

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

K.H., Appellant

and

**U.S. POSTAL SERVICE, AIRPORT MAIL
CENTER, Dallas, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1586
Issued: February 9, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 15, 2008 appellant filed a timely appeal of the March 18, 2008 merit decision of the Office of Workers' Compensation Programs, denying her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant sustained permanent impairment of her right shoulder.

FACTUAL HISTORY

On November 13, 2004 appellant, then a 44-year-old clerk, filed a claim for an occupational disease, stating that on June 20, 2004 she became aware of her right shoulder condition and on June 25, 2004 first realized that her condition was caused by lifting and pushing while working at the employing establishment. By letter dated February 17, 2005, the Office accepted the claim for rotator cuff tear of the right shoulder. It paid appellant leave buyback compensation for the period November 24, 2004 through March 17, 2005 for annual and sick

leave she used following right shoulder arthroscopic rotator cuff repair which was performed by Dr. R. Mills Roberts, an attending Board-certified orthopedic surgeon, on November 24, 2004.

On January 23, 2007 appellant filed a claim for a schedule award. In a January 23, 2007 form report, Dr. James M. Anderson, a Board-certified family practitioner, indicated with an affirmative mark that appellant's rotator cuff tear was caused by the accepted employment injury. He stated that she remained unable to lift heavy objects overhead or from the floor.

By letter dated January 30, 2007, the Office requested that appellant submit a medical report from an attending physician addressing whether she had reached maximum medical improvement and the extent of any permanent impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

In a February 12, 2007 work-capacity evaluation (Form OWCP-5c), Dr. Anderson stated that appellant could perform light-duty work with restrictions. A July 10, 2007 report of Randi True, a physician's assistant, noted that appellant had shoulder pain. In a July 11, 2007 narrative report, Ms. True provided a history that appellant had been treated by Dr. Roberts for the past five years for recurrent shoulder pain. Appellant sustained a rotator cuff tear and tendinitis and underwent shoulder surgery and arthrocentesis and steroid treatments. Ms. True stated that she continued to experience right shoulder discomfort with weather changes and prolonged heavy lifting. She recommended no lifting more than 25 pounds, pulling or pushing more than two to three hours per day and lifting overhead more than two hours intermittently per day.

By letter dated June 26, 2007, the Office requested that Dr. Anderson address the extent of appellant's permanent impairment due to the accepted employment injury based on the A.M.A., *Guides*. He did not respond.

By decision dated March 18, 2008, the Office denied appellant's claim for a schedule award, finding that she failed to submit medical evidence establishing permanent impairment as requested in its January 30, 2007 developmental letter.¹

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁴ However, neither the Act nor the regulations specify the manner in

¹ Following the issuance of the Office's March 18, 2008 decision, the Office received additional evidence. Appellant has also submitted additional evidence on appeal. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.404.

⁴ 5 U.S.C. § 8107(c)(19).

which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁵

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from her physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁶

ANALYSIS

The Office accepted that appellant sustained a rotator cuff tear of the right shoulder. Appellant contends that she is entitled to a schedule award for permanent impairment to her right shoulder. The Board finds, however, that she has not established that she has sustained any permanent impairment to her right shoulder due to her accepted rotator cuff tear.

Appellant did not submit any evidence from a physician addressing whether she sustained permanent impairment. Dr. Anderson's January 23, 2007 report indicated with an affirmative mark that appellant's rotator cuff tear was caused by the accepted employment injury. He stated that she remained unable to lift heavy objects overhead or from the floor. Dr. Anderson's February 12, 2007 OWCP-5c form stated that appellant could perform light-duty work with restrictions. He did not address the issue of whether appellant sustained any impairment of her right shoulder as a result of the accepted employment-related injury.

The July 10 and 11, 2007 reports of Ms. True, a physician's assistant, do not constitute probative medical evidence. A physician's assistant is not a "physician" as defined under the Act.⁷ Therefore, her reports do not constitute competent medical evidence to support appellant's schedule award claim.

Although the Office requested information to assist it in its development of appellant's claim for a schedule award, appellant did not respond within the allotted time. Appellant has the burden of proof to submit medical evidence supporting that she has a permanent impairment of a scheduled member or function of the body.⁸ As such evidence has not been submitted, the Board finds that appellant has not met her burden of proof and thus she is not entitled to a schedule award.

⁵ 20 C.F.R. § 10.404.

⁶ *Vanessa Young*, 55 ECAB 575 (2004); *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

⁷ 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2).

⁸ *See Annette M. Dent*, 44 ECAB 403 (1993).

CONCLUSION

The Board finds that appellant is not entitled to a schedule award for her right shoulder.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board