

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

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**J.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Louis, MO, Employer**

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**Docket No. 08-19  
Issued: June 9, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 22, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 28, 2007 issuing appellant a schedule award for an additional 6 percent impairment of his right upper extremity, for a total of 17 percent impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision.

**ISSUE**

The issue is whether appellant has established that he is entitled to an additional schedule award for greater than a total of 17 percent impairment of the right upper extremity.

**FACTUAL HISTORY**

On November 22, 2005 appellant, then a 48-year-old automotive technician, filed a traumatic injury claim alleging that on that date he sustained an injury to his right shoulder and low back while lifting a transmission. By letter dated January 11, 2006, the Office accepted his

claim for right shoulder tendinitis and sprain/strain lumbar region. The Office paid appropriate medical and compensation benefits.

On April 9, 2007 appellant filed a claim for a schedule award. The Board record reveals that he received a prior schedule award for 11 percent impairment of his right arm for a work-related injury that occurred on March 14, 1994.

In support of his claim, appellant submitted a May 4, 2007 medical report by his treating Board-certified orthopedic surgeon, Dr. David B. Fagan. In this report, Dr. Fagan indicated that he initially saw appellant on November 29, 2005 for his November 22, 2005 injury. He noted that, before appellant saw him, he had two arthroscopies for rotator cuff repair and another surgery for instability of his shoulder with an open anterior stabilization. Dr. Fagan noted that he initially utilized conservative treatment on appellant but in September 2006 appellant underwent an arthroscopy of his shoulder, a debridement of his rotator cuff, chondroplasty of his humeral head and a Mumford procedure. He noted his impression that appellant had reached maximum medical improvement for his injury and subsequent surgery. Dr. Fagan noted, "I think that he has a permanent partial disability level at his shoulder of 20 percent to 25 percent." He noted that it was difficult to determine how much of this is related to his last accident and how much of it was related to his prior injuries but that a rough estimate would be that 10 percent was related to his new injury and that 15 percent was related to his prior surgery.

By letter dated June 6, 2007, the Office asked appellant to submit a detailed medical report from his treating physician recommending an impairment rating under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*).

In a July 18, 2007 note, the Office medical adviser noted Dr. Fagan's disability rating, but he stated that disability ratings are not the same as impairment ratings. He noted that Dr. Fagan's report did not contain the information necessary to consider an impairment rating under the A.M.A., *Guides* and stated that appellant would need to be seen by a physician skilled in applying the A.M.A. *Guides* so that an impairment rating for the accepted condition affecting the right shoulder could be processed. In a July 26, 2007 note, the Office medical adviser noted that appellant was eligible for an impairment rating secondary to a right shoulder condition. He noted that the A.M.A., *Guides* must be applied and that the maximum active range of motion of the shoulder must be measured in all applicable planes with a goniometer and the results reported in degrees. The Office medical adviser also noted that chronic weakness may need to be considered.

By letter dated July 30, 2007, the Office referred appellant to Dr. John A. Gragnani, a Board-certified physiatrist, for an evaluation under the A.M.A., *Guides*. In a report dated August 8, 2007, Dr. Gragnani reviewed appellant's medical history. He listed his impressions as right shoulder pain by history, loss of range of motion, right shoulder, and multiple surgical

procedures on right shoulder for rotator cuff and impingement syndrome. Utilizing the A.M.A., *Guides*, Dr. Gragnani calculated appellant's rating as follows:

"Using the [A.M.A., *Guides*], a rating was calculated from Chapter 16 for the upper extremities.

Range of Motion Measurements	Measurement	Rating
For the Right Shoulder		
Flexion	98 [degrees]	5 percent
Extension	15 [degrees]	2 percent
Abduction	74 [degrees]	5 percent
Adduction	15 [degrees]	1 percent
External Rotation	55 [degrees]	0 percent
Internal Rotation	35 [degrees]	3 percent
Total		16 percent

"Utilizing Table 16-35, page 510, for decreased shoulder abduction, a 10 percent deficit is estimated. This would be equivalent to a 1.2 percent decrease due to strength loss, which would be rounded to 1 percent.

"Combining the 16 percent for range of motion loss with the 1 percent for strength loss, using the chart on page 604, yields 17 percent. No additional rating is offered from any other section of the [A.M.A., *Guides*] or for any sensory loss. Pain is considered in the range of motion measurements."

In a report dated August 15, 2007, the Office medical adviser agreed with Dr. Gragnani's rating, but noted that this was not the schedule award as appellant had previously received a schedule award for an 11 percent impairment of his right upper extremity and that the previous award must be subtracted from the current impairment rating to obtain the increase in the right upper extremity schedule award. Therefore, as appellant currently had a 17 percent impairment rating, subtracting the 11 percent previously awarded means that appellant was entitled to a new schedule award for 6 percent of the right upper extremity.

By decision dated August 28, 2007, the Office issued a schedule award for an additional six percent impairment of the right upper extremity.

## LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act<sup>1</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>2</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>3</sup> The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

## ANALYSIS

In the instant case, appellant previously received a schedule award for 11 percent impairment of his right arm for a work-related injury that occurred on March 14, 2006. When considering appellant's current impairment to his right upper extremity, Dr. Fagan, appellant's treating physician, made a comment that he thought appellant had a permanent partial disability level at his shoulder of 20 to 25 percent. Initially, the Board notes that Dr. Fagan's opinion is couched in speculative language in that he states that he thought appellant had a partial disability level at his shoulder of 20 percent to 25 percent. An award of compensation may not be based on surmise, conjecture or speculation.<sup>5</sup> In addition, in reaching his conclusion, Dr. Fagan did not apply the A.M.A., *Guides* as required by the Act.<sup>6</sup> Furthermore, Dr. Fagan did not make objective findings sufficient to allow the Office medical adviser to apply the A.M.A., *Guides* to his opinion. Accordingly, the Office properly referred appellant to Dr. Gragnani for an impairment rating under the A.M.A., *Guides*.

Dr. Gragnani took motion measurements for appellant's right shoulder and interpreted appellant's impairment rating by applying these measurements to the appropriate figures in the A.M.A., *Guides*. He noted that appellant's 98 degrees of flexion amounted to 5 percent impairment and his 15 degrees of extension amounted to 2 percent impairment under the A.M.A., *Guides*.<sup>7</sup> Dr. Gragnani determined that appellant's 74 degrees of abduction equaled 5 percent impairment rating and his 15 degrees of adduction equaled 1 percent impairment rating.<sup>8</sup> He then continued to apply the A.M.A., *Guides* when he determined that appellant's 55 degrees

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> A.M.A., *Guides* 476, Figure 16-40. The Board notes that Dr. Gragnani mistakenly refers to several figures he utilized in the A.M.A., *Guides* as tables. Nevertheless, this error is harmless.

<sup>8</sup> *Id.* at 477, Figure 16-43.

of external rotation equaled 0 percent impairment rating but his 35 degrees of internal rotation equaled 3 percent impairment rating.<sup>9</sup> Adding these impairment ratings together, Dr. Gragnani properly determined that appellant had 16 percent impairment rating for range of motion measurements in the right shoulder. Finally, he determined that, for decreased shoulder abduction, 10 percent deficit was estimated, which would be equivalent to 1.2 percent decrease due to strength loss, which he rounded to 1 percent.<sup>10</sup> Combining the 16 percent for range of motion loss with 1 percent for strength loss using the Combined Values Chart yielded 17 percent total impairment rating of appellant's right upper extremity.<sup>11</sup> The Office medical adviser reviewed Dr. Gragnani's report and agreed that this was a proper rating. However, he correctly noted that as appellant had previously received a schedule award for 11 percent impairment of his right upper extremity, appellant was entitled only to the additional amount of impairment, *i.e.*, 6 percent. The impairment rating found by Dr. Gragnani and approved by the Office medical adviser is supported by the evidence and the A.M.A., *Guides*. Appellant's argument that he is entitled to a greater award because the tests were passive and did not take into account the duties of his job, his pain, or the instability of his shoulder are without merit. A schedule award is based on the application of the A.M.A., *Guides*, it is not based on appellant's disability from work. There is no opinion in the record that applies the A.M.A., *Guides* and concludes that appellant is entitled to a greater award. Appellant also argues that the Office insisted that his doctor indicate what percentage of disability was caused by the prior injury and what was caused by the new injury, a task which he said was impossible. However, appellant's award was based on the fact that he now had a total 17 percent impairment of his right upper extremity. The Office simply deducted the previous schedule award of 11 percent and determined that appellant was entitled to an additional 6 percent impairment rating. Accordingly, the Board finds that the Office made no errors in determining the amount of appellant's additional schedule award.

### CONCLUSION

The Board finds that the Office properly determined that appellant had not established that he was entitled to a schedule award of greater than 17 percent of his right upper extremity.

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<sup>9</sup> *Id.* at 479, Figure 16-46.

<sup>10</sup> The Board notes that this computation was completed by multiplying the maximum allowable impairment percentage "unit of motion relative value" of 12 percent for abduction by the estimated impairment percentage "unit of motion relative value" of 10 percent abduction. *See* A.M.A., *Guides* 510, Table 16-35 entitled "Impairment of the Upper Extremity Due to Strength Deficit From Musculoskeletal Disorders Based on Manual Muscle Testing of Individual Units of Motion of the Shoulder and Elbow."

<sup>11</sup> *Id.* at 604.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 28, 2007 is affirmed.

Issued: June 9, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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