

rotator cuff tear and authorized left shoulder rotator cuff repair and left shoulder arthroscopic surgery, which was performed on March 22, 2007. Appellant stopped work on March 22, 2007 and returned to four hours per day on April 19, 2007.

On November 8, 2007 Dr. Stephen M. Kana, a treating Board-certified orthopedic surgeon, concluded that she had an 18 percent left upper extremity impairment. He noted the examination was a follow up to her rotator cuff tear surgery.

On December 3, 2007 appellant filed a claim for a schedule award.

In a December 11, 2007 report, the Office medical adviser indicated that the evidence was insufficient to determine an impairment rating as no range of motion deficits were noted.

On February 11, 2008 Dr. Kana noted November 8, 2007 as the date of maximum medical improvement and determined appellant had an 18 percent left upper extremity impairment based upon loss of range of motion. Range of motion for the left upper extremity included 68 degrees internal rotation, 84 degrees external rotation, 162 degrees forward elevation, 20 degrees backward elevation, 98 degrees abduction and 170 degrees adduction.

On February 20, 2008 the Office medical adviser reviewed Dr. Kana's report and concluded that appellant had a 17 percent left upper extremity impairment based upon her loss of range of motion. Using Figure 16-40 at page 476, he found a one percent impairment for 162 degrees of flexion and a two percent impairment for 20 degrees of extension. Next, the Office medical adviser determined appellant had a four percent impairment for 98 degrees of abduction and a zero percent impairment for 170 degrees of adduction using Figure 16-43 at page 477. Using Figure 16-46 at page 479, he concluded that appellant had a one percent impairment for 68 degrees of internal rotation and a zero percent impairment for 84 degrees of external rotation. In adding the impairment values contributed by each unit,¹ the Office medical adviser found appellant had a total eight percent impairment of the left upper extremity. He then found a 10 percent impairment for acromioclavicular arthroplasty.² Using the Combined Values Chart at page 604, the Office medical adviser found appellant had a total 17 percent left upper extremity impairment.³

By decision dated March 17, 2008, the Office granted appellant a schedule award for 17 percent impairment of her left upper extremity.

On April 18, 2008⁴ appellant requested an oral hearing before an Office hearing representative.

On June 5, 2008 the Office denied the hearing request as untimely.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* 479.

² *Id.* at Table 16-27, page 506.

³ *Id.* at 505.

⁴ This date was determined by the postmark on the attached envelope.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ 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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

Dr. Kana, appellant's attending physician, provided no explanation as to how he arrived at appellant's impairment of 18 percent in his November 8, 2007 report. In response to the Office's request for clarification, he stated that appellant reached maximum medical improvement on November 8, 2007 and provided range of motion figures. Dr. Kana again opined that appellant had an 18 percent permanent impairment of the left upper extremity based on the A.M.A., *Guides*. The Board finds, however, that he did not identify the table or tables utilized or explain why they were otherwise inapplicable in either report. Board precedent is well settled that when an attending physician's report gives an estimate of impairment but does not explain how the estimate is derived from the A.M.A., *Guides*, the Office should follow the advice of its medical adviser or consultant where he or she has properly applied the A.M.A., *Guides*.⁹

The Office medical adviser reviewed the medical evidence and found a 10 percent impairment of appellant's left shoulder from her acromioclavicular arthroplasty.¹⁰ Appellant had range of motion measurements flexion of 162 degrees which represented one percent impairment,¹¹ extension of 20 degrees which represented a two percent impairment,¹² abduction of 98 degrees which represented four percent impairment,¹³ adduction of 170 degrees which

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ See *Carol A. Smart*, 57 ECAB 340 (2006). (Section 8107 of the Act authorizes the payment of schedule awards for the loss or loss of use, of specified members or functions of the body. Such loss or loss of use is known as permanent impairment).

⁸ See *id.*; *P.C.*, 58 ECAB ____ (Docket No. 07-410, issued May 31, 2007); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ *J.Q.*, 59 ECAB ____ (Docket No. 06-2152, issued March 5, 2008); *Laura Heyen*, 57 ECAB 435 (2006).

¹⁰ A.M.A., *Guides*, Table 16-27 at 506.

¹¹ *Id.* at Figure 16-40 at 476.

¹² *Id.*

¹³ *Id.* at Figure 16-43 at 477.

equaled zero percent impairment,¹⁴ external rotation of 84 degrees which equaled zero percent impairment¹⁵ and internal rotation of 68 degrees which equaled one percent impairment.¹⁶ By using the Combined Values Chart, the 8 percent loss of range of motion combined with the 10 percent arthroplasty resection, the Office medical adviser properly found that appellant had 17 percent impairment of the left upper extremity pursuant to the A.M.A., *Guides*.¹⁷ The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the medical evidence of record and that there is no other medical evidence of record supporting a greater than 17 percent permanent impairment to the left upper extremity pursuant to the A.M.A., *Guides*.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.¹⁸ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.¹⁹ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.²⁰ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.²¹

ANALYSIS -- ISSUE 2

Appellant's request for a hearing before an Office hearing representative was postmarked April 18, 2008. The date of filing was the date of the postmark.²² The April 18, 2008 hearing request was more than 30 days after the date of the Office's March 17, 2008 decision and, thus, the Office, in its June 5, 2008 decisions properly found that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant an oral hearing, the Office, in its June 5, 2008 decision, properly exercised its discretion by stating that it had considered the issue involved and had denied appellant's request for an oral hearing because the claim could be addressed through reconsideration. The Board has held that, as the only limitation on the

¹⁴ *Id.*

¹⁵ *Id.* at Figure 16-46 at 479.

¹⁶ *Id.*

¹⁷ *Id.* at Combined Values Chart at 604.

¹⁸ 5 U.S.C. § 812(b)(2). See *A.B.*, 58 ECAB ____ (Docket No. 07-387, issued June 4, 2007).

¹⁹ 20 C.F.R. § 10.616(b).

²⁰ *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

²¹ *Teresa M. Valle*, 57 ECAB 542 (2006).

²² See *N.M.*, 59 ECAB ____ (Docket No. 07-1432, issued May 5, 2008) (a hearing request must be sent within 30 days of the date of the decision as determined by postmark or other carrier's date marking).

Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.²³ In the present case, the evidence of record does not indicate that the Office abused its discretion.

CONCLUSION

The Board finds that the medical evidence included in the record establishes that appellant has no more than 17 percent impairment of her left upper extremity. The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 5 and March 17, 2008 are affirmed.

Issued: October 27, 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

²³ *Teresa M. Valle, supra* note 21; *Daniel J. Perea*, 42 ECAB 214 (1990).