



accepted his claim for a right rotator cuff rupture and authorized surgery, which was performed on November 20, 2006. Appellant returned to limited-duty work on December 30, 2006.

On June 5, 2007 appellant filed a claim for a schedule award. In a June 11, 2007 letter, the Office advised appellant of the medical evidence necessary to be eligible for a schedule award.

In a June 13, 2007 report, Dr. Erich J. Lingenfelter, a Board-certified orthopedic surgeon, advised that appellant had a severe irreparable rotator cuff tear. He stated the latissimus dorsi tendon transfer surgery resolved appellant's pain symptoms but full functional active motion was not achieved. Appellant could not raise his arm above his head and developed pseudoparalysis. Based on examination, Dr. Lingenfelter advised that appellant may have ruptured his subscapularis as a result of all the stresses on his shoulder from the one remaining portion of the rotator cuff that was viable prior to surgery. He opined that appellant had a 60 percent right upper extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>1</sup>

The Office referred Dr. Lingenfelter's report and the case record to a medical adviser who, in a report dated August 2, 2007, found that Dr. Lingenfelter provided insufficient objective measurements to calculate a schedule award.

On August 21, 2007 the Office referred appellant for a second opinion to Dr. Joseph G. Sankoorikal, Board-certified in physical medicine and rehabilitation, for an evaluation of the extent of any permanent impairment in accordance with the A.M.A., *Guides*. In a report dated October 5, 2007, Dr. Sankoorikal noted the history of injury and presented his findings on examination. He found no wasting of any muscles in the upper extremities. Using a dynamometer, Dr. Sankoorikal found grip strength was 80 pounds bilaterally with no focal weakness. He noted decreased range of motion limited his strength examination. Examination of the shoulder revealed tenderness, minimal diffuse wasting secondary to decreased range of motion on the posterior aspect of the deltoid. Overall flexion of the arm revealed 4/5 strength, abduction revealed 3/5 strength and extension revealed 4/5 strength. Shoulder range of motion revealed 70 degrees flexion, 50 degrees extension, 50 degrees abduction and 40 degrees adduction. Internal rotation was 80 degrees and external rotation was 40 degrees. Dr. Sankoorikal found that, under page 476-79 of the A.M.A., *Guides*, the range of motion deficits totaled 14 percent. Under Table 16-35 of the A.M.A., *Guides*, the loss of strength due to decreased range of motion and disuse was six percent impairment. Dr. Sankoorikal applied the combined chart and found that appellant had a total permanent impairment of 19 percent for the right arm.

On December 30, 2007 the Office medical adviser concurred with Dr. Sankoorikal's impairment rating, finding it was based on the A.M.A., *Guides*. Maximum medical improvement was noted to be October 5, 2007.

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

By decision dated January 11, 2008, the Office granted appellant a schedule award for a 19 percent impairment of the right upper extremity. The award was for 59.28 weeks for the period October 5, 2007 to November 22, 2008.

In an undated letter postmarked February 13, 2008, appellant disagreed with the January 11, 2008 decision and requested a review of the written record. He submitted a February 11, 2008 report from Dr. Lingenfelter.

By decision dated March 25, 2008, the Office's Branch of Hearings and Review denied appellant's request for review of the written record, finding that it was not made within 30 days of the January 11, 2008 decision. The Branch of Hearings and Review further denied the request finding that the issue could equally well be addressed through the reconsideration process.<sup>2</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> and its implementing regulations<sup>4</sup> 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. However, the Act 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.<sup>5</sup>

The standards for evaluation 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>2</sup> Subsequent to the filing of the appeal on June 2, 2008, the Office issued a June 24, 2008 decision on a separate issue, appellant's wage-earning capacity. The Board has no jurisdiction over this other issue as the Board's regulations contemplate that the Board only has jurisdiction over Office decisions issued within one year prior to the filing of an appeal. See 20 C.F.R. §§ 501.2(c) and 501.3(d).

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (2002).

<sup>5</sup> *Id.* See *B.C.*, 58 ECAB \_\_\_ (Docket No. 06-925, issued October 13, 2006).

<sup>6</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>7</sup> A.M.A. *Guides* 433-521 (5<sup>th</sup> ed. 2001), Chapter 16, The Upper Extremities.

## ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right rotator cuff rupture and authorized a latissimus dorsi tendon transfer surgery. It granted appellant a schedule award for 19 percent impairment to the right arm due to restricted motion and decreased strength. This was based on a review by an Office medical adviser of an October 5, 2007 examination of Dr. Sankoorikal, Board-certified in physical medicine and rehabilitation and Office referral physician.

The Board notes that, although Dr. Lingenfelter opined that appellant had a 60 percent right upper extremity impairment in his June 13, 2007 report, he failed to cite to the tables or charts he utilized under the A.M.A., *Guides* in support of this impairment rating. Moreover, Dr. Lingenfelter report did not provide sufficient details as to measurements of the shoulder joint or other factors considered in making his rating. The Board finds that he did not properly follow the A.M.A., *Guides*. A physician's opinion is of diminished probative value where the A.M.A., *Guides* are not properly followed.<sup>8</sup>

The Office referred appellant to Dr. Sankoorikal who presented findings on examination and concluded that appellant had 19 percent impairment of the right arm. In a December 30, 2007 report, an Office medical adviser reviewed Dr. Sankoorikal's report and concurred with his impairment rating. According to Figure 16-40, page 476,<sup>9</sup> Figure 16-43, page 477<sup>10</sup> and Figure 16-46, page 479<sup>11</sup> of the A.M.A., *Guides*, appellant had a 14 percent impairment of the right upper extremity due to restricted motion, as follows: 7 percent for flexion limited to 70 degrees; 0 percent for extension limited to 50 degrees; 6 percent for abduction limited to 50 degrees; 0 percent for adduction limited to 40 degrees; 0 percent for internal rotation of 80 degrees; and 1 percent for external rotation of 40 degrees. While both Dr. Sankoorikal and the Office medical adviser accorded six percent impairment for strength deficit under Table 16-35, page 510 of the A.M.A., *Guides*, the Board finds this is an improper application of the A.M.A., *Guides*. According to page 508 of the A.M.A., *Guides*, a rating for weakness cannot be rated in conjunction with a rating for restricted motion. The Board finds that the medical evidence establishes that appellant has no more than 14 percent impairment, which is less than the 19 percent schedule award.<sup>12</sup>

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<sup>8</sup> See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

<sup>9</sup> A.M.A., *Guides* 476, Figure 16-40 is entitled Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder.

<sup>10</sup> *Id.* at 477, Figure 16-43 is entitled Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder.

<sup>11</sup> *Id.* at 479, (5<sup>th</sup> ed.) Figure 16-46 is entitled Pie Chart of Upper Extremity Impairments Due to Lack of Internal and External Rotation of Shoulder.

<sup>12</sup> Following the Office's January 11, 2008 decision, appellant submitted a February 11, 2008 report from Dr. Lingenfelter. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

On appeal, appellant notes that his accepted condition has affected his ability to engage in hobbies such as competitive fishing and has also affected the types of jobs he can perform. However, the amount payable pursuant to a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Act provides that, before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.<sup>14</sup> Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>15</sup> The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>16</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act,<sup>17</sup> has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>18</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

The Office issued its decision concerning appellant's schedule award on January 11, 2008. Appellant's request for a review of the written record before the Office's Branch of Hearings and Review was postmarked February 13, 2008. As his request for a review was filed more than 30 days after the January 11, 2008 decision, the Board finds that the Office properly found that the request was untimely.

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<sup>13</sup> See *Harry D. Butler*, 43 ECAB 859 (1992); *Robert R Kuehl*, 13 ECAB 77 (1961).

<sup>14</sup> 5 U.S.C. § 8124(b)(1).

<sup>15</sup> 20 C.F.R. § 10.615.

<sup>16</sup> 20 C.F.R. § 10.616(a).

<sup>17</sup> 5 U.S.C. §§ 8101-8193.

<sup>18</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>19</sup> *Teresa M. Valle*, 57 ECAB 542 (2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by further considering his request for review. It determined that appellant could equally well pursue his claim by submission of a request for reconsideration along with new evidence. Accordingly, the Board finds that the Office also properly exercised its discretion in denying appellant's request for review. There is no evidence of an abuse of discretion in this case.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant has no more than 19 percent permanent impairment of the right upper extremity, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely filed.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 25 and January 11, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 11, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>20</sup> See *Daniel J. Perea*, 42 ECAB 214 (1990).