

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

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ANGELA M. SMITH, Appellant)	
)	
and)	Docket No. 05-1790
)	Issued: March 3, 2006
U.S. POSTAL SERVICE, POST OFFICE,)	
Bellmawr, NJ, Employer)	
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<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Thomas R. Uliase, Esq.,</i> for the appellant	
<i>Office of Solicitor,</i> for the Director	

DECISION AND ORDER

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

JURISDICTION

On August 30, 2005 appellant filed a timely appeal from an April 12, 2005 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a schedule award for 15 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 case.

ISSUE

The issue is whether appellant has more than 15 percent impairment of the right upper extremity for which she received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. The Board, by decision dated October 30, 2003, found that there existed a conflict of medical opinion between Dr. Ronald J. Potash, appellant's Board-certified surgeon, and Dr. Howard Zeidman, a Board-certified orthopedic surgeon and an Office referral physician, on the issue of the extent of permanent impairment based on her accepted rotator cuff surgery. The Board set aside the June 5, 2003 hearing representative's

decision affirming a schedule award for 15 percent impairment of the right upper extremity and remanded the case to the Office for referral to an impartial medical specialist. The law and the facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.¹

On January 26, 2004 the Office referred the case to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon selected as the impartial medical specialist. He was requested to provide an impairment rating based on her surgery under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) and her date of maximum medical improvement.

In a report dated February 5, 2004, Dr. Glenn reviewed appellant's history of injury and noted that on February 23, 1998 she injured her right shoulder while at work. On April 14, 1998 Dr. Thomas P. Obade, an attending Board-certified orthopedic surgeon, performed right shoulder arthroscopic debridement of the glenoid labrum, the bicipital tendon and the rotator cuff, and an open bicipital tenodesis of the right shoulder. Dr. Glenn stated that Dr. Obade also performed a subacromial decompression of the rotator cuff by resecting eight millimeters along the middle of the acromion and clearing soft tissues beneath acromioclavicular (AC) joint. He stated that there was no resection of the inferior AC joint. Therefore, Dr. Obade had not performed an arthroplasty. Dr. Glenn added that Dr. Obade did not state in the surgical report that he performed an arthroplasty. He noted that appellant's subacromial decompression did not fall into the category, under the A.M.A., *Guides*, for a resection or implant arthroplasty. Dr. Glenn also noted the following range of motion findings for the right upper extremity: elevation to 75 degrees, extension to 30 degrees, abduction to 75 degrees, adduction to 50 degrees, internal rotation to 50 degrees and external rotation to 60 degrees. He also noted normal neurological examination, reflex patterns and no atrophy. Sensory pattern was also normal. Dr. Glenn further stated that there was no evidence of any discernable involvement of a peripheral nerve or the brachial plexus that would cause loss of grip strength and equated her loss to a lack of use. He added that Dr. Potash's October 28, 1998 report finding that appellant underwent an acromioplasty was incorrect, and that appellant's pain level was insufficient to allow an additional impairment in accordance with Chapter 18 of the A.M.A., *Guides*.

By decision dated March 9, 2004 the Office denied appellant's claim for an increased schedule award for her right arm.² On March 15, 2004 appellant, through counsel, requested an oral hearing which was held on November 30, 2004. In a report dated September 23, 2004, Dr. David Weiss, an osteopath, stated that the definition of arthroscopy based on an orthopedic dictionary was a reconstruction of a joint(s) to restore motion and function. Upon his review of Dr. Obade's report, Dr. Weiss stated that appellant had undergone debridement of the glenoid labrum, acromioplasty and AC joint resection and thus it would "appear" that appellant would be

¹ Docket No. 03-1980 (issued October 30, 2003).

² In a March 23, 2004 report, an Office medical adviser concurred with Dr. Glenn's report, stating that appellant had no additional impairment based on her compression surgery as it did not include an arthroplasty as defined by the A.M.A., *Guides*. The Office apparently issued an amended decision noting that the Office medical adviser verified Dr. Glenn's report. The date of that decision remained March 9, 2004 but a time stamp notes March 25, 2004.

entitled to a 10 percent impairment rating for a partial resection arthroplasty for a distal clavical, as referenced by the A.M.A., *Guides* 506, Table 16-27. Dr. Weiss then provided 3 percent impairment for the right upper extremity based on range of motion deficit on flexion, 3 percent for abduction, 1 percent for external rotation, 4 percent for supraspinatus strength deficit, and 10 percent for arthroscopy for a combined impairment rating of 19 percent.

In a decision dated April 12, 2005, the hearing representative affirmed the March 4, 2004 decision of the Office finding that appellant had no more than a 15 percent impairment of the right upper extremity. The Office based its decision on Dr. Glenn's report finding that it constituted the weight of evidence that appellant had no more than 15 percent impairment for which she was granted a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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* (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

Section 8123(a) of the Act⁶ provides, "If there is 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."⁷ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁸

ANALYSIS

The Board previously remanded the case to the Office to determine whether appellant was entitled to an additional impairment rating based on her accepted surgery. Upon remand, the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Guisepppe Aversa*, 55 ECAB ____ (Docket No. 03-2042, issued December 12, 2003)

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8123(a).

⁸ *Barbara J. Warren*, 51 ECAB 413 (2000).

Office referred appellant to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion.

In a February 5, 2004 report, Dr. Glenn stated that, based on his review of Dr. Obade's report of April 14, 1998, the surgeon performed an arthroscopy of appellant's right shoulder including a debridement of a glenoid labrum tear, a clearing of the inferior and anterior aspects of the acromion and the inferior aspect of the AC joint. He also noted that Dr. Obade performed a resection of the soft tissue of the underside of the acromion and also repaired the rotator cuff and distal biceps tendon. Dr. Glenn stated that Dr. Obade did not indicate that he performed an arthroplasty, and fortified his opinion with the observation that the inferior aspect of the AC joint was not resected.⁹ Dr. Glenn provided a rationalized medical opinion describing the scope of Dr. Obade's surgical procedures on April 14, 1998. His opinion was based on a complete review of the surgical report and the statement of accepted facts. The Office properly determined that appellant did not undergo an arthroplasty and thus was not entitled to an additional impairment rating under Table 16-27. Dr. Glenn found no basis on which to attribute an increase in impairment rating due to appellant's April 14, 1998 surgery.

The Board finds that Dr. Glenn provided a detailed and well-rationalized report based on a proper factual background. His opinion is entitled to the special weight accorded an impartial medical examiner. Dr. Glenn's report therefore constitutes the weight of the medical opinion evidence and establishes that appellant does not have any additional impairment due to her April 14, 1998 surgery.

The Board notes that Dr. Weiss stated that appellant was entitled to 10 percent impairment for an arthroplasty and had a total of 19 percent impairment for the right arm. His report appears to be based on a review of Dr. Potash's prior report,¹⁰ which Dr. Glenn, the impartial specialist, considered in resolving the medical conflict. Dr. Weiss did not indicate that he had conducted a new examination of appellant or derived any new findings entitling appellant to an increased schedule award. He further characterized his description of appellant's surgical procedure as one which would "appear" to entitle appellant to a schedule award for a partial resection arthroplasty, in speculative terms.¹¹ Dr. Weiss also noted impairment ratings for range of motion findings for the right shoulder. It is not clear when these measurements were taken and he also did not refer to specific tables in the A.M.A., *Guides* to support his impairment findings. Consequently, Dr. Weiss' report is of diminished probative value and does not create a conflict in the medical evidence with the opinion of Dr. Glenn.

⁹ The A.M.A., *Guides* 505, Chapter 16.7b refers to arthroplasty of a joint as in the AC joint. The resection in this case did not affect a joint.

¹⁰ It appears that Dr. Weiss and Dr. Potash were previously associated in a medical practice.

¹¹ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).

CONCLUSION

The Board finds that appellant has not established that she is entitled to more than a 15 percent schedule award which the Office previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 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