

In a report dated April 10, 2003, Dr. Nicholas P. Diamond, an attending osteopath, determined that appellant had a 27 percent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition. On September 8, 2003 an Office medical adviser found that appellant had a nine percent impairment of his right thumb based on the A.M.A., *Guides*. On September 23, 2003 it granted appellant a schedule award for a nine percent permanent impairment of the right upper extremity. By decision dated August 19, 2004, an Office hearing representative affirmed the September 23, 2003 decision. In an August 2, 2005 decision, the Board set aside the Office's September 23, 2003 schedule award. The Board found that the Office hearing representative erred in finding that the impairments for appellant's September 27, 1997 right shoulder injury and June 24, 2002 thumb injury should be rated separately. The Board noted that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.² The Board remanded the case to the Office for consolidation of appellant's claims and for referral to an appropriate medical specialist in order to obtain an assessment of appellant's right upper extremity impairment. The facts of this case are set forth in the Board's August 2, 2005 decision and are herein incorporated by reference.

In a report dated November 17, 2005, Dr. Richard Sacks, Board-certified in orthopedic surgery, found that appellant had a 19 percent impairment of the right upper extremity, combining impairments of the right arm and of the right thumb. Regarding the right thumb, he found four percent impairment for 20 degrees flexion of the interphalangeal (IP) joint under Figure 16-12 page 456 and four percent impairment for 20 degrees flexion of the metatarsophalangeal (MP) joint under Figure 16-15 page 457. This totaled eight percent impairment of the thumb for loss of range of motion. Dr. Sacks found that an eight percent thumb impairment represented three percent impairment of the right hand pursuant to Table 16-1, page 438. In turn, three percent impairment of the right hand represented three percent upper extremity impairment under Table 16-2 at page 439.

For the right shoulder, Dr. Sacks found that a 120 degree flexion for the right shoulder represented four percent upper extremity impairment and 130 degrees of abduction was a two percent upper extremity impairment. He rated 10 percent impairment for a resection arthrotomy under Table 16-27. The range of motion of 6 percent was combined with the 10 percent impairment to total 16 percent impairment for the right shoulder. Using the Combined Values Chart, Dr. Sacks found a total 19 percent impairment of the right upper extremity after combining the shoulder loss with the 3 percent for the upper extremity due to the thumb.

In a decision dated December 19, 2005, the Office found that appellant had 19 percent right upper extremity impairment based on Dr. Sacks' opinion. As appellant had previously

² See *Dale B. Larson*, 41 ECAB 481, 490 (1990); *Pedro M. DeLeon, Jr.*, 35 ECAB 487, 492 (1983). The Board has held that where the residuals of an injury to a member of the body specified in the schedule award provisions of the Federal Employees' Compensation Act extend into an adjoining area of a member also enumerated in the schedule, such as an injury of the finger into the hand, of a hand into the arm or of a foot into the leg, the schedule award should be made on the basis of the percentage of loss of use of the larger member. See *Tonya D. Bell*, 43 ECAB 845, 849 (1992).

received a schedule award for 33 percent impairment of the right arm, he was not entitled to any additional award.

On December 22, 2005 appellant's attorney requested an oral hearing, which was held on April 26, 2006. Appellant did not submit any additional medical evidence with his request.

By decision dated July 11, 2006, an Office hearing representative affirmed that appellant had 19 percent right upper extremity impairment. However, the Office's December 19, 2005 decision was set aside. The hearing representative directed the district office to compute the amount of compensation appropriate for a 19 percent permanent impairment of the right upper extremity, utilizing a pay rate of \$718.00, at the augmented compensation rate. The hearing representative stated that, if the amounts actually paid to appellant amounted to less than the amount due under the current award, he should be paid the difference. If he was not entitled to additional compensation the Office should issue a formal decision outlining the basis for such determination.

By decision dated October 30, 2006, the Office found that appellant was not entitled to any additional schedule award compensation. It noted that a schedule award for 19 percent impairment of the right arm, from November 17, 2005 to January 5, 2007, using a pay rate of \$718.00 at the augmented $\frac{3}{4}$ rate would result in total compensation in the amount of \$34,403.53. The Office determined that, for the two schedule awards previously paid, appellant had received total compensation in the amount of \$41,373.17. It found that appellant was not entitled to any additional compensation.

On November 2, 2006 appellant's attorney requested an oral hearing, which was held on February 21, 2007. He argued that the Office erred in finding appellant should be paid a schedule award for a 19 percent right upper extremity impairment, in light of the May 19, 2005 decision finding that he had a 23 percent right upper extremity impairment from the 1997 shoulder injury. Appellant's attorney further argued that the 23 percent award was paid at the incorrect pay rate. He contended that the Office needed to determine whether appellant was entitled to additional compensation based on payment of the award at the correct pay rate.

By decision dated May 21, 2007, an Office hearing representative affirmed the October 30, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Act³ set 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.⁴ 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

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁴ 5 U.S.C. § 8107(c)(19).

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.⁵

ANALYSIS

The Board finds that appellant has not established more than 19 percent permanent impairment of the right upper extremity. Dr. Sacks found 19 percent right upper extremity impairment based on impairments to appellant's right thumb and right shoulder. He rated four percent impairment for 20 degrees flexion of the IP joint under Figure 16-12 at page 456 and four percent impairment for 20 degrees flexion of the MP joint under Figure 16-15 at page 457. This totaled eight percent impairment of the thumb, which Dr. Sacks then converted to upper extremity impairment he found that an eight percent thumb impairment was three percent impairment of the right hand under Table 16-1 at page 438. Dr. Sacks then found that a three percent impairment of the right hand was three percent upper extremity impairment under Table 16-2 at page 439. He measured appellant's right shoulder range of motion and applied these findings to Figure 16-40 and Figure 16-43 of the A.M.A., *Guides*. Dr. Sacks found that 120 degrees flexion of the right shoulder was four percent impairment and 130 degrees of abduction was a two percent upper extremity impairment. He also allowed a 10 percent impairment for a resection arthrotomy under Table 16-27. Dr. Sacks combined the range of motion loss with the arthroscopic loss to total 16 percent impairment for the right shoulder. Using the Combined Values Chart, he found a total 19 percent impairment of the right upper extremity. This award was proper and is in conformance with the A.M.A., *Guides*.

The Office properly determined that the rating by Dr. Sacks represented the weight of the medical evidence. As appellant previously reviewed a schedule award for 23 percent permanent impairment of the upper extremity, he is not entitled to an additional award. The Office properly computed the amount of appellant's schedule award utilizing the pay rate of \$718.00 at the augmented compensation rate, or \$34,403.53, and comparing it to the amount of compensation paid to appellant in the prior schedule award, or \$41,373.17. As the amount paid under the prior schedule award exceeds the amount appellant would be entitled to for 19 percent permanent impairment for the right arm, the Office properly found that he was not entitled to additional schedule award compensation.

There is no other probative medical evidence establishing that appellant sustained additional permanent impairment. The Board will affirm the Office's October 30, 2006 and May 21, 2007 decisions finding that appellant sustained 19 percent permanent impairment to his right upper extremity.

CONCLUSION

The Board finds that appellant has no more than a 19 percent impairment of the right upper extremity.

⁵ 20 C.F.R. § 10.404.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2007 and October 30, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2008
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