

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

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**J.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Houston, TX, Employer**

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**Docket No. 09-105  
Issued: September 4, 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  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 15, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' July 29, 2008 schedule award decision, finding 13 percent impairment of his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this schedule award.

**ISSUE**

The issue is whether appellant has more than 13 percent impairment of the right upper extremity for which he received a schedule award.

**FACTUAL HISTORY**

Appellant, a 46-year-old mail handler, filed an occupational injury claim for a right shoulder and back injury due to pushing equipment and lifting boxes at work. The Office accepted the claim on March 30, 2006 for an unspecified disorder of the bursae and tendons in the right shoulder and nontraumatic rupture of the right biceps tendon. It authorized appellant's

January 31, 2006 rotator cuff repair surgery. Appellant stopped work on December 13, 2005 and returned to light duty on June 12, 2006.

In a December 14, 2005 report, Dr. Alain Elbaz, a Board-certified orthopedic surgeon, advised that appellant presented with complaints of right shoulder pain for two months or longer. He diagnosed right shoulder impingement syndrome and brachial radiculitis. In a January 31, 2006 operative report, Dr. Elbaz performed an arthroscopic rotator cuff repair, arthroscopic subacromial decompression and arthroscopic biceps tenodesis of the right shoulder. He noted that there was a 30 to 40 percent biceps tendon tear within the subpatellar tendon and there was a full-thickening rotator cuff tear at the anterior portion of the supraspinatus. Dr. Elbaz submitted additional reports noting appellant's status.

On January 3, 2008 appellant filed a schedule award claim. In support of his claim, he submitted a December 21, 2007 work capacity evaluation form from Dr. Elbaz who indicated that appellant was not capable of performing his usual job but could work full time with permanent restrictions. Dr. Elbaz advised that appellant had reached maximum medical improvement.

On January 29, 2008 the Office advised appellant to have his physician provide an opinion rating his permanent impairment pursuant to American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a December 21, 2007 report, Dr. Elbaz noted permanent restrictions and an impairment determination for appellant's right shoulder based on the A.M.A., *Guides*. He noted flexion at 133 degrees for three percent impairment, abduction at 129 degrees for two percent impairment, adduction at 30 degrees for one percent impairment, external rotation at 54 degrees for one percent impairment and internal rotation at 72 degrees for one percent impairment. Dr. Elbaz concluded that appellant had eight percent loss of range of motion, which converted to five percent whole person impairment. He also determined loss of strength of the upper extremity to be 25 percent, which converted to 15 percent whole person impairment. Dr. Elbaz combined the 15 percent loss of strength impairment with the 5 percent loss of range of motion impairment to total 19 percent whole person impairment for the right upper extremity. He advised that appellant had reached maximum medical improvement.

Appellant also submitted a Texas workers' compensation commission report form signed by Dr. Elbaz on December 21, 2007. Dr. Elbaz indicated that appellant had a permanent impairment as a result of a compensable injury. The report also stated that he had 19 percent permanent impairment according to the fourth edition of the A.M.A., *Guides*.

On March 21, 2008 an Office medical adviser noted that Dr. Elbaz's December 21, 2007 report did not contain descriptive information with subjective complaints and objective signs to support his impairment rating. The Office medical adviser recommended a referral for a second opinion.

On April 15, 2008 the Office referred appellant, with a statement of accepted facts, to Dr. Donald Mauldin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 22, 2008 report, Dr. Mauldin summarized the history of appellant's injury and the nature of

treatment sought. He reported examination findings, noting that there was no atrophy and no gross motor or sensory deficit in the upper extremity. Dr. Mauldin noted that appellant was at maximum medical improvement. He measured range of motion of appellant's right shoulder as 120 degrees of flexion and 30 degrees of extension. Dr. Mauldin determined that appellant had four percent flexion impairment and one percent extension impairment according to Figure 16-40<sup>1</sup> on page 476 of the fifth edition of the A.M.A., *Guides*. He also measured 90 degrees abduction and 30 degrees adduction, resulting in four percent and one percent impairment, respectively, according to Figure 16-43 on page 477. Dr. Mauldin also measured 40 degrees internal rotation and 60 degrees external rotation, resulting in three percent and zero percent impairment respectively according to Figure 16-46 on page 479. He determined that appellant had total right upper extremity impairment of 13 percent.

On June 10, 2008 a second Office medical adviser reviewed the medical evidence and statement of accepted facts and determined that appellant had reached maximum medical improvement on May 22, 2008. He agreed that appellant had 13 percent permanent impairment of the right upper extremity according to Figure 16-40, 16-43 and 16-46 on pages 476-479 of the A.M.A., *Guides*. The Office medical adviser noted that there was no evidence of left upper extremity impairment.

On June 11, 2008 Dr. Elbaz tested appellant's right shoulder for muscle strength and found it to be normal. He also tested for muscle pain and allocated between four and eight points for each range of motion category tested.

By decision dated July 29, 2008, the Office issued appellant a schedule award for 13 percent impairment of the right upper extremity. It paid 40.56 weeks of compensation from May 22, 2008 to March 1, 2009.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>3</sup>

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<sup>1</sup> The Board notes that the citations in Dr. Mauldin's report refer to "Table" instead of "Figure."

<sup>2</sup> 5 U.S.C. §§ 8101-8193. See 5 U.S.C. § 8107.

<sup>3</sup> See 20 C.F.R. § 10.404; *R.D.*, 59 ECAB \_\_\_ (Docket No. 07-379, issued October 2, 2007).

## ANALYSIS

The Office accepted that appellant sustained an unspecified disorder of the bursae and tendons in the right shoulder and nontraumatic rupture of the right biceps tendon. It subsequently authorized his January 31, 2006 rotator cuff surgery.

In a December 21, 2007 report, Dr. Elbaz found that appellant had reached maximum medical improvement and noted 19 percent whole person impairment. However, Dr. Elbaz's whole person impairment rating is not a basis for a schedule award as impairment based on the whole person is not recognized under the Act.<sup>4</sup> He also provided findings for the arm based on loss of range of motion to appellant's right shoulder. Dr. Elbaz's range of motion findings for the shoulder result in eight percent impairment of the right arm when applied to appropriate figures in the A.M.A., *Guides*.<sup>5</sup> He also advised that appellant had 25 percent impairment based on loss of strength. However, this rating is of diminished probative value as Dr. Elbaz did not explain how he calculated such impairment pursuant to the A.M.A., *Guides*.<sup>6</sup> Dr. Elbaz did not reference any specific provisions in the A.M.A., *Guides* to explaining exactly how he calculated 25 percent impairment of the arm due to loss of strength. Consequently, the impairment rating provided by Dr. Elbaz is of diminished probative value as it does not conform with the protocols of the A.M.A., *Guides*. Dr. Elbaz also submitted a June 11, 2008 report, but it did not specifically address permanent impairment pursuant to the A.M.A., *Guides*.

The Office referred appellant to Dr. Mauldin who, in a May 22, 2008 report, found that appellant had reached maximum medical improvement and provided findings on examination. Dr. Mauldin listed range of motion findings for appellant's right shoulder and applied these findings to the A.M.A., *Guides*. His findings for appellant's right shoulder included 120 degrees of flexion, 30 degrees of extension, 90 degrees abduction, 30 degrees adduction, 40 degrees internal rotation and 60 degrees external rotation. Dr. Mauldin applied these values to Figures 16-40, 16-43 and 16-46 of the A.M.A., *Guides* on pages 476, 477 and 479, respectively, to determine the individual percentages for flexion, extension, abduction, adduction and internal and external rotation, which he concluded was four percent, one percent, four percent, one percent, three percent and zero percent, respectively. He added these percentages to total 13 percent right upper extremity impairment. The Board notes that Dr. Mauldin did not find any basis for rating impairment for loss of strength as his examination revealed no atrophy and no gross motor or sensory deficit in the right arm.

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<sup>4</sup> See 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see also *Tommy R. Martin*, 56 ECAB 273 (2005) (whole person impairment ratings are not provided for under the Act as section 8107 provides a compensation schedule in terms of specific members of the body).

<sup>5</sup> As noted, Dr. Elbaz reported flexion of 133 degrees for three percent impairment, abduction of 129 degrees for two percent impairment, adduction of 30 degrees for one percent impairment, external rotation of 54 degrees for one percent impairment and internal rotation of 72 degrees for one percent impairment. See A.M.A., *Guides*, 476-79, Figures 16-40, 16-43, 16-46.

<sup>6</sup> See *Tonya D. Bell*, 43 ECAB 845 (1992) (where the Board held that an opinion is of little probative value where the physician does not explain how he derived such an impairment rating or whether it was ascertained by using the appropriate standards of the A.M.A. *Guides*). See also A.M.A., *Guides*, 508 (decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated).

An Office medical adviser reviewed Dr. Mauldin's report agreed that Dr. Mauldin had properly determined the extent of permanent impairment for loss of range of motion. He concurred with Dr. Mauldin that appellant had 13 percent permanent impairment of the right arm. The Board finds that the weight of the medical evidence establishes that appellant has no more than 13 percent impairment of the right arm.

**CONCLUSION**

The Board finds that appellant has no more than a 13 percent impairment of the right upper extremity for which he has received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated July 29, 2008 is affirmed.

Issued: September 4, 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