United States Department of Labor
Employees' Compensation Appeals Board

DENNIS L. SMITH, Appellant	)	
and	)	**Docket No. 06-650**
	)	**Issued: June 12, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Nashville, TN, Employer	)	

Appearances:
Dennis L. Smith, 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 January 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 15, 2005, finding that he had a 12 percent impairment for the right arm. 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 12 percent impairment to the right upper extremity for which he received schedule awards.

FACTUAL HISTORY

On October 22, 2002 appellant, then a 46-year-old custodian, filed a traumatic injury claim stating that, on October 21, 2002, he twisted his right shoulder while in the performance of duty. Appellant accepted a limited-duty job offer effective November 5, 2002. The Office accepted appellant's claim for a right rotator cuff tear, appropriate benefits were paid and it authorized surgical repair.

On November 11, 2002 Dr. John Michael Kioschos, an attending Board-certified orthopedic surgeon, performed right shoulder arthroscopic surgery consisting of limited debridement of articular cartilage tear and long head of the biceps tendon and sheath, with debridement of the supraspinatus tendon tear, open rotator cuff repair with acromioplasty and ligament release. Appellant returned to full-time limited duty on November 20, 2002.

In a report dated May 23, 2003, Dr. Kioschos stated that appellant had 100 degrees of active elevation, although he had good rotator cuff strength rating him a Grade 4 out of 5 with the arm in 90 degrees of abduction. He stated that he was unable to assign permanent restrictions due to appellant's inconsistent efforts as documented in a May 8, 2003 functional capacity evaluation. Dr. Kioschos noted that appellant was at maximum medical improvement that day and had an impairment rating of seven percent for the right upper extremity. On that same date, he released appellant to return to full-time duty. On July 3, 2003 appellant filed a claim for a schedule award. On July 24, 2003 the Office medical adviser reviewed the medical records and determined that appellant had a seven percent impairment of the right upper extremity. On August 13, 2003 the Office granted appellant a schedule award for seven percent impairment to the right arm.

In a report dated July 13, 2004, Dr. Kioschos stated that appellant was lacking 20 degrees of elevation and 10 to 20 degrees of external rotation on the right side. He also noted that internal rotation was five vertebral levels less than the left. Dr. Kioschos recommended physical therapy. On July 14, 2004 appellant filed a claim for a recurrence of disability stating that he had a frozen shoulder that hurt constantly. On July 30, 2004 the Office accepted his claim for a recurrence of disability and authorized physical therapy. On September 15, 2004 Dr. Kioschos stated that appellant had made some progress but still had occasional aches and pains and shoulder popping. He noted that appellant's capsulitis had resolved, that his range of motion had improved and that he was near symmetric motion bilaterally. Dr. Kioschos referred him to additional physical therapy followed by a home exercise program. In a follow-up report dated March 15, 2005, he found profound posterosuperior cuff weakness and ordered a magnetic resonance imaging (MRI) scan.

On April 12, 2005 Dr. Kioschos reviewed the March 30, 2005 MRI scan and noted an asymptomatic bone acromiale, acromioclavicular osteoarthritis, recurrent right rotator cuff tear, and chronic soft right shoulder tissue. Appellant agreed to additional surgery.

In a functional capacity evaluation, dated June 30, 2005, a therapist stated that appellant could work in a light-duty capacity, including exerting up to 20 pounds of force occasionally and/or up to 10 pounds frequently, and a negligible amount of force to move objects constantly. The report included range of motion findings of the right shoulder on June 30, 2005.[1]

On July 14, 2005 Dr. Kioschos reviewed appellant's functional capacity evaluation, noted that he elected to forego further surgery and stated that he had reached maximum medical improvement on that day. He rated appellant with a 15 percent impairment of the right upper extremity and released him to return to full duty.

[1] Dr. Kioschos referred appellant for this evaluation.

On July 24, 2005 appellant filed a claim for an additional schedule award.

In a report dated September 6, 2005, Dr. Kioschos stated that appellant declined additional surgery and thus had reached maximum medical improvement. In reaching the 15 percent impairment rating of the right shoulder, he used Figure 16-40 which shows impairment due to loss of flexion and extension, Figure 16-43 which shows loss of abduction and adduction, and Figure 16-46 which shows loss of internal and external rotation. He then added impairment percentages and converted to a whole person impairment rating of nine percent using Table 16-3, page 439 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

On September 27, 2005 the Office referred the medical record to the Office medical adviser, noting that it had previously granted a seven percent schedule award for the right arm and that it had accepted a right ruptured rotator cuff. The Office medical adviser noted appellant's history of a November 11, 2002 right shoulder surgical repair and appellant's declination of further surgery. Based on the A.M.A., *Guides* he recommended a 12 percent schedule award based on the same charts used in Dr. Kioschos' September 6, 2005 determination. He noted that no additional impairment could be granted for loss of muscle strength.

On November 15, 2005 the Office granted appellant an additional schedule award for a 5 percent impairment for a total impairment of the right shoulder of 12 percent.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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.[4]

ANALYSIS

The functional capacity evaluation test results of June 30, 2005 found 109 degrees of flexion, 40 degrees of extension, 91 degrees of abduction, 25 degrees of adduction, 89 degrees of internal rotation and 55 degrees of external rotation. In a September 6, 2005 report, Dr. Kioschos based his impairment rating of appellant's right shoulder on loss of flexion and extension, abduction and adduction, and internal and external rotation. However, while he

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Willie C. Howard*, 55 ECAB ___ (Docket No. 04-342 & 04-464, issued May 27, 2004).

referenced certain tables in the A.M.A., *Guides*, he did not explain how he applied any specific finding from the functional capacity evaluation to the A.M.A., *Guides* to arrive at his calculation. The Office medical adviser relied on the findings contained in the functional capacity evaluation on which Dr. Kioschos made his recommendation.

The Office medical adviser reviewed the findings from the functional capacity evaluation and sets forth his calculations as follows: 109 degrees of flexion was a 5 percent impairment, 46 degrees of extension was 1 percent impairment, based on Figure 16-40, page 476; 91 degrees of abduction was 4 percent impairment, and 25 degrees of impairment was 1 percent impairment based on Figure 16-43, page 477; and 89 degrees of internal rotation was 0 degrees of impairment and 55 degrees of external rotation was 1 percent of impairment. The Office medical adviser added the range of motion impairments to find a total 12 percent impairment of the right upper extremity. He also noted that the date of maximum medical improvement was July 14, 2005. As the Office previously granted appellant a seven percent schedule award for the right upper extremity on August 13, 2003, appellant received the difference in impairment rating between the prior impairment rating and the current impairment rating which resulted in an additional award of five percent for the right upper extremity.

There is no other medical evidence of record, conforming with the A.M.A., *Guides*, that supports any greater impairment. The Board finds that the Office properly found that appellant has no more than 12 percent impairment of the right upper extremity for which he received schedule awards.

The Board finds that appellant has failed to establish that he is entitled to more than a 12 percent schedule award for the right upper extremity.[5]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a hearing loss in the performance of duty.

[5] The Board notes that this case record contains evidence which was submitted subsequent to the Office's November 15, 2005 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 15, 2005 is affirmed.

Issued: June 12, 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