United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
	)	
and	)	**Docket No. 06-1281**
	)	**Issued: September 6, 2006**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTIC AGENCY, Fort Belvoir, VA, Employer	)	

Appearances:
P.R., 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 May 15, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 10 and April 13, 2006 merit decisions concerning her entitlement to schedule award compensation. 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 a three percent impairment of her left arm for which she received a schedule award.

FACTUAL HISTORY

On December 15, 2003 appellant, then a 36-year-old human resources specialist, filed a traumatic injury claim alleging that she sustained injury to her neck, back, left shoulder and left elbow when she fell at work on that date.[1] The Office accepted that she sustained a cervical

[1] The Office later accepted that appellant also sustained a thoracic sprain/strain.

strain, left shoulder strain and left shoulder impingement syndrome. It authorized subacromial decompression surgery of the left shoulder with resection of the distal clavicle which was performed on December 2, 2004. Appellant stopped work on December 15, 2003 and returned to work in January 2005.[2]

In June 2005, appellant claimed schedule award compensation due to her accepted employment injury.

In a report dated June 1, 2005, Dr. Robert S. Adelaar, an attending Board-certified orthopedic surgeon, stated that appellant's range of left shoulder motion was "about 110 degrees of abduction and forward flexion" and that she had good external rotation strength. He indicated that she had reached maximum medical improvement on June 1, 2005. Based on her loss of range of motion, appellant had a "10 percent disability of the upper extremity."

In September 2005, the Office referred appellant to Dr. William K. Fleming, a Board-certified orthopedic surgeon, for evaluation of her left shoulder impairment. In a report dated September 6, 2005, Dr. Fleming stated that on examination she complained of left shoulder soreness but that no real tenderness was found. Range of motion testing of the left shoulder revealed about 100 to 110 degrees of passive abduction, about 90 degrees of active abduction, flexion of about 95 to 100 degrees, internal rotation of about 60 degrees and external rotation of about 60 degrees. Dr. Fleming diagnosed "status post left shoulder partial acromionectomy" and "persistent periscapular and thoracic spine pain on the left" and indicated that appellant could return to her regular work. He did not provide an impairment rating for her left shoulder and indicated that he thought that her left shoulder condition would eventually resolve itself.

In a report dated September 14, 2005, Dr. Willie E. Thompson, a Board-certified orthopedic surgeon serving as an Office medical adviser reviewed Dr. Fleming's report. He found that appellant had an eight percent impairment of her left arm under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. Thompson indicated that, under Figure 16-40 on page 476 of the A.M.A., *Guides*, appellant had a 5 percent impairment due to her 100 degrees of left shoulder flexion and, under Figure 16-43 on page 477, a 3 percent impairment due to 110 degrees of left shoulder abduction. He stated that she reached maximum medical improvement on June 1, 2005.

The Office determined that there was a conflict in the medical evidence between Dr. Adelaar and Dr. Thompson regarding the extent of appellant's left shoulder impairment. It referred her to Dr. Steven Blasdell, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation.

In a report dated December 20, 2005, Dr. Blasdell noted that appellant reported left shoulder pain. However, examination revealed no atrophy of the left shoulder or neurologic deficits. Dr. Blasdell noted that on range of motion testing of the left shoulder, she had 40 degrees of adduction, 170 degrees of abduction, 170 degrees of flexion, 65 degrees of extension, 50 degrees of external rotation and 70 degrees of internal rotation. He diagnosed left shoulder sprain and status post arthroscopic subacromial decompression and distal clavicle resection for

[2] On February 2, 2006 the Office issued a decision concerning appellant's wage-earning capacity.

impingement syndrome. Dr. Blasdell indicated that she reached maximum medical improvement on June 1, 2005. He concluded that appellant had a three percent impairment of the left arm comprised of a one percent rating for limited flexion, one percent for limited external rotation and one percent for limited internal rotation.

By decision dated January 10, 2006, the Office granted appellant a schedule award for a three percent impairment of her left arm. The award ran for 9.36 weeks from June 1 to August 5, 2005.

Appellant requested a review of the written record by an Office hearing representative, arguing that there was no conflict in the medical evidence at the time of the referral to Dr. Blasdell and that the 10 percent impairment rating of Dr. Adelaar should be accepted.

By decision dated and finalized April 13, 2006, the Office hearing representative affirmed the January 10, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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.[5]

Section 8123(a) of the Act provides in pertinent part: "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."[6] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[7]

It is well stablished that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[8]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

[6] 5 U.S.C. § 8123(a).

[7] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[8] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

ANALYSIS

The Office accepted that appellant sustained an employment-related cervical strain, left shoulder strain, left shoulder impingement syndrome and thoracic sprain/strain. It granted her a schedule award for a three percent impairment of her left arm based on the opinion of Dr. Blasdell, a Board-certified orthopedic surgeon, who it characterized as an impartial medical specialist.

The Board notes that the Office improperly found a conflict in the medical evidence between Dr. Adelaar, an attending Board-certified orthopedic surgeon, and Dr. Thompson, a Board-certified orthopedic surgeon, who served as an Office referral physician, regarding the extent of appellant's left shoulder impairment.[9] Neither Dr. Adelaar, nor Dr. Thompson based their impairment ratings on complete evaluations of appellant's range of left shoulder motion. Dr. Adelaar only made note of her abduction and flexion motions. Dr. Thompson, who evaluated a September 6, 2005 report of Dr. Fleming, a Board-certified orthopedic surgeon acting as an Office referral physician, only considered appellant's abduction, flexion, external rotation and internal rotation motions.[10] Therefore, Dr. Blasdell served as an Office referral physician rather than an impartial medical specialist.

Dr. Blasdell determined that appellant had a three percent impairment of the left arm comprised of a one percent rating for limited flexion of 170 degrees, 1 percent for limited external rotation of 50 degrees and one percent for limited internal rotation of 70 degrees. Although Dr. Blasdell properly performed these ratings,[11] there is other evidence of record which suggests that appellant may have higher impairment ratings for limited left shoulder motion. For example, the evaluation of Dr. Adelaar, while incomplete, suggested a 3 percent impairment due to 110 degrees of abduction and a 5 percent impairment due to 110 degrees of flexion.[12] Moreover, the evaluation of Dr. Fleming, while also incomplete, suggested a 3 percent impairment due to 110 degrees of abduction and a 5 percent impairment due to 100 degrees of flexion.[13]

It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. The medical evidence regarding appellant's left arm impairment is in need of further development. The case should be remanded to the Office for such development it deems necessary to obtain a reasoned evaluation of her entitlement to schedule award compensation.

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[9] *See supra* note 6 and 7 and accompanying text.

[10] The A.M.A., *Guides* dictates that six motions be considered: abduction, adduction, flexion, extension, external rotation and internal rotation. A.M.A., *Guides* 474-79, Figures 16-40, 16-43, 16-46.

[11] *See* A.M.A., *Guides* 476, 479, Figures 16-40 and 16-46.

[12] *Id.* at 476-77, Figure 16-40 and 16-43.

[13] *Id.*

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to show that she has more than a three percent impairment of her left arm for which she received a schedule award. The case shall be remanded to the Office for further development to be followed by an appropriate decision on appellant's schedule award entitlement.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 13 and January 10, 2006 decisions are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 6, 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