

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

S.M., Appellant)	
)	
and)	Docket No. 08-345
)	Issued: May 5, 2008
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Southeastern, PA, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 November 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 19, 2007 merit decision with respect to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 15 percent permanent impairment to his right arm.

FACTUAL HISTORY

The Office accepted that appellant sustained a right shoulder strain/tendinitis/impingement in the performance of duty on June 13, 2003. He underwent arthroscopic right shoulder surgery on June 25, 2003.

In a report dated June 3, 2004, Dr. Nicholas Diamond, an osteopath, provided a history and results on physical examination. He opined that appellant had a 43 percent right upper extremity permanent impairment, based on loss of range of motion, surgery, sensory deficit and pain. An Office medical adviser reviewed the evidence and opined that appellant had sustained a 10 percent permanent impairment to the right arm. The medical adviser identified Table 16-27 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), which provides a 10 percent impairment for resection arthroplasty of the distal clavicle.

By decision dated July 27, 2005, the Office issued a schedule award for a 10 percent permanent impairment to the right arm. The period of the award was 31.20 weeks from June 3, 2004.

Appellant requested a hearing before an Office hearing representative, which was held on December 19, 2005. By decision dated March 3, 2006, the hearing representative set aside the July 27, 2005 schedule award. She found there was a conflict in the medical evidence pursuant to 5 U.S.C. § 8123(a) and the case was remanded for a referee examination to resolve the conflict.

The Office referred appellant to Dr. William Spellman, a Board-certified orthopedic surgeon, who, in a report dated November 16, 2006, Dr. Spellman provided a history and results on examination. He provided range of motion for the right shoulder as follows: flexion 160 degrees; extension 40 degrees; abduction 150 degrees; external and internal rotation of 60 degrees. Dr. Spellman reviewed the medical evidence and opined that under the A.M.A., *Guides* appellant had a five percent permanent impairment for loss of motion. He indicated that this represented a three percent whole person impairment.

In a report dated December 13, 2006, an Office medical adviser reviewed the medical evidence. He opined that appellant had a 5 percent impairment for loss of shoulder range of motion and 10 percent for the shoulder surgery under Table 16-27, for a 15 percent right arm permanent impairment.

By decision dated December 20, 2006, the Office issued a schedule award for an additional five percent to the right arm. The period of the award was 15.60 weeks commencing November 16, 2006. Appellant requested a hearing before an Office hearing representative, which was held on April 2, 2007. By decision dated June 19, 2007, the hearing representative affirmed the December 20, 2006 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹ Neither the Act nor the regulations specify the manner in which the percentage of

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.²

It is well established that, when a case is referred to a referee physician for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.³

ANALYSIS

The Office found a conflict in the medical evidence under 5 U.S.C. § 8123(a), which provides that, if there is a disagreement between a physician selected by the Office and an attending physician, a third physician is selected to resolve the conflict. In this case, an attending physician, Dr. Diamond, opined that appellant had a 43 percent right arm permanent impairment, while an Office medical adviser found that appellant had a 10 percent right arm impairment.

Appellant was referred to Dr. Spellman as a referee physician. On appeal, appellant contends that Dr. Spellman did not provide a complete history and did not specify a right arm impairment rating. Dr. Spellman provided a history of the June 13, 2003 employment injury and reviewed the medical evidence. There is no indication that his report lacked a proper background on which to base his rating of permanent impairment to the right arm.

With respect to the impairment rating, Dr. Spellman clearly did provide an opinion as to the right arm permanent impairment. Based on examination results, he found that appellant had a five percent impairment for loss of range of motion in the right shoulder. Specifically, Dr. Spellman found a 1 percent impairment for 160 degrees of flexion, 1 percent for 40 degrees extension, 1 percent for 150 degrees abduction and 2 percent for 60 degrees of internal rotation. This is in accord with Figures 16-40, 16-43 and 16-46 of the A.M.A., *Guides*.⁴ The reference to a three percent whole person impairment is simply a conversion from the five percent right arm impairment.⁵ Dr. Spellman provided a rationalized medical opinion as to the degree of permanent impairment based on loss of range of motion.⁶

Dr. Spellman did not provide an impairment estimate based on Table 16-27, for shoulder arthroplasty.⁷ The medical adviser, however, included the 10 percent impairment for a distal

² A. George Lampo, 45 ECAB 441 (1994).

³ Harrison Combs, Jr., 45 ECAB 716, 727 (1994).

⁴ A.M.A., *Guides* 476-79.

⁵ *Id.* at 439, Table 16-3.

⁶ It is well established that when a case is referred to referee physician for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. *Harrison Combs, Jr.*, *supra* note 3.

⁷ A.M.A., *Guides* 506, Table 16-27. For resection arthroplasty of the distal clavicle, the arm impairment is 10 percent.

resection which was the basis for appellant's prior schedule award. The Board finds that the weight of the medical evidence does not establish more than a 15 percent permanent impairment to the right arm, for which appellant received a schedule award.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the arm, the maximum number of weeks of compensation is 312 weeks. Since appellant's permanent impairment was 15 percent, he was entitled to 15 percent of 312 weeks, or 46.80 weeks of compensation. Appellant received 31.20 weeks of compensation pursuant to the July 27, 2005 decision, and an additional 15.60 weeks in the December 20, 2006 decision. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.⁸ In this case, the Office medical adviser properly concluded that the date of maximum medical improvement was the date of examination by Dr. Spellman on November 16, 2006.

CONCLUSION

The evidence does not establish more than a 15 percent permanent impairment to the right arm.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 19, 2007 and December 20, 2006 are affirmed.

Issued: May 5, 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

⁸ *Albert Valverde*, 36 ECAB 233, 237 (1984).