



further development of the medical evidence.<sup>1</sup> The Board found that the case was not in posture for decision regarding whether appellant had more than a nine percent permanent impairment of his left arm. On December 16, 2005 Dr. Hanley rated a nine percent permanent impairment of appellant's left arm due to limited left shoulder motion. However, impairment values reported by him, added up to eight percent: one percent for 70 degrees of internal rotation, three percent for 110 degrees of abduction, three percent for 130 degrees of flexion and one percent for 30 degrees of extension.<sup>2</sup> The Board further found that, although the Office hearing representative remanded the case to the Office for further evaluation of whether appellant had impairment due to pain or sensory or strength loss, Dr. Hanley provided little explanation of why he did not include impairment ratings for these categories. Dr. Hanley indicated that there was "no evidence of sensory impairment" and "no evidence of strength loss impairment." He noted that, despite having discomfort at night, it was not significant enough to be rated under Chapter 18 of the A.M.A., *Guides*. The Board remanded the case to the Office for further development of the medical evidence. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office requested a supplemental report regarding the permanent impairment to appellant's left arm. On September 6, 2007 Dr. Hanley acknowledged that he miscalculated that appellant had a nine percent permanent impairment of his left arm due to limited left shoulder motion when in fact he had eight percent impairment due to such limited motion. He noted that the A.M.A., *Guides* provides that Chapter 18 should not be used to

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<sup>1</sup> Docket No. 07-941 (issued August 3, 2007). The Office accepted that on December 30, 1996 appellant, then a 63-year-old maintenance mechanic, sustained a cervical strain/sprain, back strain, left elbow contusion and bilateral shoulder strains. It granted appellant a schedule award for a nine percent permanent impairment of his left arm based on a December 16, 2005 report of Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, who served as an Office referral physician. The amount of the award was based on a weekly pay rate of \$670.65 at a 2/3 compensation rate.

<sup>2</sup> In his December 16, 2005 report, Dr. Hanley stated that appellant was a right-handed individual who had biceps measuring 12.5 inches on both sides and forearms measuring 11.25 on both sides. Appellant had intact reflexes in his upper extremity, normal neurologic status and positive impingement sign. With respect to his left shoulder, he had 110 degrees of abduction, 130 degrees of forward flexion, 30 degrees of extension, 40 degrees of adduction, 70 degrees of internal rotation and 70 degrees of external rotation. Dr. Hanley indicated that external and internal rotation strength was excellent and diagnosed impingement syndrome of the left shoulder with probable tear of the rotator cuff. He stated that there was "no evidence of sensory impairment" and "no evidence of strength loss impairment." Dr. Hanley concluded that appellant had a nine percent permanent impairment of his left shoulder due to limited left shoulder motion. He further stated, "[appellant] does have some discomfort which, is at night, but it is not significant enough to be rated according to Chapter 18 of the [A.M.A., *Guides*] American Medical Association, *Guides to the Evaluation of Permanent Impairment*." The record also contains a September 3, 1999 report in which Dr. Ronald Potash, an attending Board-certified surgeon, determined that appellant had a 12 percent permanent impairment due to limited left shoulder motion and an 8 percent impairment due to 3/5 strength in his left supraspinatus muscles which equaled a 19 percent permanent impairment of his left arm when using the Combined Values Chart of the A.M.A., *Guides*. In calculating appellant's impairment, Dr. Potash used the fourth edition of the A.M.A., *Guides* which became effective in 1995.

evaluate pain when a claimant's conditions can be adequately rated in other chapters of the A.M.A., *Guides*. Dr. Hanley stated:

“In this particular case we are dealing with a very straight forward shoulder condition known as impingement syndrome and [A.M.A., *Guides*] is quite good at offering an appropriate rating without going to Chapter 18. That is the reason that Chapter 18 was not used. Relative to the sensory loss, [appellant] did not report any sensory loss to me, and therefore no rating could be done. With regard to motor loss, if one looks at page 509 paragraph 16.9C, it talks about manual muscle testing. Though I didn't outline specifically in my report that [appellant] had 5/5 muscle strength, he indeed had 5/5 muscle strength in flexion, extension, adduction, abduction and rotational movements of the right shoulder. Therefore there would be no basis for a rating. If you read further under that subparagraph it says that the severity of strength deficit is classified and rated on the same principal as used for evaluation of peripheral nerves, Table 16-11. Table 16-11 would indicate that, on the basis of my examination, his percent motor deficit would be 0 since he is graded at [G]rade 5, complete active motion against gravity with full resistance. Therefore, no additional impairment is indicated on the basis of the [A.M.A., *Guides*] as I had suggested in my original report.”

On September 11, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, agreed with Dr. Hanley's assessment that appellant had an eight percent permanent impairment of his left arm due to limited left shoulder motion and no impairment for loss of strength. He noted that Dr. Hanley advised that appellant was not entitled to an impairment rating for sensory loss or pain and stated:

“However, [appellant's] primary complaint is pain and the maximal allowable is three percent. He is not severely disabled with pain and, therefore, I would recommend two percent rather than the three percent. Whenever there is a pain award based upon page 574, Figure 18-1, it is added rather than combined. Therefore, 2 percent should be added to the previously awarded 8 percent for loss of range of motion with resultant 10 percent award for the left upper extremity.”

The Office requested that Dr. Hanley clarify his opinion with respect to whether appellant was entitled to an impairment rating for pain under Chapter 18 of the A.M.A., *Guides*. On November 1, 2007 Dr. Hanley stated that he had reviewed the September 11, 2007 report of Dr. Berman. He stated:

“Assuming this is two percent of the possible three percent when one feels that pain is an additional burden of disability over and above that which would be considered by applying the guides in a normal fashion, I cannot agree with Dr. Berman and feel that my rating is appropriate. Based on my clinical assessment I would not assess an additional impairment for pain in this particular case.”

On November 5, 2007 Dr. Berman stated that appellant had very significant limitation of range of motion of his left shoulder and opined that limitation of motion of 110 degrees of

abduction and 130 degrees of forward flexion typically resulted in significant pain that was disabling. He asserted that such pain typically woke patients from sleep. Dr. Berman concluded that his provision of a two percent rating for pain was warranted and stated:

“In conclusion, the pain award was open to interpretation and the rules of its use are not strictly outlined. Clearly, [appellant] did have pain and in my experience a patient with this degree of limitation of motion would be expected to have pain. The pain was not rated in any other way as part of the schedule award.”

In a December 4, 2007 decision, the Office determined that appellant was not entitled to any additional schedule award compensation. It indicated that the weight of the medical evidence regarding appellant’s left arm impairment rested with the opinion of Dr. Hanley.<sup>3</sup>

Appellant requested a hearing before an Office hearing representative regarding his claim. At the April 9, 2008 hearing, his attorney contended that the Office erred by not having the claimant reexamined by Dr. Hanley. He asserted that there was no proof to establish Dr. Hanley’s assertion that he performed strength testing in 2005. Counsel also contended that there was a conflict in the medical evidence of Drs. Berman and Hanley because Dr. Berman opined that appellant was entitled to a two percent impairment rating for pain and Dr. Hanley opined that he was not entitled to such a rating. He asserted that Dr. Hanley’s supplemental report was not sufficient to be the weight of medical evidence because he did not adequately respond to the Board’s request for clarification with respect to possible ratings for sensory or strength loss.

In a June 20, 2008 decision, the Office hearing representative affirmed the Office’s December 4, 2007 decision finding that appellant did not meet his burden of proof to establish that he has more than a nine percent permanent impairment of his left arm.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees’ Compensation Act<sup>4</sup> and its implementing regulations<sup>5</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>6</sup>

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<sup>3</sup> The Office also determined that appellant’s schedule award compensation had been paid using a proper pay rate. The matter of the pay rate for appellant’s schedule award compensation is not currently before the Board.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> *Id.*

Section 8123(a) of the Act provides in pertinent part: “If there is 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>7</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>8</sup>

### ANALYSIS

The Office accepted that on December 30, 1996 appellant sustained a cervical strain/sprain, back strain, left elbow contusion and bilateral shoulder strains. It granted appellant a schedule award for a nine percent permanent impairment of his left arm based on a December 16, 2005 report of Dr. Hanley, a Board-certified orthopedic surgeon who served as an Office referral physician.

The Board issued a decision on August 3, 2007 in which it set aside the Office’s August 21, 2006 decision regarding appellant’s entitlement to schedule award compensation. The Board determined that Dr. Hanley provided very little explanation of why he did not include impairment ratings for sensory loss, pain or strength loss.<sup>9</sup> The Board indicated that the A.M.A., *Guides* provides specific detailed procedures for evaluating pain and sensory and strength loss, but Dr. Hanley did not specifically explain how he applied these portions of the A.M.A., *Guides*. The Board remanded the case to the Office for further development of the nature and extent of appellant’s left arm impairment.

On remand, Dr. Hanley produced reports in which he continued to find that appellant only had a nine percent permanent impairment of his left arm. The Board finds that he still has not adequately explained why he did not include impairment ratings for sensory loss, pain or strength loss.

With respect to whether appellant is entitled to an impairment rating for strength loss in his left arm, Dr. Hanley noted in his September 6, 2007 report that reference should be made to page 509 of the A.M.A., *Guides* regarding manual muscle testing and stated, “Though I did not outline specifically in my report that [appellant] had 5/5 muscle strength, he indeed had 5/5 muscle strength in flexion, extension, adduction, abduction and rotational movements of the right shoulder. Therefore there would be no basis for a rating.” Dr. Hanley further noted that Table 16-11 of the A.M.A., *Guides* indicated that, on the basis of his examination, appellant’s motor deficit would be zero “since he is graded at [G]rade 5, complete active motion against gravity with full resistance.”

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<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>9</sup> The Board also noted that Dr. Hanley determined in his December 16, 2005 report that appellant had a nine percent permanent impairment of his left arm due to limited left shoulder motion, but indicated that based on the values reported by Dr. Hanley appellant would have impairments based on limited left shoulder motions which add up to eight percent.

The Board notes that although Dr. Hanley suggested that he performed manual muscle testing of appellant's left arm there is no clear indication in the record that he performed such testing in accordance with the standards of the A.M.A., *Guides* in December 2005 or any time thereafter. The Board requested additional clarification of this matter and it is not sufficient for Dr. Hanley to simply state in a conclusory manner that appellant did not have strength loss in his left arm which warranted a rating under the A.M.A., *Guides*. The record does not indicate that manual muscle testing was performed and evaluated, as described in the relevant portions of the A.M.A., *Guides*, for flexion, extension, abduction, adduction, internal rotation and external rotation of appellant's left shoulder to determine whether complete active range of motion could be achieved at varying levels of resistance.<sup>10</sup> On remand, Dr. Hanley further indicated, "Relative to the sensory loss, [appellant] did not report any sensory loss to me and therefore no rating could be done." He was asked to provide further clarification of his earlier opinion that appellant was not entitled to a rating for sensory loss. Dr. Hanley's later reports do not adequately provide such clarification. As previously noted, appellant regularly complained of left shoulder pain which kept him awake at night and Dr. Hanley did not provide sufficient explanation of why such findings would not constitute a ratable sensory loss.<sup>11</sup>

For these reasons, the case should be remanded to the Office for further consideration of the permanent impairment of appellant's left arm with special emphasis on whether he has impairment of his left arm due to sensory loss, pain or strength loss.<sup>12</sup> Appellant and the case record should be referred to an appropriate medical specialist for further development of these matters to be followed by an appropriate decision on his left arm impairment.

### CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant did not meet his burden of proof to establish that he has more than a nine percent permanent impairment of his left arm. The case is remanded to the Office for further development.

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<sup>10</sup> A.M.A., *Guides* 483-84, 509-11 (including Table 16-11). Dr. Hanley indicated in December 2005 that external and internal rotation strength was excellent, but he did not clearly explain how this assessment was made.

<sup>11</sup> On remand, Dr. Hanley properly noted that the A.M.A., *Guides* provides that Chapter 18 should not be used to evaluate pain when a claimant's conditions can be adequately rated in other chapters of the A.M.A., *Guides*. A.M.A., *Guides* 569-81. However, given that he has not yet adequately considered appellant's pain and sensory complaints under portions of the A.M.A., *Guides* other than Chapter 18, his evaluation of pain under Chapter cannot be considered to be complete. It should be noted that appellant's attorney, Mr. Uliase, asserted that there was a conflict in the medical evidence regarding a pain rating between Drs. Hanley and Berman, a Board-certified orthopedic surgeon who served as an Office medical adviser. However, no such conflict exists because both Dr. Hanley and Dr. Berman served as physicians for the Office. See *supra* notes 7 and 8 and accompanying text.

<sup>12</sup> As previously found by the Board, the medical evidence showed that appellant had nine percent impairment due to limited left shoulder motion. The record contains a September 3, 1999 report in which Dr. Potash, an attending Board-certified surgeon, determined that appellant had a 12 percent permanent impairment due to limited left shoulder motion and an 8 percent impairment due to 3/5 strength in his left supraspinatus muscles which combined for a 19 percent permanent impairment of his left arm. In calculating appellant's impairment, Dr. Potash used the fourth edition of the A.M.A., *Guides* which became effective in 1995. Mr. Uliase asserted that there was a conflict in the medical evidence between Dr. Potash and Dr. Hanley regarding appellant's strength loss. However, there is no such conflict as Dr. Potash did not explain how his assessment of strength comported with the relevant standards of the A.M.A., *Guides*. Moreover, the evaluations of Dr. Potash and Dr. Hanley were not reasonably contemporaneous.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' June 20, 2008 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 1, 2009  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board