

A December 15, 2005 magnetic resonance imaging (MRI) scan of appellant's right shoulder noted a diffuse increased signal throughout the rotator cuff consistent with underlying tendinosis. Dr. Jerry Domescik, a Board-certified radiologist, diagnosed diffuse tendinosis of the rotator cuff associated with a near full thickness tear involving the supraspinatus tendon at its attachment to the greater tuberosity and down projecting degenerative changes of the acromioclavicular joint compromising the subacromial space consistent with clinical impingement. In a January 3, 2006 report, Dr. Wing K. Chang, a Board-certified physiatrist and appellant's treating physician, diagnosed bilateral rotator cuff tendinitis, right greater than left, right rotator cuff tear and neck and upper back myofascial pain. He noted that appellant had positive signs of impingement and continuing weakness in her right rotator cuff.

In a January 11, 2006 report, Dr. Douglas H. Murray, a Board-certified orthopedic surgeon and associate of Dr. Chang, diagnosed right shoulder pain with overlapping neck pain as well as a significant partial thickness rotator cuff tear. He noted the results of the December 15, 2005 MRI scan and reported that appellant's active range of motion for the right shoulder was 170 degrees of flexion with pain and 30 degrees of external rotation.

In a May 17, 2006 report, Dr. Murray provided an impairment rating. He measured 100 degrees of active flexion of the right shoulder, 140 degrees of passive flexion, 100 degrees of abduction, 90 degrees of internal rotation and 90 degrees of external rotation. Dr. Murray also noted that appellant's rotator cuff strength was slightly diminished and that she had minimally positive impingement symptoms. He concluded:

“[Appellant's] impairment rating according to the [American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition (A.M.A., *Guides*)] is seven percent whole person. This is obtained with the range of motion above, using [F]igure 16-40 for flexion, 16-46 for rotation and 16-43 for abduction. Table 16-35 is used for some weakness on [flexion] and then the upper extremity impairment of 9 percent for motion and 3 percent for weakness gives a 12 percent upper extremity impairment, which is 7 percent whole person regarding her shoulder injury.”

On July 31, 2006 appellant requested a schedule award.

In an August 2, 2006 report, an Office medical adviser reviewed Dr. Murray's impairment rating and calculated appellant's impairment based upon loss of range of motion. Using Dr. Murray's measurements, he found that 140 degrees of flexion corresponded to a three percent impairment and 100 degrees of abduction corresponded to a four percent impairment rating for the right arm. The Office medical adviser found that appellant's adduction and extension were normal and also noted that 90 degrees of internal and external rotation corresponded to no permanent impairment. He added the impairment values from flexion and abduction to determine that appellant had seven percent permanent impairment of the right arm. The Office medical adviser explained that he relied upon the A.M.A., *Guides*, fifth edition, pages

476-79 in his calculations.¹ He found that appellant reached maximum medical improvement on May 17, 2006, the date of Dr. Murray's examination.

On August 9, 2006 the Office informed Dr. Murray of the medical adviser's rating of seven percent permanent impairment of appellant's right arm. It requested his opinion on this determination.

Dr. Murray responded on August 23, 2006. Although he stated that he had explained why the Office should find that appellant had 12 percent permanent impairment of the right arm, he added: "I think seven percent impairment is fine. I think it would be better to just seal it at seven percent and say I agree with it and allow them to close the case."

On September 26, 2006 the Office granted appellant a schedule award for seven percent permanent impairment of the right arm.

On October 30, 2006 appellant requested an oral hearing. She provided an October 11, 2006 report from Dr. Murray and an October 24, 2006 report from Dr. Chang.

By decision dated November 30, 2006, the Office denied appellant's oral hearing request as untimely filed. The Office also declined to grant a discretionary hearing, advising that the matter could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

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 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 -- ISSUE 1

The Board finds that appellant has no more than seven percent impairment of the right arm. The record reflects that the Office accepted appellant's claim for bilateral shoulder bursitis and right shoulder rotator cuff tear. On May 17, 2006 appellant's physician, Dr. Murray, found that appellant had 12 percent impairment of the right arm. He measured 100 degrees of active flexion, 140 degrees of passive flexion, 100 degrees of abduction, 90 degrees of internal rotation

¹ A.M.A., *Guides* 476-79 (fifth edition).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *See id.*

and 90 degrees of external rotation. Dr. Murray stated that his findings for flexion, rotation and abduction equated to nine percent impairment for loss of range of motion, under the A.M.A., *Guides*. He also advised that appellant had weakness on forward elevation that warranted three percent impairment.

On August 2, 2006 the Office medical adviser calculated that appellant had seven percent impairment of the right arm. He relied upon Dr. Murray's measurements of 140 degrees of flexion, 100 degrees of abduction and 90 degrees of internal and external rotation, in determining appellant's impairment rating. Pursuant to the A.M.A., *Guides*, Figure 16-40 on page 476, which measures impairment based on loss of flexion and extension, 140 degrees of flexion corresponds to a three percent impairment rating.⁵ Because Dr. Murray measured appellant's shoulder extension as normal, no additional impairment rating was warranted extension.⁶ The A.M.A., *Guides*, Figure 16-43 on page 477, measures loss of range of motion based on abduction and adduction.⁷ Pursuant to Figure 16-43, appellant's 100 degrees of abduction corresponds to a four percent impairment rating.⁸ As Dr. Murray measured appellant's adduction as normal, no additional impairment rating was warranted based on abduction and adduction.⁹ The A.M.A., *Guides*, Figure 16-46 on page 479, measures impairment based on internal and external rotation.¹⁰ Pursuant to Figure 16-43, 90 degrees of internal and external rotation corresponds to no impairment.¹¹

The Board finds that the Office medical adviser properly calculated appellant's impairment rating at seven percent; three percent impairment based on loss of flexion and four percent impairment based on loss of abduction.¹² Dr. Murray's initial impairment rating of 12 percent for appellant's right arm did not comport with the A.M.A., *Guides*. He did not explain how appellant's range of motion measurements yielded nine percent impairment under the A.M.A., *Guides*. When the Office gave Dr. Murray an opportunity to comment on the Office medical adviser's calculations, he concurred with the medical adviser's finding of seven percent impairment. Dr. Murray also recommended that the Office award appellant three percent impairment based on weakness under Table 16-35 of the A.M.A., *Guides*.¹³ However, the A.M.A., *Guides* state that the use of such a method for calculating impairment is appropriate only in a rare case where the loss of strength represents an impairing factor that has not been considered adequately by other methods. This section of the A.M.A., *Guides* states that

⁵ *Supra* note 1 at 476, Figure 16-40.

⁶ *Id.*

⁷ *Id.* at 477, Figure 16-43.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 479, Figure 16-46.

¹¹ *Id.*

¹² *Id.* at 476-477, Figures 16-40, 16-43.

¹³ *Id.* at 510.

“decreased strength cannot be rated in the presence of decreased motion.”¹⁴ Dr. Murray did not explain how his inclusion of weakness in appellant’s impairment rating comported with the A.M.A., *Guides* or why it would be appropriate in appellant’s case.

The Board finds that appellant has no more than a seven percent permanent impairment of the right arm, for which she has received a schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.¹⁵ Section 10.615 of the federal regulation implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹⁶ The Office’s regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹⁷

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹⁸ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁹ Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.²⁰

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant’s request for an oral hearing on the grounds that it was untimely filed. The Office issued its schedule award decision on September 26, 2006. Appellant requested an oral hearing on October 30, 2006, more than 30 days after the date of issuance of the decision appealed.

¹⁴ *Id.* at 508.

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. § 10.615.

¹⁷ 20 C.F.R. § 10.616(a).

¹⁸ 5 U.S.C. §§ 8101-8193.

¹⁹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

²⁰ *Teresa M. Valle*, 57 ECAB __ (Docket No. 06-438, issued April 19, 2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

On appeal, appellant contends that “standard business practice” allowed for five days for her to receive the decision and also stated that it was not mailed until October 11, 2006. The Act, however, states that a request must be made within 30 days from the date of issuance of the decision, not from the date appellant receives the decision.²¹ Moreover, the evidence indicates that the decision was properly addressed and therefore it is presumed to have been received by appellant.²²

After it determined that appellant’s request was untimely, the Office exercised its discretion by denying appellant’s request for a hearing. The Office determined that appellant’s case would be best served by her submission of a request for reconsideration along with new supporting evidence. The Board finds that the Office acted within its discretion in denying appellant’s hearing request as untimely, because she failed to file the request within the statutory time frame.

CONCLUSION

The Board finds that appellant has no more than seven percent permanent impairment of the right arm, for which she received a schedule award. The Office properly denied appellant’s request for an oral hearing.²³

²¹ See 5 U.S.C. § 8124(b)(1). See also 20 C.F.R. § 10.616(a) (the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought).

²² See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

²³ Following the Office’s September 19, 2006 decision, appellant submitted additional evidence to the Office. However, as the Office has not considered this evidence in reaching a decision, the Board may not consider it for the first time on appeal. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the November 30 and September 19, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 14, 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