United States Department of Labor
Employees' Compensation Appeals Board

I.O, Appellant	)	
and	)	
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	**Docket No. 09-206** **Issued: September 17, 2009**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 27, 2008 appellant filed a timely appeal from an October 2, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the Office's March 25, 2008 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a seven percent permanent impairment of his right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On April 17, 2003 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim alleging that on March 10, 2003 he injured his right shoulder while lifting parcels in the performance of duty.[1] He stopped work on March 10, 2003. The Office accepted appellant's

[1] The record reflects that appellant had a separate claim for work-related injury in 1992. This other claim is not presently before the Board.

claim for right shoulder impingement and rotator cuff tear. Appellant underwent surgery for a subacromial decompression, biceps tenotomy and partial thickness rotator cuff debridement. He received compensation benefits.

On December 12, 2003 appellant submitted a Form CA-7 request for a schedule award.[2]

On June 8, 2004 Dr. Jeffrey L. Visotsky, a Board-certified orthopedic surgeon and treating physician, noted that six months following surgery appellant had good strength on forward flexion and no weakness. He still lacked some internal rotation despite good strength in the forward plane and all functional activities. Dr. Visotsky advised that appellant had slight tenderness along the proximal biceps but noted that he had good elbow flexion strength. He recommended therapy and avoiding overhead activities. By letter dated June 8, 2006, the Office requested that the physician provide an assessment of permanent impairment based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Dr. Visotsky, in a June 16, 2006 report, provided range of motion measurements for the right upper extremity. He found that appellant had 10 percent impairment of the right arm. An Office medical adviser reviewed Dr. Visotsky's reports and utilized the A.M.A., *Guides*. He determined that appellant had six percent impairment of the right arm.

On September 25, 2006 the Office granted appellant a schedule award for a six percent impairment of the right upper extremity. The award covered a period of 18.72 weeks from December 8, 2004 to April 18, 2005.

On October 17, 2006 appellant requested a hearing which was held on October 25, 2007. The Office received a November 10, 2006 report from Dr. Visotsky, advising that appellant had reached maximum medical improvement and he would not recommend any further surgical intervention.

By decision dated January 10, 2008, the Office hearing representative affirmed the September 25, 2006 schedule award decision.

On January 19, 2008 appellant, through counsel, requested reconsideration. In a December 18, 2007 medical report, Dr. Jeffrey E. Coe, Board-certified in occupational medicine, noted findings for the right shoulder including a 1 1/2 inch well-healed surgical scar on the anterior surface of the right upper arm in the area of the proximal biceps tendon and several arthroscopic scars about the right shoulder which were not tender. Dr. Coe advised that there was tenderness on palpation over the anterior right glenohumeral joint and proximal biceps tendon-region, but that there was no tenderness about the right acromioclavicular joint. Range of motion of the right shoulder revealed abduction of 160 degrees, forward elevation of 170 degrees, external rotation of 35 degrees and internal rotation of 30 degrees. Dr. Coe also found marked right shoulder crepitus and noted that appellant was able to reach behind his back with his right arm and touch his outstretched thumb to the mid lumbar region. He opined that

[2] The record reflects that he submitted several requests.

appellant had 12 percent impairment to the right arm. Dr. Coe referred to Figure 16-40[3] and noted one percent loss due to stiffness in forward elevation. He referred to Figure 16-43[4] and determined that appellant had one percent loss due to stiffness in abduction. Dr. Coe referred to Figure 16-46[5] and advised that appellant had one percent loss due to stiffness in internal rotation. He also referred to Table 16-35[6] and determined that appellant had nine percent loss due to weakness of the right shoulder in flexion and abduction and weakness of the right arm in flexion at the elbow.

In a March 17, 2008 report, an Office medical adviser noted that appellant had continued right shoulder pain complaints when lifting his arm or when reaching above the shoulder, with subjective complaints of weakness in the right arm. The medical adviser indicated that appellant had crepitus in the right shoulder with range of motion testing and diminished strength in the rotator cuff musculature graded at 4/5. The rotator cuff was intact at the time of surgery and was previously graded as normal by Dr. Visotsky.[7] The Office medical adviser explained that the apparent weakness was due to pain and guarding rather than overt weakness and thus no additional award was warranted. The medical adviser also noted weakness with elbow flexion and explained that the biceps was a forearm supinator and not an elbow flexor and thus there was "no anatomic basis or explanation for this weakness." He rated impairment of one percent for shoulder flexion of 170 degrees[8] and abduction of 160 degrees was one percent impairment.[9] Under Figure 16-46,[10] external rotation of 35 degrees was one percent impairment and internal rotation of 30 degrees was four percent impairment. The Office medical adviser added the values for the shoulder and opined that this yielded seven percent impairment. He explained that this impairment was greater then the six percent previously awarded. The Office medical adviser found that appellant reached maximum medical improvement on December 8, 2004.

On March 25, 2008 the Office granted appellant a schedule award for an additional impairment of one percent to the right upper extremity. The award covered a period of 3.12 weeks from April 19 to May 10, 2005.

On March 29, 2008 appellant's representative requested a hearing, which was held on July 14, 2008. Counsel contended that Dr. Coe's findings were sufficient to justify an additional impairment of five percent.

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[3] A.M.A., *Guides* 476.

[4] *Id*. at 477.

[5] *Id*. at 479.

[6] *Id*. at 510.

[7] He also noted that this finding was made by physical therapists as well.

[8] *Supra* note 4.

[9] *Supra* note 5.

[10] *Supra* note 6.

By decision dated October 2, 2008, the Office hearing representative affirmed the Office's March 25, 2008 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[11] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[12] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[13] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[14]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[15] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.

ANALYSIS

The Office accepted that appellant sustained right shoulder impingement and a right shoulder rotator tear with surgery in the performance of duty.

In support of his claim for an increased schedule award, appellant submitted the December 18, 2007 report of Dr. Coe, who found 12 percent impairment of the right arm based on loss of range of motion of the shoulder and elbow. The Office medical adviser reviewed his report and determined that appellant had seven percent impairment to the right arm.

Dr. Coe provided range of motion findings for the right shoulder and referred to Figure 16-40.[16] Dr. Coe and the Office medical adviser agreed that appellant had one percent impairment due to forward elevation of 170 degrees and one percent impairment due to abduction of 160 degrees in accordance with Figure 16-43.[17] However, regarding rotation, the

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8107.

[13] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[14] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

[15] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[16] *Supra* note 4.

[17] *Supra* note 5.

Board notes that the physicians referred to Figure 16-46.[18] Dr. Coe advised that appellant had impairment of one percent for internal rotation of 30 degrees, but the Board notes that internal rotation of 30 degrees is a four percent impairment. The Office medical adviser properly reflected this impairment for internal rotation of 30 degrees. Although Dr. Coe found external rotation of 35 degrees, he did not indicate whether appellant had impairment. The Board notes that Figure 16-46 of the A.M.A., *Guides* provides one percent impairment for this loss of range of motion. The Office medical adviser noted this in his range of motion findings. When added together, the findings for loss of range of motion correlate a total seven percent impairment of the right upper extremity. The Office medical adviser explained the aforementioned findings and concluded that appellant was entitled to no more than seven percent to the right upper extremity.

The Board also notes that Dr. Coe referred to Table 16-35[19] and determined that appellant had nine percent impairment due to weakness of the right shoulder in flexion and abduction and weakness of the right arm in flexion at the elbow. However, the A.M.A., *Guides,* indicate that decreased strength cannot be rated in the presence of decreased motion or painful conditions. The A.M.A., *Guides* provide that only in rare cases, if the examiner believed that the individual's loss of strength represents an impairment factor that has not been considered adequately by other methods in the A.M.A., *Guides*, then loss of strength can be rated separately.[20] In this instance, Dr. Coe did not provide any explanation as to why strength impairment was appropriate in light of the range of motion impairment. He did not address whether the rotator cuff warranted a separate loss of strength rating. Furthermore, the Office medical adviser noted that while Dr. Coe found that appellant had diminished strength of 4/5 for strength, he also indicated that the rotator cuff was intact at the time of surgery. Thus, the evidence does not reflect additional impairment for decreased strength pursuant to the A.M.A., *Guides*.

The Board finds that the medical evidence does not establish a ratable impairment greater than seven percent permanent impairment of the right upper extremity

CONCLUSION

The Board finds that appellant has seven percent permanent impairment of his right arm, for which he received a schedule award.

[18] *Supra* note 6.

[19] *Supra* note 7.

[20] A.M.A., *Guides* 508, 16.8a, Principles.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 2 and March 25, 2008 are affirmed.

Issued: September 17, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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