United States Department of Labor
Employees' Compensation Appeals Board

N.B., Appellant	)	
and	)	**Docket No. 07-1622**
	)	**Issued: November 26, 2007**
DEPARTMENT OF THE ARMY, AIR DEFENSE CENTER, Fort Bliss, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated September 12, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of her claim for a schedule award.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has more than a four percent impairment of her left upper extremity for which she received a schedule award.

FACTUAL HISTORY

On January 23, 2002 appellant, then a 61-year-old "milper" technician filed a traumatic injury claim alleging that she experienced pain in her left shoulder on January 16, 2002 in the performance of duty. The Office accepted the claim for rotator cuff syndrome and paid appropriate compensation benefits. The Office also authorized physical therapy and diagnostic testing. Appellant continued to work with restrictions.

On March 8, 2006 appellant requested a schedule award. By letter dated March 31, 2006, the Office advised her that it was unable to process her claim for a schedule award as additional information was needed, including verification from her physician that she had reached maximum medical improvement. The Office advised appellant to submit medical evidence in support of her claim based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*).

In an April 17, 2006 report, Dr. Alvaro A. Hernandez, a Board-certified orthopedic surgeon and treating physician, noted that appellant was still experiencing comfort in her left shoulder. He advised that a physical examination revealed "pain at the extremes, pain with backward flexion, tenderness about the rotator cuff tendons."

On May 22, 2006 the Office referred appellant for a second opinion examination to Dr. Randy Pollet, a Board-certified orthopedic surgeon, to determine appellant's current status and prospects for returning to work, her permanent work restrictions and an impairment rating.

In a June 22, 2006 report, Dr. Pollet utilized the A.M.A., *Guides*, noted appellant's history of injury and treatment and conducted a physical examination. He provided findings for range of motion which included forward flexion of 160 degrees or one percent, backward elevation of 40 degrees or one percent, abduction of 140 degrees or two percent, adduction of 40 degrees or zero percent, internal rotation of 80 degrees or zero percent, external rotation of 90 degrees or zero percent, and extension of 30 degrees or one percent. Dr. Pollet opined that appellant had an impairment of five percent of the left shoulder and that her date of maximum medical improvement was June 22, 2006.

In a July 28, 2006 report, an Office medical adviser utilized the A.M.A., *Guides*. He referred to Figures 16-37, 16-40 and 16-46[1] and determined that appellant had an impairment of four percent to the left arm. The medical adviser noted flexion of 160 degrees equated to one percent, extension of 30 degrees equated to one percent, abduction of 140 degrees equated to two percent. He also noted that adduction of 40 degrees, internal rotation of 80 degrees, and external rotation of 90 degrees equated to zero percent. The medical adviser concluded that appellant had four percent impairment based on loss of range of motion. He indicated that the difference in his report compared to Dr. Pollet's report, arose because he did not consider shoulder extension and backward elevation as separate movements and that he believed they were the same. The medical adviser indicated that appellant had reached maximum medical improvement on June 22, 2006.

In an August 16, 2006 report, Dr. Hernandez advised that appellant experienced shoulder discomfort. He noted the prior impairment estimate of 5 percent, but now found 10 percent impairment. Dr. Hernandez explained that his impairment was based on the A.M.A., *Guides*. He opined that appellant had 140 degrees of flexion, 40 degrees of extension, adduction of 30 degrees, abduction of 140 degrees, internal rotation of 40 degrees, and external rotation of 70 degrees, which was equal to a 10 percent impairment rating to the upper extremity.

[1] A.M.A., *Guides* 476, 477, 479.

On September 12, 2006 the Office granted appellant a schedule award for a four percent permanent impairment of the left upper extremity. The award covered a period of 12.48 weeks from June 22 to September 17, 2006.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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 regulations as the appropriate standard for evaluating schedule losses.[4]

ANALYSIS

On August 16, 2006 Dr. Hernandez noted that he had utilized the A.M.A., *Guides* and provided range of motion findings. His findings included 140 degrees of flexion, 40 degrees of extension, adduction of 30 degrees, abduction of 140 degrees, internal rotation of 40 degrees and external rotation of 70 degrees. Dr. Hernandez opined that appellant had an impairment of 10 percent to the upper extremity. However, he failed to properly explain how he calculated the impairment rating under the respective tables as set forth in the A.M.A., *Guides*. As such, Dr. Hernandez' impairment rating does not conform to the A.M.A., *Guides.* It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. In such cases, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[5]

In a July 28, 2006 report, the Office medical adviser applied the findings of Dr. Pollet, the second opinion physician, to the fifth edition of the A.M.A., *Guides.* Dr. Pollet referred to Table 16-40[6] and noted that flexion of 160 degrees was equal to a one percent impairment of the upper extremity and that extension of 30 degrees was equal to a one percent impairment of the upper extremity. Regarding abduction, he referred to Table 16-43[7] and noted that 140 degrees of

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides* (5th ed. 2001).

[5] *See John L. McClanic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

[6] A.M.A., *Guides* 476.

[7] *Id.* at 477.

abduction equated to two percent.[8] The Office medical adviser also noted that adduction of 40 degrees was equal to zero percent. Regarding internal rotation, he referred to Figure 16-46[9] and determined that 80 degrees of internal rotation and 90 degrees of external rotation were equal to impairments of zero percent. The Office medical adviser concluded that appellant had four percent impairment. He also noted that he did not include an additional impairment of one percent for "backward elevation," as provided by Dr. Pollet, since it was the same as shoulder extension. The Office medical adviser explained that they were not considered separate movements. The Board notes that the A.M.A., *Guides* allow findings for flexion and extension of the shoulder, but do not contain any provision for rating "backward elevation."[10]

The Board finds that there is no other medical evidence of record, based upon a proper application of the A.M.A., *Guides*, to establish that appellant has more than a four percent permanent impairment of the left upper extremity. Accordingly, the Board finds that appellant has no more than a four percent permanent impairment of the right upper extremity.

On appeal, appellant alleged that she was entitled to a 15 percent schedule award based upon the report of her physician. However, as noted, the record establishes that appellant is entitled to no more than a four percent impairment of the left upper extremity.[11]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained more than a four percent permanent impairment of her left upper extremity, for which she received a schedule award.

[8] The Board notes that he actually indicated Figure 16-37; however, it appears to be a typographical error, as his calculation of two percent matches the 140 degrees for abduction in Figure 16-43.

[9] A.M.A., *Guides* 479.

[10] *See* A.M.A., *Guides* 476, Figure 16-40.

[11] The Board notes that subsequent to the Office's September 12, 2006 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2006 is affirmed.

Issued: November 26, 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