



appellant had more than seven percent impairment of her right arm for which she received a schedule award. The Board noted that appellant's physician, Dr. James Sullivan, an osteopath and Board-certified physiatrist, found that appellant had nine percent impairment of the right arm while an Office medical adviser found that she had seven percent impairment. The Board remanded the case for further development regarding the right arm.<sup>2</sup> In a March 6, 2008 decision, the Board found that appellant's case was not in posture for decision. The Board found that an Office medical adviser, reviewing evidence from an Office referral physician, did not adequately explain how he concluded that appellant had seven percent right arm impairment. The Board remanded the case to the Office for a referral to an appropriate Board-certified specialist for an evaluation and calculation of appellant's work-related impairment of her right arm. The facts and the history contained in the prior appeals are incorporated by reference.

On March 19, 2008 the Office referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. William Smulyan, a Board-certified orthopedic surgeon.

In an April 8, 2008 report, Dr. Smulyan noted appellant's history of injury and treatment and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He advised that appellant had pain in the right arm at night, as well as numbness and tingling in the right hand, with tingling in the fifth and third fingers, pain in the right side of the neck, which radiated to the trapezius and skipped the upper arm to radiate into the forearm and wrist. Dr. Smulyan advised that appellant related having difficulty carrying heavy objects and had persistent sleep disturbance. He stated that diagnostic studies of the cervical spine revealed a healed two-level anterior cervical fusion at C5-6 and at C6-7, narrowing in the C4-5 intervertebral disc space, osteophytic changes and a well-preserved bony alignment. Right shoulder radiographic studies revealed no evidence of fracture or dislocation. Dr. Smulyan noted that appellant had a history of cervical disc disease and that she underwent an anterior cervical fusion at C5-6 and C6-7. He also noted that appellant underwent a cervical discectomy and allograft fusion. Additionally, Dr. Smulyan added that appellant had a preoperative cervical spine magnetic resonance imaging (MRI) scan, which revealed a left paracentral disc protrusion at C6-7 and a broad-based disc protrusion at C5-6. He noted that appellant had advanced degenerative changes at C4-5, C5-6 and C6-7 and lobe uncovertebral hypertrophy at C5-6. Dr. Smulyan advised that appellant had mild adhesive capsulitis in the right shoulder and persistent sensory complaints in the right arm after her anterior cervical disc surgery. He referred to Tables 15-15, 15-16 and 15-17 in the A.M.A., *Guides*, and opined that appellant had seven percent permanent impairment of the right arm based on her neurologic findings and restricted shoulder motion.

After a request for further clarification, in an April 23, 2008 addendum, Dr. Smulyan explained his calculations. He indicated that the C6 nerve root with a percentage loss of five percent multiplied by a Grade 4 sensory deficit of five percent was equivalent to a rating of 2.5. Dr. Smulyan advised that a similar calculation for the C7 nerve root, with a three percent loss of sensory function graded at same sensory deficit was equal to 1.5. He noted that this would

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<sup>2</sup> The Board also found that appellant had no more than 14 percent impairment of the larynx, for which she received a schedule award.

equate to four percent and an additional three percent impairment was based on the restriction of mobility in the right upper limb. Dr. Smulyan referred to the Combined Values Chart and noted that appellant had seven percent impairment.

On April 30, 2008 the Office requested that the Office medical adviser utilize Dr. Smulyan's report and determine whether he properly utilized the A.M.A., *Guides* to arrive at an impairment rating of seven percent to the right arm.

In a May 12, 2008 report, the Office medical adviser noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. He noted Dr. Smulyan's findings and concluded that the right upper extremity impairment should not exceed seven percent. The Office medical adviser noted that Dr. Smulyan used the incorrect percentage for the C6 nerve root in Table 15-17 for a unilateral spinal nerve root impairment affecting the upper extremity.<sup>3</sup> He multiplied the correct percentage, 8 percent by 25 percent utilizing Grade 4 impairment due to sensory loss based upon Table 15-15 to reach 2 percent.<sup>4</sup> The Office medical adviser also referred to Table 15-17 for the C7 nerve root and noted that the maximum percentage loss of function due to sensory deficit or pain was 5 percent multiplied by 25 percent for Grade 4 or 1.25 percent.<sup>5</sup> He added the values for the nerve roots and arrived at an impairment of 3.25 percent. The Office medical adviser further found that appellant had additional impairment of three percent based upon restricted mobility of the right arm. Using Dr. Smulyan's indications of a neurologic abnormality of the right upper extremity based upon the anterior cervical fusion as well as the decreased range of motion based upon mild adhesive capsulitis, he found an additional three percent impairment. The Office medical adviser combined the 3 percent with the 3.25 percent and opined that appellant was entitled to an impairment of less than 7 percent.

By decision dated May 29, 2008, the Office denied appellant's claim for an increased schedule award. It found that appellant was entitled to no more than seven percent permanent impairment of the right upper extremity.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>6</sup> and its implementing regulations<sup>7</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 appellants, good administrative practice necessitates the use of a single set of tables so that there may be

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<sup>3</sup> A.M.A., *Guides* 424.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

uniform standards applicable to all appellants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>8</sup>

Section 8123(a), in pertinent part, provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>9</sup>

### ANALYSIS

The Board finds this case is not in posture for decision. The Board finds that there is an unresolved conflict in the medical evidence between appellant's treating physician, Dr. Sullivan, who found that she had nine percent impairment of the right arm, and Dr. Smulyan, the second opinion physician, who opined that she had no more than seven percent impairment of that arm. As noted in the Board's November 3, 2006 decision, Dr. Sullivan reviewed appellant's history and noted findings in concluding that she had nine percent impairment of the right arm pursuant to the A.M.A., *Guides*. In contrast, Dr. Smulyan, in April 8 and 23, 2008 reports, applied the A.M.A., *Guides* to his examination findings in concluding that appellant had no more than seven percent impairment of the right arm. An Office medical adviser, on May 8, 2008, also opined that appellant did not have any greater impairment.

As a conflict exists between Drs. Sullivan and Smulyan, the Office should have referred appellant to an impartial medical examiner to resolve the medical conflict. Office regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and it will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>10</sup> The Board will set aside the Office's May 29, 2008 decision and remand the case to the Office for referral to an impartial medical examiner for further medical development pertaining to permanent impairment of appellant's right arm. In particular, the Board notes that the impartial medical examiner should note with specificity which nerve roots are involved regarding any impairment for sensory deficit, including identification of the tables or figures in the A.M.A., *Guides* that are used in rating impairment.<sup>11</sup> The specialist should also address whether there is any range of motion impairment, under Chapter 16 of the A.M.A., *Guides*, warranting a finding of impairment.<sup>12</sup> Following this and any such further development as may be deemed necessary, the Office shall issue an appropriate final decision on appellant's entitlement to schedule award compensation for the right upper extremity.

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<sup>8</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *Id.* See also *R.H.*, 59 ECAB \_\_\_ (Docket No. 07-2124, issued March 7, 2008).

<sup>11</sup> The Board notes that Dr. Sullivan found impairment based on sensory deficit involving C5-7 dermatomes while Dr. Smulyan, on April 23, 2008, only attributed impairment to C6-7.

<sup>12</sup> Dr. Sullivan did not reference any impairment due to lost range of motion but Dr. Smulyan found that appellant had three percent impairment of the arm due to restricted mobility.

**CONCLUSION**

The Board finds this case is not in posture for decision regarding appellant's entitlement to a schedule award for her right upper extremity due to a conflict in the medical evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 29, 2008 is set aside and remanded for further action consistent with this decision.

Issued: September 2, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board