

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Phoenix, AZ, Employer**

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**Docket No. 09-254
Issued: August 13, 2009**

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 4, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 30, 2008 denying an additional 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 25 percent right upper extremity permanent impairment.

FACTUAL HISTORY

On February 4, 2002 the Office advised appellant that it accepted a right shoulder strain in the performance of duty on December 30, 2001. It also accepted a right shoulder impingement syndrome and adhesive capsulitis. By decision dated February 24, 2004, the Office issued a schedule award for 25 percent permanent impairment to the right arm. The period of the award was 78 weeks from December 10, 2003.

In a claim for compensation (Form CA-7) dated July 27, 2007, appellant requested an additional schedule award. In a report dated October 16, 2007, Dr. J. Carvel Jackson, an osteopath, opined that appellant had 18 percent permanent impairment of the right arm, based on passive range of motion.

By decision dated February 7, 2008, the Office denied the claim for an additional schedule award. Appellant requested reconsideration and submitted additional evidence. By report dated March 4, 2008, Dr. Jackson again opined that appellant had 18 percent right arm impairment based on loss of range of motion. In a report dated March 11, 2008, Dr. William Brainard, an orthopedic surgeon, stated that appellant had “dysesthesias which were not addressed at that time and some further weakness, and I think a maximum of 5 percent added disability would put him at the 30 percent level.”

In a report dated July 16, 2008, Dr. Brainard provided range of motion results for the right shoulder from a July 16, 2007 functional capacity evaluation. He opined that the loss of range of motion resulted in 18 percent permanent impairment. Dr. Brainard also found that appellant had 15 percent impairment for weakness, pain and discomfort. He did not cite to a specific table or figure in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* for this impairment.

The Office referred appellant to Dr. Jon Abbott, an orthopedic surgeon, for a second opinion examination. In a report dated September 19, 2008, Dr. Abbott provided a history, review of medical records and results on examination. For range of motion in the right shoulder, he reported 90 degrees of flexion, 50 degrees of extension, 90 degrees of abduction, 45 degrees adduction, 70 degrees internal rotation and 45 degrees external rotation. Dr. Abbott opined that appellant had 11 percent right arm impairment for loss of range of motion, based on 6 percent for loss of flexion, 4 percent abduction and 1 percent internal rotation. He also noted that appellant did have a partial excision of the distal clavicle, and he awarded five percent under Table 16-27. In addition, Dr. Abbott noted that appellant “had no complaints of loss of sensation during my examination nor obvious findings of weakness in a radicular pattern. I feel the patient’s weakness can be attributed to his loss of range of motion and pain. He is noted to have pain with range of motion of the shoulder and I do not feel that a formal strength assessment can be performed in the presence of pain.” He noted that the A.M.A., *Guides* provided for up to 3 percent for pain impairment, but this would not increase the impairment to more than 25 percent. Dr. Abbott concluded that appellant did not have more than 25 percent permanent impairment to the right arm.

By decision dated October 30, 2008, the Office denied modification of the February 7, 2008 decision. It found that Dr. Abbott represented the weight of the evidence.

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 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

ANALYSIS

In the present case, appellant had received a schedule award for 25 percent right arm permanent impairment on February 24, 2004. He seeks an additional award for the right arm. The reports submitted by appellant from Dr. Jackson and Dr. Brainard do not establish an impairment greater than 25 percent. Dr. Jackson reported 18 percent impairment based on loss of range of motion, and found no additional impairment. Dr. Brainard, relying on range of motion results in a functional capacity evaluation dated July 16, 2007, also found appellant had 18 percent impairment for loss of range of motion. He then added an additional 15 percent for weakness, pain and discomfort. Dr. Brainard did not cite any specific table or figure under the A.M.A., *Guides*. It is not clear how the 15 percent impairment was calculated. If Dr. Brainard was intending to find impairment based on peripheral nerve disorders, the impairment must be calculated in accord with the methods described in section 16.5 of the A.M.A., *Guides*, which require identification of the nerves involved and grading of the impairment.³ The Board finds Dr. Brainard's reports are of little probative value to the issue presented.⁴

The Office referred appellant to Dr. Abbott for a second opinion examination. While appellant argues his September 19, 2008 report is based on an incomplete history, Dr. Abbott provided an accurate history and reviewed the relevant medical evidence of record. Appellant also argued that Dr. Abbott provided inadequate range of motion results. However, Dr. Abbott provided his measured range of motion for the right shoulder and appellant has provided no evidence that the measurements were inaccurate. In this regard, the Board notes that Dr. Abbott found six percent impairment for 90 degrees flexion, four percent impairment for 90 degrees abduction, and one percent for 70 degrees internal rotation. Dr. Abbott did not report a ratable impairment for external rotation. Based on a reported 45 degrees of external rotation, this would be an additional 1 percent under Figure 16-46, or a total of 12 percent for loss of range of motion.⁵

Dr. Abbott also provided an additional five percent for a partial distal clavicle resection arthroplasty under Table 16-27. This table was intended for a total shoulder distal clavicle resection and provides 10 percent arm impairment.⁶ While there is no indication that this table

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).

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

³ A.M.A., *Guides* 480-97.

⁴ *See Richard A. Neidert*, 57 ECAB 474 (2006).

⁵ A.M.A., *Guides* 479, Figure 16-46.

⁶ *Id.* at 506, Table 16-27.

provides for five percent impairment under the circumstances of this case, any error is to the benefit of appellant. In addition, Dr. Abbott referred to Chapter 18 of the A.M.A., *Guides*, which provides up to a three percent additional arm impairment and is appropriate if the condition cannot adequately be rated under other chapters.⁷ Dr. Abbott did not find a peripheral nerve impairment and he explained that an impairment for weakness was incorporated in the impairments for loss of range of motion and pain. The impairments for range of motion, partial distal clavicle resection and pain do not result in arm impairment greater than 25 percent.⁸ The Board finds Dr. Abbott's report does not establish that appellant has more than the 25 percent permanent impairment previously received.

On appeal, appellant argues that Dr. Abbott's report is of diminished probative value because the statement of accepted facts did not include all relevant information regarding his prior surgeries, work history and accepted conditions. Dr. Abbott, however, was asked to provide an opinion as to the degree of permanent impairment in the right arm, and he provided a history demonstrating an understanding of the relevant factual and medical history. As noted above, the Board finds Dr. Abbott's report represents the weight of the medical evidence concerning the current impairment of appellant's right arm. Appellant also argues that, if the Board finds Dr. Abbott's report to be of probative value, then a conflict exists with Dr. Brainard. As the Board notes above, Dr. Brainard's report is of diminished probative value as it did not explain any impairment over 18 percent pursuant to the A.M.A., *Guides* and therefore is not sufficient to create a conflict under 5 U.S.C. § 8123(a).⁹

CONCLUSION

The Board finds the evidence does not establish more than 25 percent right arm permanent impairment.

⁷ *Id.* at 570, 574, Figure 18-1.

⁸ A range of motion impairment would be combined (using the Combined Values Chart) with an impairment under Table 16-27, rather than added. A.M.A., *Guides* 505. Even if Dr. Abbot had found appellant was entitled to 10 percent arm impairment under Table 16-27, this would combine with 12 percent loss of range of motion for 21 percent impairment, with the additional 3 percent for pain totaling 24 percent arm impairment.

⁹ To create a conflict, the physician's reports must be of virtually equal weight and rationale. *See John D. Johnson*, 55 ECAB 465 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 30, 2008 is affirmed.

Issued: August 13, 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