

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

<p>A.S., Appellant</p> <p>and</p> <p>GENERAL SERVICES ADMINISTRATION, HUMAN RESOURCES OFFICE, Philadelphia, PA, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 07-941</p> <p>Issued: August 3, 2007</p>
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Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 21, 2006 merit decision regarding his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a nine percent permanent impairment of his left arm, for which he received a schedule award; and (2) whether appellant's schedule award compensation was paid at a proper pay rate.

FACTUAL HISTORY

On December 30, 1996 appellant, then a 64-year-old maintenance mechanic, filed a traumatic injury claim alleging that he sustained an injury when he slipped and fell on his back at work. The Office accepted that he sustained a cervical strain/sprain. Appellant retired from the

employing establishment effective January 3, 1997. On January 8, 1998 he underwent a medial meniscectomy of the right knee which was not authorized by the Office at the time.

On September 3, 1999 Dr. Ronald Potash, an attending Board-certified surgeon, diagnosed left shoulder rotator cuff tear with significant arthropathy and tendinitis, acute cervical strain and sprain and acute lumbosacral strain and sprain. He determined that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* appellant had a 12 percent permanent impairment due to limited left shoulder motion: 6 percent due to 90 degrees of flexion, 5 percent due to 70 degrees of abduction and 1 percent due to 40 degrees of external rotation. Dr. Potash determined that appellant had an eight percent impairment due to 3/5 strength in his left supraspinatus muscles. He used the Combined Values Chart of the A.M.A., *Guides* to combine this 8 percent value with the 12 percent value for limited left shoulder motion to conclude that appellant had a 19 percent permanent impairment of his left arm.¹ Dr. Potash indicated that appellant reached maximum medical improvement on August 16, 1999 and stated that his left arm impairments were all employment related.

The Office referred appellant to Dr. Steve Valentino, an osteopath and Board-certified orthopedic surgeon, for further evaluation of his condition. On September 3, 1999 Dr. Valentino diagnosed resolved strain and sprain of the cervical spine and indicated that his left shoulder condition was not related to the December 30, 1996 employment injury because “there is no mechanism of injury to account for his [magnetic resonance imaging scan] findings noted in the left shoulder which are degenerative in nature.” He indicated that appellant did not have any residuals of his December 30, 1996 employment injury.

In December 29, 1999, appellant filed a claim for a schedule award due to his accepted employment injuries. In an August 15, 2002 decision, the Office denied his schedule award claim indicating that the medical evidence did not show that appellant’s left arm impairment was employment related. In a decision dated and finalized October 24, 2003, an Office hearing representative set aside the Office’s August 15, 2002 decision and remanded the case for further development of the medical evidence in connection with appellant’s schedule award claim. She found that there was sufficient medical evidence of record to expand the accepted conditions to include back strain, left elbow contusion and bilateral shoulder strains.

In December 2003, the Office referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for evaluation of his permanent impairment. On September 19, 2003 Dr. Smith determined that appellant had a 10 percent permanent impairment of his left arm.

¹ In calculating appellant’s impairment, Dr. Potash used the fourth edition of the A.M.A., *Guides* which became effective in 1995.

He indicated that appellant had five percent impairment due to limited left shoulder motion² and five percent impairment for “credible” pain and weakness.

In a May 13, 2004 award of compensation, the Office granted appellant a schedule award for a 10 percent permanent impairment of his left arm. The amount of the award, which ran for 31.20 weeks, was based on a weekly pay rate of \$374.67 at a 2/3 compensation rate.³ The Office reissued this award of compensation on November 1, 2004 with appeal rights. Appellant later claimed that the schedule award should have been based on a weekly pay rate of \$16.71 for a GS-10, step 5 employee (the date-of-injury pay rate) plus overtime pay and that it should have been paid at a 3/4 compensation rate because he served as legal guardian for his minor granddaughter.

In a decision dated and finalized October 6, 2005, an Office hearing representative set aside the November 1, 2004 award of compensation and remanded the case to the Office for further development. He directed Dr. Smith to clarify why he assigned a five percent impairment rating for pain and weakness. The Office hearing representative indicated that the schedule award should have been based on a weekly pay rate of \$16.71 for a GS-10, step 5 employee, without including overtime pay and that appellant properly received compensation at a 2/3 compensation rate because his granddaughter did not qualify as a dependent.

On remand, Dr. Smith did not respond to the request for clarification and appellant was referred to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for further evaluation of his permanent impairment. On December 16, 2005 Dr. Hanley determined that appellant had a nine percent permanent impairment of his left arm due to limited left shoulder motion, including one percent for internal rotation, four percent for abduction and adduction and four percent for flexion and rotation.⁴ He did not provide any impairment rating for pain or sensory or strength loss but noted that “internal strength is excellent,” that “neurological status is normal” and that despite having discomfort at night such discomfort was not significant enough to be rated under Chapter 18 of the A.M.A., *Guides*. On January 18, 2006 an Office district medical director indicated that he agreed with Dr. Hanley’s ratings.

In a February 3, 2006, 2004 award of compensation, the Office granted appellant a schedule award for a nine percent permanent impairment of his left arm. The amount of the award, which ran for 28.08 weeks, was based on a weekly pay rate of \$670.65 at a 2/3

² The findings reported by Dr. Smith actually show seven percent impairment for limited left shoulder motion: two percent for 60 degrees of internal rotation; two percent for 140 degrees of flexion; and three percent for 140 degrees of flexion. See A.M.A., *Guides* 476-77, 479, Figures 16-40, 16-43, 16-46. On January 20, 2004 an Office medical adviser indicated that appellant had a one percent impairment for pain associated with a cervical spine nerve and an eight percent impairment for limited left shoulder motion: two percent for 60 degrees of internal rotation; two percent for 140 degrees of flexion; three percent for 140 degrees of flexion; and one percent for 50 degrees of backward elevation or extension. The A.M.A., *Guides* would not support a finding of a one percent rating for 50 degrees of extension. See A.M.A., *Guides* 476, Figures 16-40.

³ The Office later reissued this award of compensation on November 1, 2004 with appeal rights.

⁴ Dr. Hanley indicated that appellant had 70 degrees of internal rotation, 70 degrees of external rotation, 110 degrees of abduction, 40 degrees of adduction, 130 degrees of flexion and 30 degrees of extension.

compensation rate. In a decision dated and finalized August 21, 2006, the Office hearing representative affirmed the Office's February 3, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulation⁶ 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 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.⁷ 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.⁸

ANALYSIS

The Office accepted that appellant sustained a cervical strain/sprain, back strain, left elbow contusion and bilateral shoulder strains. The Office granted him a schedule award for a nine percent permanent impairment of his left arm based on the December 16, 2005 opinion of Dr. Hanley, a Board-certified orthopedic surgeon who served as an Office referral physician.

Dr. Hanley determined that appellant had a nine percent permanent impairment of his left arm due to limited left shoulder motion, including one percent for internal rotation, four percent for abduction and adduction and four percent for flexion and rotation. The Board notes, however, that based on the values reported by Dr. Hanley appellant would have the following impairments based on limited left shoulder motions which add up to eight percent: one percent for 70 degrees of internal rotation; three percent for 110 degrees of abduction; three percent for 130 degrees of flexion and one percent for 30 degrees of extension.⁹

The Board further notes that, although the Office hearing representative remanded the case to the Office for further evaluation of whether appellant had impairment due to pain or sensory or strength loss, Dr. Hanley provided very little explanation of why he did not include impairment ratings for these categories. Dr. Hanley merely indicated that "internal strength is excellent," that "neurological status is normal" and that despite having discomfort at night such discomfort was not significant enough to be rated under Chapter 18 of the A.M.A., *Guides*. The

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

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

⁹ See A.M.A., *Guides* 476-77, 479, Figures 16-40, 16-43, 16-46.

A.M.A., *Guides* provides specific, detailed procedures for evaluating pain, and sensory and strength loss, but Dr. Hanley did not specifically explain how he applied these portions of the A.M.A., *Guides*.

As noted above, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. The case shall be remanded to the Office for further development of the nature and extent of appellant's left arm impairment to include clarification by Dr. Hanley regarding any impairment rating appellant might be entitled to for limited left shoulder motion, pain, sensory loss or strength loss. After such development it deems necessary, the Office should issue an appropriate decision regarding appellant's entitlement to schedule award compensation.¹⁰

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than a nine percent permanent impairment of his left arm, for which he received a schedule award.

¹⁰ Given the Board's disposition of the first issue of this case, it is premature for the Board to consider the second issue regarding the pay rate for schedule award compensation. The Office should address the pay rate matter as part of its development of appellant's claim and issue a decision which details its findings on this matter.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 21, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: August 3, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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