

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

E.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 09-213
Issued: August 25, 2009**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
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 October 28, 2008 appellant filed a timely appeal from an October 14, 2008 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant has established more than 13 percent right upper extremity impairment, for which he received a schedule award.

FACTUAL HISTORY

On April 17, 2001 appellant, then a 36-year-old distribution clerk, filed an occupational disease claim attributing his right arm condition to his employment. He stopped work on April 2, 2001 and returned on June 12, 2001. The Office accepted his claim for sprain/strain of the right shoulder with rotator cuff impingement. Appellant underwent right shoulder

arthroscopic surgery on January 31 and September 7, 2005.¹ The Office paid appropriate compensation and appellant returned to work after each surgery.

On January 31, 2008 appellant filed a schedule award claim. In a December 18, 2007 report, Dr. Steven M. Allon, an orthopedic surgeon, opined that appellant reached maximum medical improvement on December 18, 2007. He reviewed the medical records, including the surgical reports and set forth findings on examination. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Allon opined that appellant had 20 percent right arm impairment. He found eight percent range of motion deficit consisting of four percent right shoulder flexion and four percent right shoulder abduction. Dr. Allon's range of motion findings were comprised of: forward elevation of 115 degrees, which equaled four percent impairment under Figure 16-40, page 476; abduction of 90 degrees and adduction of 50 degrees, which equaled four percent and zero percent impairment respectively under Figure 16-43 page 477; external rotation of 70 degrees and internal rotation of 75 degrees, which equaled zero percent impairment under Figure 16-46 page 479. He also found that appellant had 10 percent impairment due to right shoulder resection arthroplasty under Table 16-27, page 506. Dr. Allon combined the range of motion impairment of 8 percent with the 10 percent impairment due to right shoulder resection arthroplasty to total 17 percent impairment of the right upper extremity. He also found that appellant had a pain-related impairment of three percent under Figure 18-1, page 574.

In a May 2, 2008 report, an Office medical adviser reviewed the medical record and agreed that appellant reached maximum medical improvement on December 18, 2007. He stated that Dr. Allon's 10 percent impairment rating for a resection of the distal clavicle could not be accepted as the records did not establish that appellant underwent such a procedure. The Office medical adviser stated that he underwent an acromioplasty, a shaving of the under-side of the acromion, which did not represent a resection of the distal end of the clavicle. He noted that the x-ray and magnetic resonance imaging (MRI) scan studies showed that the acromion joint was within normal limits with no subacromial spur, which indicated that no distal clavicle resection was needed or performed. The Office medical adviser utilized Dr. Allon's findings to rate impairment as 13 percent to the right upper extremity. He rounded off the forward flexion of 115 degrees to 110 degrees to find five percent impairment under Figure 16-40 page 476. Under Figure 16-43 page 477, the Office medical adviser found 90 degrees abduction equaled four percent impairment and 50 degrees adduction equaled zero percent impairment. Under Figure 16-46 page 479, he found external rotation of 70 degrees equaled zero percent impairment and internal rotation of 75 degrees rounded to 70 degrees equaled one percent impairment. The medical adviser totaled appellant's shoulder range of motion impairments at 10 percent. He further found that appellant met the criteria for a three percent pain impairment rating under Figure 18-1 page 574.

¹ Appellant's January 41, 2005 arthroscopic surgery consisted of debridement and resection of labral tear, partial bursectomy and acromioplasty. Appellant's September 7, 2005 arthroscopic surgery consisted of arthroscopy, arthroscopic chondroplasty, debridement of partial thickness rotator cuff tear and microfracture arthroplasty of the glenoid.

² A.M.A., *Guides* (5th ed. 2001).

By decision dated October 3, 2008, the Office granted appellant a schedule award for 13 percent permanent impairment to his right upper extremity. The award covered the period December 18, 2007 to September 25, 2008 for a total 40.56 weeks of compensation. The Office used a weekly pay rate of \$261.64.

On October 5, 2008 appellant requested reconsideration of the October 3, 2008 decision contesting the weekly pay rate of \$261.64. In an October 14, 2008 letter, the Office advised that it used an incorrect pay rate and vacated the October 3, 2008 schedule award decision.

By decision dated October 14, 2008, the Office issued an amended schedule award for 13 percent right upper extremity impairment for the period December 18, 2007 to September 25, 2008. The corrected weekly pay rate was \$729.86.³ It issued a lump-sum payment of \$15,038.65 representing the difference between an entitlement to \$23,453.61 and the \$8,414.06 which appellant initially received.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.⁷ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.⁸

Section 18.3d(c) of the A.M.A., *Guides* provides that an additional three percent impairment may be granted for pain that slightly increases the burden of a condition.⁹ The

³ Appellant does not dispute the pay rate on appeal.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.404.

⁶ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁸ A.M.A. *Guides* 433-521 (5th ed. 2001), Chapter 16, The Upper Extremities.

⁹ *Id.* at 573.

A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in the other chapters.¹⁰

ANALYSIS

The Office accepted that appellant sustained a sprain/strain of the right shoulder and right shoulder rotator cuff impingement and authorized two arthroscopic surgeries. It granted him a schedule award for 13 percent impairment to the right upper extremity due to restricted motion and pain. This was based on a review by an Office medical adviser of a December 18, 2007 report from Dr. Allon, an orthopedic surgeon.

Dr. Allon opined that appellant had a 20 percent right upper extremity impairment based on restricted motion, a right shoulder resection arthroplasty and pain. The Office medical adviser found that he had 13 percent right upper extremity impairment based on restricted motion and pain. Although Dr. Allon opined that appellant had a 10 percent impairment based on right shoulder resection arthroplasty, the Office medical adviser explained that the medical evidence of record did not establish that a resection of the distal clavicle was performed. The record supports that acromioplasty surgery was performed.¹¹ The Office medical adviser further explained that diagnostic tests confirmed that a distal clavicle resection was not performed. The Office medical adviser also stated that testing demonstrated that the acromial joint was within normal limits and there were no subacromial spurs. The Board finds that there is no basis to support an impairment rating based on a shoulder resection arthroplasty under the diagnosis based estimates.

Dr. Allon also found that appellant had a range of motion deficit of eight percent based on four percent flexion impairment and four percent shoulder abduction impairment. The Office medical adviser opined the range of motion deficit was 10 percent, based on 5 percent flexion impairment, 4 percent abduction impairment and a 1 percent loss of internal rotation impairment. Under Figure 16-40, page 476, shoulder flexion of 115 degrees results in 4.5 percent impairment, which under Office procedures should be rounded to 5 percent.¹² Under Figure 16-43 page 477, shoulder abduction of 90 degrees results in four percent impairment while an adduction of 50 degrees results in zero percent impairment. Under Figure 16-46 page 479, external rotation of 70 degrees results in 0 percent impairment while an internal rotation of 75 degrees results in 0.5 percent impairment, which is rounded to 1 percent. The record supports that appellant had a 10 percent range of motion deficit based on 5 percent flexion impairment, 4 percent abduction impairment and 1 percent internal rotation impairment.

¹⁰ *Id.* at 571. See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (November 2002). See *A.G.*, 58 ECAB ___ (Docket No. 07-677, issued June 21, 2007).

¹¹ See *supra* note 1.

¹² The policy of the Office is to round the calculated percentage of impairment to the nearest whole number. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (June 2003). Fractions are rounded up from .50. See *Carl J. Cleary*, 57 ECAB 563 (2006).

While both Dr. Allon and the Office medical adviser accorded three percent impairment for pain deficit under Figure 18-1 page 574 of the A.M.A., *Guides*, the Board finds this is an improper application of the A.M.A., *Guides*. The Board has held that physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.¹³ Neither Dr. Allon nor the Office medical adviser provided any rationale for why the fact of this case warranted a separate pain impairment rating under Chapter 18. The medical evidence establishes that appellant has 10 percent impairment of the right arm based on loss of range of motion.

CONCLUSION

The Board finds appellant has no more than 13 percent right upper extremity impairment, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: August 25, 2009
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

¹³ See *Linda Beale*, 57 ECAB 429 (2006); *Frantz Ghassan*, 57 ECAB 349 (2006). See *supra* note 10.