



In a July 16, 2002 decision, the Office granted a schedule award for 24 percent impairment of the right upper extremity. By decision dated November 7, 2002, an Office hearing representative found that there was an unresolved conflict of medical opinion regarding the extent of appellant's right upper extremity impairment.<sup>1</sup> The case was remanded to the Office so that appellant could be evaluated by an impartial medical examiner.<sup>2</sup>

On remand, appellant was scheduled for a February 14, 2003 examination by Dr. Stanley R. Askin, a Board-certified orthopedic surgeon and impartial medical examiner. He failed to attend the scheduled appointment with Dr. Askin and the Office later issued a March 5, 2003 decision finding that he obstructed the medical examination. The Office also found that because of appellant's obstruction, he was not entitled to a schedule award in excess of the previous award for 24 percent impairment. The March 5, 2003 decision was affirmed by an Office hearing representative on January 12, 2004.

On appeal, the Board agreed with the Office's finding that appellant obstructed the February 14, 2003 scheduled examination with Dr. Askin. The Board, however, disagreed with the Office's decision to deny an additional schedule award based solely on his refusal to undergo examination by Dr. Askin. Accordingly, the Board reversed the Office's decision denying entitlement to an additional schedule award.<sup>3</sup>

While the case was pending before the Board, appellant was examined by Dr. Askin. In a report dated May 14, 2004, Dr. Askin rated appellant's impairment of the spine by applying the diagnosis-related-estimate (DRE) method. He characterized appellant's condition as DRE cervical Category III, which corresponds to a 15 to 18 percent impairment of the whole man. Dr. Askin explained that the DRE method incorporated the affectation of the right upper extremity. In choosing between the district medical adviser's 24 percent rating and Dr. Weiss' 31 percent rating of the right upper extremity, Dr. Askin noted that the district medical adviser's impairment rating was clearly closer to his own findings.

In a November 9, 2005 decision, the Office found that appellant was not entitled to an additional schedule award beyond the 24 percent award previously granted. Appellant subsequently requested a hearing, which was held on February 28, 2006. He also submitted an amended report from Dr. Weiss dated April 8, 2002. Dr. Weiss had previously omitted an additional six percent impairment for motor strength deficit involving the right biceps.<sup>4</sup> His overall rating remained at 31 percent of the right upper extremity.

By decision dated May 15, 2006, the Office hearing representative affirmed the November 9, 2005 decision denying an additional schedule award.

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<sup>1</sup> The hearing representative found a conflict between the district medical adviser's 24 percent impairment rating and the 31 percent rating provided by appellant's physician, Dr. David Weiss, a Board-certified osteopath.

<sup>2</sup> The hearing representative did not disturb the July 16, 2002 schedule award for 24 percent impairment of the right upper extremity.

<sup>3</sup> Docket No. 05-480 (issued August 3, 2005). The Board's prior decision is incorporated herein by reference.

<sup>4</sup> On physical examination, Dr. Weiss reported manual muscle testing of the right bicep was 4/5.

## LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>5</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>6</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>7</sup>

## ANALYSIS

The Office hearing representative disagreed with the earlier finding that a conflict of medical opinion existed between the district medical adviser, who found 24 percent impairment, and Dr. Weiss' initial April 8, 2002 report. Both the district medical adviser and Dr. Weiss agreed on the extent of appellant's right upper extremity impairment attributable to loss of grip strength (20 percent) and impairment due to motor deficit involving the supraspinatus muscle (4 percent). The two, however, disagreed as to whether appellant was entitled to an additional three percent impairment for pain. Dr. Weiss offered no explanation for the additional three percent impairment he assigned under Figure 18-1, A.M.A., *Guides* 574. In contrast, the district medical adviser explained that pain was "too subjective [and] not well tested."

The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18.<sup>8</sup> The A.M.A., *Guides* provide for an incremental adjustment of up to three percent for pain when the conventional rating system does not adequately encompass the burden of the individual's condition. Where the pain-related impairment appears to increase the burden of the individual's condition "slightly," the physician can increase the percentage found under the conventional rating system by up to three percent.<sup>9</sup>

Because Dr. Weiss did not explain why the conventional impairment rating provided under Chapter 16 was ostensibly inadequate, an additional three percent impairment for pain is

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<sup>5</sup> The Act provides that for a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000).

<sup>6</sup> 20 C.F.R. § 10.404 (2006).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

<sup>8</sup> A.M.A., *Guides* 571, section 18.3b.

<sup>9</sup> *Id.* at 573, section 18.3d; *Id.* at 574, Figure 18-1.

unjustified in the instant case.<sup>10</sup> The Board agrees with the hearing representative's finding that the differences between the district medical adviser's July 8, 2002 report and Dr. Weiss' original April 8, 2002 report do not rise to the level of a conflict in medical opinion.

The Board also agrees with the hearing representative's decision not to award additional impairment for motor strength deficit involving appellant's right biceps. When Dr. Weiss examined appellant on April 8, 2002 he reported that manual muscle testing of both the right supraspinatus and biceps was 4/5. His initial report included a specific impairment rating for the supraspinatus motor deficit (four percent), but he did not specifically identify any impairment associated with appellant's right biceps. Dr. Weiss corrected this omission in his amended report, also dated April 8, 2002, which appellant submitted to the Office in March 2006. However, the hearing representative found Dr. Weiss' amended April 8, 2002 report unpersuasive because at least one earlier report, also from April 2002, found that appellant's upper extremity "[m]otor functions appeared intact." Additionally, when Dr. Askin later examined appellant on May 14, 2004, he noted that muscle function of the biceps was intact bilaterally. The Board finds that Dr. Askin's May 2004 examination findings are more probative of appellant's current physical condition. The current record does not support an increased award in 2006.

### **CONCLUSION**

Appellant has not established that he has greater than 24 percent impairment of the right upper extremity.

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<sup>10</sup> See *Philip A. Norulak*, 55 ECAB 690, 696 (2004); *Mark A. Holloway*, 55 ECAB 321, 326 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 15, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board