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

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| **T.O., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1757** |
| | ) | **Issued: January 10, 2008** |
| **U.S. POSTAL SERVICE, NEW AUGUSTA BRANCH, Indianapolis, IN, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On June 20, 2007 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated April 2, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination in this case.

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish that he has greater than a three percent impairment of the right upper extremity for which he received a schedule award.

### ***FACTUAL HISTORY***

On March 13, 2006 the Office accepted that appellant, then a 54-year-old letter carrier, sustained an employment-related right rotator cuff tear. Appellant came under the care of Dr. Jon M. Sieber, a Board-certified orthopedic surgeon, who performed surgical repair on

March 29, 2006. He returned to limited duty on April 18, 2006 and on September 26, 2006 filed a schedule award claim. A functional capacity evaluation was completed on July 27, 2006.

In an August 3, 2006 report, Dr. Sieber advised that a functional capacity evaluation was appropriate. He noted that appellant had a little bit of weakness in his shoulder girdle which represented a nine percent upper extremity impairment. In an October 18, 2006 report, Dr. Sieber provided an impairment rating of appellant's right upper extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[1] He noted range of motion measurements of 160 degrees of forward elevation, 165 degrees of abduction, 90 degrees of external rotation and a 20 degree lack of symmetry of internal rotation. Dr. Sieber stated that, under the figures found on pages 476-79 of the A.M.A., *Guides*, appellant had a three percent upper extremity impairment for loss of range of motion. He stated that, while there was subjectivity of his assessment, because of residual weakness in flexion and external rotation of the shoulder girdle as well as residual pain, under Table 16-35, appellant would be entitled to an additional six percent upper extremity impairment for a total nine percent impairment of the upper extremity.

The Office referred Dr. Sieber's report to an Office medical adviser. In a February 3, 2007 report, the Office medical adviser noted Dr. Sieber's range of motion findings. He advised that maximum medical improvement had been reached on October 18, 2006 and that, under Figure 16-40 of the A.M.A., *Guides*, appellant had a one percent impairment for flexion of 160 degrees, under Figure 16-43, a one percent impairment for abduction of 165 degrees, and that, under Figure 16-46, appellant had a one percent impairment for 70 degrees of internal rotation and no impairment for 90 degrees of external rotation, for a right upper extremity impairment rating of three percent. The Office medical adviser stated that he did not agree with Dr. Sieber's additional impairment for strength as the A.M.A., *Guides* clearly states that no impairment can be given for strength in the presence of decreased range of motion. While appellant's external rotation was normal, multiple therapy notes in the record demonstrated that he had more or less normal external rotation strength and was therefore not entitled to a strength deficit for external rotation either.

By decision dated April 2, 2007, appellant was granted a schedule award for a three percent impairment of the right upper extremity, to run from October 18 to December 22, 2006.

## ***LEGAL PRECEDENT***

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in

[1] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[6] Office procedures provide that to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred ("date of maximum medical improvement"), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment, and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*. The procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment, and the Office medical adviser should provide rationale for the percentage of impairment specified.[7]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[8]

Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[9] Section 16.4 provides that in evaluating abnormal motion both active and passive motion measurements are necessary to evaluate the joint motion under the appropriate charts, and these should be added to obtain the total motion impairment.[10] Section 16.8a of the A.M.A., *Guides* provides that, in a rare case, if the examiner believes the

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[4] A.M.A., *Guides*, *supra* note 1.

[5] *See Joseph Lawrence, Jr.*, *supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(b-d) (August 2002).

[8] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[9] A.M.A., *Guides*, *supra* note 1 at 433-521.

[10] *Id.* at 451-52.

individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately. An example of such situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.[11]

## ***ANALYSIS***

The Board finds that appellant has no more than a three percent right upper extremity impairment. In a report dated October 18, 2006, Dr. Sieber provided range of motion measurements for appellant's right shoulder and concluded that he had three percent impairment due to loss of motion. Dr. Sieber's findings of 165 degrees of abduction under Figure 16-43 of the A.M.A., *Guides*, represents a one percent impairment.[12] Under Figure 16-40, forward flexion of 160 degrees yields an impairment of one percent,[13] and under Figure 16-46 internal rotation of 70 degrees (or a lack of 20 degrees) and external rotation of 90 degrees yields impairments of one and zero percent respectively.[14] Dr. Sieber then properly added the loss of shoulder motion units to conclude that appellant had three percent right upper extremity impairment due to loss of motion.[15] In a February 3, 2007 report, an Office medical adviser reviewed Dr. Sieber's report and agreed with his conclusion that appellant had a three percent right upper extremity impairment due to loss of motion. While Dr. Sieber also awarded an additional six percent for loss of strength, the Office medical adviser properly found that appellant was not entitled to an additional award for loss of strength. The A.M.A., *Guides* provides that only in rare cases should an additional award be given for loss of strength and it cannot be rated in the presence of decreased motion or painful conditions.[16] As an example, an increased rating for loss of strength could be made if, after healing, a palpable muscle defect is present.[17] Such is not the case here. There is no other medical evidence of record that provides a greater rating for appellant's right shoulder impairment. He did not establish that he is entitled to a schedule award greater than the three percent awarded on April 20, 2007.[18]

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[11] *Id*. at 508.

[12] *Id.* at 477.

[13] *Id.* at 476.

[14] *Id.* at 479.

[15] *Id.* at 474, section 16.4i.

[16] *Id*. at 508, section 16.8a.

[17] *Id.*

[18] A claimant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Tommy R. Martin*, 56 ECAB ___ (Docket No. 03-1491, issued January 21, 2005).

## ***CONCLUSION***

The Board finds that appellant has failed to establish that he is entitled to a schedule award greater than the three percent right upper extremity impairment previously awarded.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 2, 2007 be affirmed.

Issued: January 10, 2008
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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