's pain from 3 to 4 out of 10. He found that appellant had 150 degrees of forward elevation, 30 degrees of backward elevation, 160 degrees of abduction, 35 degrees of adduction, 35 degrees of internal rotation, 90 degrees of external rotation and 30 degrees of extension. Dr. Depew found no atrophy but, reported weakness of 60 percent of normal that could not be localized to any specific muscle group. He stated that appellant did not have any additional factors of disability to the shoulder and concluded that he reached maximum medical improvement in August 2005. The Board finds that Dr. Depew failed to provide a rationalized medical opinion on the issue of permanent impairment. He did not determine the degree of impairment of the right upper extremity based on any specific figures and tables of the A.M.A., *Guides* as requested by the Office. Further, the

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

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

[6] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

A.M.A., *Guides* provide that decreased strength cannot be rated in the presence of decreased motion or painful conditions[7] and that strength deficits measured by manual muscle testing should only rarely be included in the calculation of upper extremity impairment.[8] Therefore, appellant is not entitled to a schedule award for impairment due to loss of range of motion and loss of muscle strength as determined by manual muscle testing. The Board notes that appellant did not submit any other medical evidence establishing that he has more than an eight percent impairment of the right upper extremity.

An Office medical adviser reviewed Dr. Depew's findings and explained how the provisions of the A.M.A., *Guides* were applied in calculating an impairment rating for the right upper extremity. The Office medical adviser stated that, 150 degrees of flexion constituted a 2 percent impairment based on the A.M.A., *Guides* 476, Figure 16-40 and 160 degrees of abduction and 35 degrees of adduction each constituted a 1 percent impairment based on the A.M.A., *Guides* 477, Figure 16-43. Utilizing the A.M.A., *Guides* 479, Figure 16-46, the Office medical adviser further stated that, 35 degrees of internal rotation constituted a 4 percent impairment and 90 degrees of external rotation resulted in a 0 percent impairment. Finally, the Office medical adviser determined that 30 degrees of extension resulted in a 0 percent impairment based on the A.M.A., *Guides* 476, Figure 16-40.[9] The Office medical adviser found no evidence of atrophy, weakness or a clavicle resection. The Office medical adviser added the above-noted figures to calculate an eight percent impairment of the right upper extremity.

Board precedent is well settled 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*.[10] The Board notes, however, that the 30 degrees of backward elevation or extension found by appellant's attending physician Dr. DePew, is actually a 1 percent impairment of the right upper extremity per Figure 16-40 of the A.M.A., *Guides*. Thus, when adding the 1 percent impairment to the percentages of impairment for flexion, abduction, adduction and internal and external rotation, appellant has a 9 percent impairment of the right upper extremity, which equals 28.08 weeks of compensation (312 weeks x 9 percent). The case will be returned to the Office for payment to appellant for the additional 1 percent impairment of the right upper extremity, which is an additionally 3.12 weeks of compensation.

[7] A.M.A., *Guides* 508 and 526, Table 17-2; *Patricia J. Horney*, 56 ECAB __ (Docket No. 04-2013, issued January 14, 2005). The A.M.A., *Guides* further note that motor weakness associated with disorders of the peripheral nerve system are evaluated in accordance with Chapter 16.5. A.M.A., *Guides*, 508, 480. This is not the evaluation method utilized by Dr. Depew.

[8] *Cerita J. Slusher*, 56 ECAB ___ (Docket No. 04-1584, issued May 10, 2005).

[9] The Board notes that 30 degrees of backward elevation as found by Dr. Depew is synonymous with his finding of 30 degrees of extension, based on the A.M.A., *Guides* 476, Figure 16-40.

[10] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

CONCLUSION

The Board finds that appellant has a nine percent impairment of the right upper extremity for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2005 decision of the Office of Workers' Compensation Programs is affirmed as modified to reflect a nine percent impairment of the right upper extremity.

Issued: July 20, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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