



light-duty position. He subsequently retired in 2003. The Office later terminated benefits as he had no continuing disability.

On March 18, 2005 appellant filed a claim for a schedule award. He submitted a February 22, 2005 report from Dr. John J. Vargo, a Board-certified orthopedist, who diagnosed impingement syndrome and right sprain/strain of the shoulder. Dr. Vargo opined that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>1</sup> appellant had a 19 percent impairment of the right arm.

In an August 2, 2006 decision, the Office denied appellant's claim for a schedule award finding that the evidence did not establish permanent impairment to a scheduled member due to the accepted work injury. On August 30, 2006 appellant requested an oral hearing.

On December 7, 2006 a hearing representative vacated the August 2, 2006 decision and remanded the matter for further development. The hearing representative instructed the Office to refer appellant's case record to an Office medical adviser to determine if there was a conflict in opinion between appellant's treating physician, Dr. Vargo, and the Office referral physician, Dr. Sterle, regarding the degree of permanent partial impairment of the right upper extremity due to appellant's work-related injury. In a report dated January 17, 2007, an Office medical adviser indicated that there was a medical conflict between Dr. Vargo and Dr. Sterle regarding the degree of permanent partial impairment of the right arm due to his work injury. He noted that Dr. Vargo opined that appellant sustained a 19 percent permanent impairment of the right upper extremity pursuant to the A.M.A., *Guides*, which was causally related to the work injury, and Dr. Sterle opined that appellant did not have residuals of the work-related right shoulder injury, rather, his complaints were due to preexisting conditions and was therefore not entitled to a schedule award.

To resolve the conflict, on March 12, 2007, the Office referred appellant to Dr. James A. Shaer, a Board-certified orthopedic surgeon, who indicated, in a report dated March 26, 2007, that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Shaer noted a history of appellant's work-related injury and advised that appellant reached maximum medical improvement approximately 42 days after the injury. He noted appellant's history was significant for surgery for right shoulder impingement and repair of the right rotator cuff. Dr. Shaer noted that a physical examination of the right shoulder revealed a well-healed surgical scar and muscle strength was normal and symmetric in the deltoid, biceps and triceps. He noted that impairment due to loss of range of motion for the right shoulder for flexion, extension, abduction was seven percent and opined that appellant had a seven percent impairment of the right upper extremity in accordance with the A.M.A., *Guides*. Dr. Shaer noted that Dr. Vargo did not properly apply the A.M.A., *Guides* and attributed appellant's impairment to conditions not accepted by the Office. He opined that appellant's diagnosed conditions of a rotator cuff injury and impingement syndrome, accounted for appellant's current and ongoing complaints and symptoms, and were not attributed to the accepted sprain/strain of the shoulder from the injury in 2003. Dr. Shaer opined that, based on a reasonable degree of medical certainty, a review of the records and an interview and examination of appellant, he lacked active

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

and passive range of motion of the shoulder due to preexisting injuries and not as a result of the March 24, 2003 shoulder injury.

In a decision dated April 11, 2007, the Office found that appellant was entitled to a schedule award for seven percent impairment of the right arm.<sup>2</sup> On May 10, 2007 appellant requested an oral hearing.

In a July 23, 2007 decision, the hearing representative vacated the April 11, 2007 decision. The hearing representative noted that it appeared that the Office misinterpreted Dr. Shaer's report as it appeared that Dr. Shaer did not find that any of appellant's impairments were causally related to his accepted work injury. The hearing representative instructed the Office to obtain a supplemental report from the referee physician addressing whether appellant's current right shoulder condition was related to his work injury of March 24, 2003, whether appellant's work injury had resolved and whether appellant had any impairment of his right shoulder due to residuals of his work injury.

On August 7, 2007 the Office requested a supplemental report from the referee physician. In a September 5, 2007 report, Dr. Shaer diagnosed impingement syndrome of the right shoulder which was degenerative and not work related and noted the preexisting condition was not accelerated or aggravated by the March 24, 2003 work injury. He indicated that the work injury caused a direct trauma from the firearm recoil which resulted in a soft tissue contusion. Dr. Shaer noted that the diagnosed impingement was degenerative in nature and related to a repair of appellant's rotator cuff prior to the work injury of March 2003 and opined that there was no causal relationship between the March 2003 claim and his current condition of impingement syndrome. He advised that, as a result of the March 24, 2003 work injury, appellant sustained a strain/sprain of the right shoulder which resolved and his current complaints were attributed to a degenerative condition. Dr. Shaer opined that appellant did not have any impairment of this right shoulder due to residuals of his work injury; rather, the impairment was attributed solely to his preexisting nonwork-related condition.

In a decision dated October 31, 2007, the Office denied appellant's claim for a schedule award. It found that the weight of the medical evidence rested with Dr. Shaer, who determined that appellant did not have permanent impairment as a result of his work-related injury of March 24, 2003. On November 26, 2007 appellant requested an oral hearing which was held on March 12, 2008.

In a decision dated April 24, 2008, the hearing representative affirmed the decision of the Office dated October 31, 2007 on the grounds that the evidence of record did not support that appellant was entitled to a schedule award for his accepted condition.

### **LEGAL PRECEDENT**

The Board has upheld the Office's authority to set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an

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<sup>2</sup> The record does not indicate whether the Office actually issued a schedule award payment based on this decision.

award for compensation can only be set aside in the manner provided by the compensation statute.<sup>3</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.<sup>4</sup> It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.<sup>5</sup> The Office's burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.<sup>6</sup>

Not all medical conditions accepted by the Office result in permanent impairment to a scheduled member. Where the claimant does not demonstrate any permanent impairment caused by the accepted occupational exposure, the claim is not ripe for consideration of any preexisting impairment.<sup>7</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>8</sup>

### ANALYSIS

On April 11, 2007 the Office granted appellant a schedule award for seven percent impairment of the right arm. This award had been premised on the March 26, 2007 report from the referee physician, Dr. Shaer, that appellant had seven percent impairment of the right arm. On July 23, 2007 the hearing representative set aside the April 11, 2007 schedule award decision finding that the evidence did not support any impairment resulting from the accepted work injury. He remanded the case for a supplemental opinion from Dr. Shaer regarding permanent impairment. The July 23, 2007 decision rescinded the April 11, 2007 decision which granted appellant a schedule award for his right arm.<sup>9</sup> The Office, therefore, bore the burden of proof to rescind acceptance of appellant's claim for a schedule award.

The Office found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Vargo, who disagreed with the Office referral physician, Dr. Sterle, concerning whether appellant had any impairment of the right upper extremity. Consequently, the Office properly referred appellant to Dr. Shaer to resolve the conflict.

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<sup>3</sup> See *Stephen N. Elliott*, 53 ECAB 659 (2002).

<sup>4</sup> *L.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1263, issued May 3, 2007).

<sup>5</sup> *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

<sup>6</sup> See *Delphia Y. Jackson*, 55 ECAB (2004).

<sup>7</sup> *Thomas P. Lavin*, 57 ECAB 353 (2006).

<sup>8</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> See *Ausbon N. Johnson*, 50 ECAB 304 (1999).

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>10</sup>

In a March 26, 2007 report, Dr. Shaer reviewed appellant's history, reported findings and diagnosed sprain of the right shoulder, resolved and impingement syndrome. He noted appellant's history was significant for surgery for right shoulder impingement and repair of the right rotator cuff. Dr. Shaer noted physical examination revealed a well-healed surgical scar and muscle strength was normal and symmetric in the deltoid, biceps and triceps. He noted range of motion findings for the right shoulder and advised that appellant sustained a seven percent impairment of the right upper extremity for lost range of motion pursuant to the A.M.A., *Guides*. However, Dr. Shaer advised that appellant's ongoing complaints were attributable to his rotator cuff injury and impingement syndrome and not to his accepted shoulder sprain which he characterized as a "simple sprain/strain" that occurred in 2003 and had resolved. He opined that, while appellant had range of motion deficits in his right shoulder, these deficits were not the result of the March 24, 2003 shoulder injury but were due to conditions that were already present prior to the work injury.

Subsequent to the Office's April 11 and July 23, 2007 decisions, noted above, the Office requested a supplemental report from Dr. Shaer requesting that he address whether appellant had any impairment of his right shoulder due to residuals of his work injury. In a September 5, 2007 report, Dr. Shaer diagnosed impingement syndrome of the right shoulder, degenerative, not work related. He indicated that the work incident consisted of appellant firing a shotgun 10 times would cause a direct trauma from the firearm recoil and a soft tissue contusion. However, Dr. Shaer noted that the diagnosed impingement was degenerative in nature and was related to a repair of his rotator cuff which occurred prior to the work injury of March 2003. He opined that there was no causal relationship between the March 2003 work incident and injury and appellant's current impingement syndrome. Dr. Shaer advised that, as a result of the March 24, 2003 work injury, appellant sustained a strain/sprain of the right shoulder which was resolved and the current complaints were degenerative in nature and any impairment was attributed to his preexisting nonwork-related condition. He opined that appellant did not have any impairment of this right shoulder due to residuals of his work injury; rather, the impairment was attributed solely to his preexisting nonwork-related condition.

The Board finds that the opinion of Dr. Shaer is well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant sustained no impairment of the right upper extremity as a result of his work-related injury. Dr. Shaer found that appellant's continuing residuals were not due to the accepted condition and that his impairment was due to his preexisting condition and not to his accepted right shoulder sprain which had resolved. Consequently, the Board finds that the Office met its burden of proof in rescinding acceptance of its schedule award finding set forth in its April 11, 2007 decision. The weight of the medical evidence establishes that appellant has no permanent impairment of the right arm causally related to his March 24, 2003 employment injury.

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<sup>10</sup> *Aubrey Belnavis*, 37 ECAB 206 (1985). See 5 U.S.C. § 8123(a).

**CONCLUSION**

The Board finds that the Office properly rescinded its acceptance of appellant's claim for a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 24, 2008 and October 31, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 17, 2009  
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