

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

RONALD K. COPELAND, Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

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**Docket No. 05-1829
Issued: March 1, 2006**

Appearances:
Ronald K. Copeland, 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 August 31, 2005 appellant filed a timely appeal from April 18 and July 19, 2005 merit decisions of the Office of Workers' Compensation Programs, which awarded him compensation for a three percent permanent impairment of his 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 a three percent permanent impairment of the right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On August 27, 1996 appellant, then a 44-year-old preservation servicer, filed a claim alleging that he injured his right elbow in the course of his employment. The Office accepted his claim for lateral epicondylitis and contusion of the right elbow and authorized right elbow lateral fasciotomy with lateral epicondylectomy, which was performed on December 18, 1996. Appellant returned to light duty on February 18, 1997.

On June 10, 1997 appellant received a schedule award for nine percent impairment to his right upper extremity for the period April 22 to November 4, 1997.

On July 31, 2002 appellant filed a claim for a recurrence of disability alleging continuous pain and weakness in his right arm. By letter dated January 6, 2003, the Office notified appellant that it had reopened his case for medical care of his accepted condition.

On February 4, 2003 appellant filed a claim for a schedule award. The Office requested a report from appellant's treating physician, Dr. Jeffrey T. DeHaan, a Board-certified orthopedic surgeon, describing the percentage of impairment of appellant's right upper extremity.

In a report dated May 1, 2003, Dr. DeHaan opined that appellant had a 34 percent impairment of the right upper extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The date of maximum medical improvement was March 17, 2003. He noted that appellant had subjective complaints of pain and discomfort and weakness in his right upper extremity. Dr. DeHaan indicated that the enclosed physical therapy interpretation of John Flint, physical therapist, reflected range of motion, strength testing and other objective findings. In a May 8, 2003 physical therapy report, Mr. Flint indicated that he had evaluated appellant according to the fifth edition of the A.M.A., *Guides*. Range of motion for the right elbow reflected: "Flexion -- 117 (2 percent UE), Extension -- 16 (1 percent UE), Supination -- 74 (0 percent UE), Pronation -- 50 (2 percent UE), Add ROM impairments (16.4c pg. 452) 2 percent + 1 percent + 2 percent = 5 percent UE." MMT reflected: "4-/5 wrist and finger extension (25 percent Table 16-11a page 484. Associated motor nerve -- radial nerve below elbow (35 percent) Table 16-15 page 492. Multiply (Table 16-11b.) 25 percent x 35 percent = 9 percent UE." Grip strength right hand (section 16.8) revealed: "Measured at 12.5 kg. compared to age-related norm of 49.5 kg. (Table 16.32). Strength Index Formula $49.5 - 12.5$ divided by $49.5 = 73$ percent (Strength loss index). Thirty percent UE -- (Table 16.34 page 509)." Mr. Flint stated that MMT and grip measures cannot be considered together, as they represent an overlap. He opined that appellant had a 34 percent upper extremity impairment and a 20 percent whole person impairment.

The Office referred Dr. DeHaan's May 1, 2003 report and a statement of accepted facts to the district medical adviser for review. By letter dated June 2, 2003, the district medical adviser requested actual Jamar grip strength figures supporting Dr. DeHaan's report. By letter dated July 30, 2003, he asked the Office to obtain an impairment evaluation from a Board-certified physician, which included a detailed description of the objective findings, all pertinent subjective complaints, a correlation of the impairment with the accepted conditions and references between the percent impairment and the proper tables in the fifth edition of the A.M.A., *Guides*.

The Office referred appellant, together with a statement of accepted facts and the medical record to Dr. Roshan Sharma, a Board-certified physiatrist, for a second opinion examination and an assessment of his permanent impairment. In a report dated September 23, 2003, Dr. Sharma reviewed appellant's medical history and determined that March 17, 2003 was the date of maximum medical improvement. Examination revealed range of motion in the right and left elbows to be 120 and 140 degrees respectively, with a 14 degree right elbow extension lag.

Supination and pronation were found to be 80 degrees and 90 degrees respectively. Appellant's sensory examination was within normal limits in both upper extremities. Appellant's right hand averaged 33 pounds in the stand grip test and 44 pounds in the rapid exchange grip test. Dr. Sharma indicated that the validity criteria during maximum voluntary effort protocol was not met. Referencing pages 472, 474 and 507 of the fifth edition of the A.M.A., *Guides*, Dr. Sharma calculated that appellant had a three percent right upper extremity impairment.

In a July 30, 2004 report, the district medical adviser, Dr. Ronald H. Blum, a Board-certified orthopedic surgeon, reviewed Dr. Sharma's September 23, 2003 evaluation and a July 30, 2004 statement of accepted facts. Referencing Figure 16-34, page 472 and Figure 16-37, page 474 of the A.M.A., *Guides*, Dr. Blum agreed that appellant had a three percent permanent impairment of the right upper extremity due to loss of motion in the right elbow.

On April 18, 2005 the Office granted appellant a schedule award for an additional three percent impairment of his right upper extremity. The award was for 9.36 weeks, for the period from March 17 to May 21, 2003.¹

On April 22, 2005 appellant requested reconsideration of the April 18, 2005 schedule award.

Appellant submitted a copy of the previously submitted May 8, 2003 report from physical therapist Mr. Flint. Appellant also submitted a report from Mr. Flint dated May 25, 2004 reflecting his opinion that appellant had a 21 percent right upper extremity impairment, based on loss of strength and loss of range of motion. Referencing Table 16.4c, page 452 of the fifth edition of the A.M.A., *Guides*, Mr. Flint concluded that appellant had a one percent range of motion impairment due to a nine degree right elbow extension deficit. Referencing Table 16.32 and 16.34, page 509 of the A.M.A., *Guides*, he concluded that appellant had a 20 percent grip strength impairment.

By decision dated July 19, 2005, the Office denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set 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

¹ The Office originally granted appellant a schedule award on March 25, 2005 for an additional three percent impairment of his right upper extremity. The award was for 9.36 weeks, for the period March 17 to May 21, 2003. On April 18, 2005 the Office issued a corrected copy of the schedule award, which included an address change.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

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 Board finds that Dr. Sharma and the district medical adviser properly applied the fifth edition of the A.M.A., *Guides* in determining that appellant had a three percent impairment to his right upper extremity.

In a September 23, 2003 report, Dr. Sharma utilized and referenced the appropriate tables and figures in the A.M.A., *Guides*. Dr. Sharma noted that appellant had flexion of 120 degrees and a 14 degree right elbow extension lag. Referring to figures 16-34 (page 427), 16-37 (page 474), and page 507, Dr. Sharma determined that appellant was entitled to an impairment rating of two percent for flexion and one percent for extension, for a total of a three percent impairment rating for range of motion. In accordance with page 472 of the A.M.A., *Guides*, Dr. Sharma found that no rating was warranted for supination of 80 degrees or pronation of 90 degrees. Regarding motor strength, Dr. Sharma noted that, based on appellant's average standard grip test and average rapid exchange grip test of 33 pounds and 44 pounds respectively, he did not meet the validity criteria during maximum voluntary effort protocol, and that no rating was warranted for strength deficit. The A.M.A., *Guides* specifically provide that strength deficits measured by manual muscle testing should only rarely be included in the calculation of an upper extremity impairment.⁵ The Board finds that Dr. Sharma properly concluded that no rating was warranted for strength deficit based on the results of manual muscle testing.

The district medical adviser concurred with Dr. Sharma's findings and application of the A.M.A., *Guides* and concluded that appellant had a three percent impairment of the right upper extremity due to loss of motion in his right elbow. The Board finds that there is no other probative medical evidence of record to establish that appellant has more than a three percent impairment of his right upper extremity, for which he received a schedule award. Dr. DeHaan's May 1, 2003 report lacks probative value, in that it did not include actual Jamar grip strength figures. Additionally, his report was based on findings of a physical therapist. A physical therapist is not a physician as defined under section 8101(2) of the Act, and cannot render a medical opinion.⁶ Similarly, Mr. Flint's May 25, 2004 report reflecting his opinion that appellant had a 21 percent right upper extremity lacks probative value in that it was not signed

⁴ A.M.A., *Guides* (5th ed. 2001).

⁵ The A.M.A., *Guides* provides that loss of strength may be rated separately if such a deficit has not been considered adequately by other rating methods. An example of this situation would be loss of strength caused by a severe muscle tear that healed leaving a palpable muscle defect. If the rating physician determines that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence. The A.M.A., *Guides* further provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximum force. A.M.A., *Guides* 508, section 16.8a. See *Cerita J. Slusher*, 56 ECAB ___ (Docket No. 04-1584, issued May 10, 2005).

⁶ See *Vicky C. Randall*, 51 ECAB 357 (2000).

by a physician. Accordingly, the Board finds that appellant has no more than a three percent permanent impairment of his right upper extremity.⁷

CONCLUSION

The Board finds that appellant failed to establish that he has greater than three percent impairment of the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the July 19 and April 18, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 1, 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

⁷ The record reflects that appellant has received schedule awards for a total 12 percent permanent impairment of the right upper extremity.