



appellant underwent on April 24, 2001. On July 1, 2003 appellant injured her right shoulder while lifting a tub of mail. The Office accepted the claim for right shoulder sprain.<sup>1</sup>

In a report dated September 9, 2004, Dr. Nicholas P. Diamond, an osteopath, found that appellant had an 18 percent impairment of the right upper extremity. He stated:

“Examination of the right shoulder reveals acromioclavicular point tenderness.... Range of motion reveals forward elevation of 0 to 150/180 degrees; abduction of 150/180 degrees; crossover adduction of 0 to 60/75 degrees; external rotation of 0 to 90/90 degrees, and internal rotation of 50/80 degrees. All ranges of motion were carried through with pain at the extremes reached.”

Dr. Diamond found, based on the above calculations, that appellant had a two percent impairment for right shoulder range of motion deficit based on flexion pursuant to Figure 16-40 at page 476 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) [the A.M.A., *Guides*]; a 1 percent impairment for right shoulder range of motion deficit based on abduction pursuant to Figure 16-43 at page 476 of the A.M.A., *Guides*; a 2 percent impairment for right shoulder internal rotation pursuant to Figure 16-46 at page 479 of the A.M.A., *Guides*; a 10 percent impairment for right shoulder resection arthroplasty pursuant to Table 16-27 at page 506 of the A.M.A., *Guides*; and a 3 percent impairment for pain under Table 18-1 at page 574 of the A.M.A., *Guides*, for a total 18 percent right upper extremity impairment.

On January 31, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her right upper extremity.

In a report dated January 30, 2006, an Office medical adviser found that appellant had a 16 percent permanent impairment.

The Office found that there was a conflict in the medical evidence between the impairment ratings of Dr. Diamond and the Office medical adviser. The Office remanded the case for referral to an impartial medical specialist to resolve the conflict regarding the correct amount of impairment to assign to appellant’s accepted right shoulder condition.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David A. Bundens, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated March 28, 2006, Dr. Bundens determined that appellant had a 16 percent right upper extremity impairment due to her accepted right shoulder condition. He concurred with Dr. Diamond’s rating of two percent impairment for right shoulder internal rotation pursuant to Figure 16-46 at page 479 of the A.M.A., *Guides*. However, Dr. Bundens measured a forward flexion of 100 degrees, which yielded a five percent impairment for right shoulder range of motion deficit based on flexion pursuant to Figure 16-40 at page 476 of the A.M.A., *Guides*; abduction of 90 degrees, which yielded a four percent impairment for right shoulder range of motion deficit based on abduction pursuant to Figure 16-43 at page 476 of the

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<sup>1</sup> This claim was referenced by the hearing representative in his December 8, 2006 decision. However, there is no documentation pertaining to this claim contained in the instant case file.

A.M.A., *Guides*; Dr. Bundens also reduced the impairment for appellant's right shoulder resection arthroplasty pursuant to Table 16-27 at page 506 of the A.M.A., *Guides* to five percent. He further stated:

“Dr. Diamond refers to [T]able 16-27 on [p]age 506 for resection arthroplasty but the acromioplasty is not within that list. A total resection of the distal clavicle is 10 percent. The acromioplasty is just a resection of the spurs on the underneath; therefore, I would judge this to be about five percent. I do not feel that a separate rating is noted for pain because I believe this is implicit in an impingement syndrome that requires an acromioplasty; therefore, I do not believe a separate award for pain would be warranted.”

By decision dated April 26, 2006, the Office granted appellant a schedule award for a 16 percent permanent impairment of the right upper extremity for the period March 28, 2006 to March 12, 2007, for a total of 49.92 weeks of compensation.

By letter dated May 3, 2006, appellant's attorney requested an oral hearing, which was held on October 17, 2006.

By decision dated December 8, 2006, an Office hearing representative affirmed the April 26, 2006 Office decision, finding that Dr. Bundens' referee opinion that appellant was entitled to no greater than a 16 percent impairment for her right upper extremity represented the weight of the medical evidence.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>3</sup> However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.<sup>4</sup>

Section 8123(a) of the Act provides that, 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.<sup>5</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>3</sup> 5 U.S.C. § 8107(c)(19).

<sup>4</sup> 20 C.F.R. §10.404.

<sup>5</sup> 5 U.S.C. § 8123(a).

## ANALYSIS

The Board initially finds that the Office erred in finding a conflict in the medical evidence prior to its December 8, 2006 decision. The Office found that there was a conflict between the impairment ratings of Dr. Diamond, who found that appellant had an 18 percent right upper extremity impairment, and the Office medical adviser, who accorded appellant a 16 percent impairment for her right upper extremity impairment. However, a review of the Office medical adviser's January 30, 2006 report reveals that he miscalculated the amount of impairment presented by Dr. Diamond's September 9, 2004 evaluation. Although the Office medical adviser adopted the identical findings and impairment ratings for range of motion deficit, right shoulder resection arthroplasty and pain computed by Dr. Diamond, he improperly found that these calculations added up to a 16 percent impairment. As the two physicians of record who rendered impairment ratings essentially presented the same impairment rating, based on the same tables of the A.M.A., *Guides*, the Board finds that no conflict existed in the medical evidence at the time of the Office's referral to Dr. Bundens, whose March 28, 2006 report is therefore not entitled to the special weight of an impartial medical specialist.

The Board finds, however, that, although Dr. Bundens' opinion does not merit the special weight of an impartial medical examiner, it is entitled to its own intrinsic weight.<sup>6</sup> Dr. Bundens concurred with Dr. Diamond's rating of two percent impairment for right shoulder internal rotation pursuant to Figure 16-46 at page 479 of the A.M.A., *Guides*. However, he measured a forward flexion of 100 degrees, which yielded a five percent impairment for right shoulder range of motion deficit based on flexion pursuant to Figure 16-40 at page 476 of the A.M.A., *Guides*; and abduction of 90 degrees, which yielded a four percent impairment for right shoulder range of motion deficit based on abduction pursuant to Figure 16-43 at page 476 of the A.M.A., *Guides*. These findings were proper and in conformance with the applicable tables of the A.M.A., *Guides*.<sup>7</sup> In addition, Dr. Bundens properly rejected the five percent impairment Dr. Diamond awarded for pain pursuant to Chapter 18. FECA Bulletin No. 01-05 and section 18.3(b) provide that Chapter 18 should not be used to rate pain-related impairment when conditions are adequately rated in the other chapters of the A.M.A., *Guides*. The Board has held that an additional rating for pain is not appropriate in the absence of an explanation of why the protocols of other chapters of the A.M.A., *Guides* would not adequately rate appellant's impairment.<sup>8</sup> Lastly, the Board notes that Table 17-2 of the A.M.A., *Guides* expressly prohibits an award for impairments based on gait derangement, muscle atrophy, muscle strength (loss), range of motion loss or ankylosis in combination with an impairment due to a diagnosis-based estimate (resection

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<sup>6</sup> See *Pierre W. Peterson*, 39 ECAB 955 (1988).

<sup>7</sup> These findings for loss of range of motion are supported by the figures and tables referenced in subchapter 16.4i, "Shoulder Motion Impairment," at pages 474-77 of the A.M.A., *Guides*. The Board notes that Dr. Bundens accorded a greater degree of impairment for loss of flexion and abduction than did Dr. Diamond in his September 9, 2004 report, which was issued 16 months years prior to Dr. Bundens' March 28, 2006 report. As Dr. Bundens' report is the more recent of the two, it may be considered an updated, and more accurate, medical evaluation of appellant's current condition.

<sup>8</sup> See *Mark A. Holloway*, 55 ECAB 321 (2004).

arthroplasty).<sup>9</sup> The Board therefore disallows the five percent impairment that Dr. Bundens accorded for appellant's July 2000 resection arthroplasty.

The Board finds that Dr. Bundens' opinion constituted a sufficient basis for an award based on an 11 percent right upper extremity impairment, as modified. The Office therefore properly found that his opinion constituted the weight of the medical evidence. Following this decision, appellant's attorney requested a hearing, but did not submit any additional medical evidence. The Board therefore affirms the December 8, 2006 decision of the Office hearing representative.

As there is no other medical evidence establishing that appellant sustained any additional permanent impairment, the Board finds that appellant has not established that she has more than a 16 percent impairment of the right upper extremity.

### **CONCLUSION**

The Board finds that appellant has no more than a 16 percent impairment of the right upper extremity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 8, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 26, 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

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<sup>9</sup> See *James R. Taylor*, 56 ECAB \_\_\_ Docket No. 05-135 (2005). In this case the Board held that the principle enunciated in Table 17.2, page 526 for not combining these awards in lower extremity impairments also applies to upper extremity impairments.