United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 09-2091**
	)	**Issued: April 19, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Baltimore, MD, Employer	)	

Appearances:
Samuel Sperling, Esq., for the appellant
No appearance, for the Director

Oral Argument December 10, 2009

DECISION AND ORDER

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

JURISDICTION

On August 15, 2009 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' August 21, 2008 and May 7, 2009 merit schedule award decisions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 12 percent impairment of his right upper extremity and an 11 percent impairment of his left upper extremity, for which he received schedule awards.

FACTUAL HISTORY

The Office accepted that on March 28, 1997 appellant, then a 52-year-old attorney, sustained a fractured right wrist, bilateral rotator cuff tear with surgery and recurrent intestinal

obstruction with surgery and disorder of the bursae and tendons when he slipped and fell while in the performance of his work duties.[1]

On June 24, 2005 appellant filed a claim for a schedule award accompanied by medical evidence. In a June 15, 2005 medical report, Dr. Douglas M. Shepard, an attending Board-certified orthopedic surgeon, advised that appellant sustained a 45 percent impairment of the right upper extremity and a 25 percent impairment of the left upper extremity based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On March 14, 2006 Dr. Robert H. Wilson, an Office medical adviser, reviewed Dr. Shepherd's June 15, 2005 findings. He opined that appellant reached maximum medical improvement on February 1, 2000. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Wilson determined that appellant sustained an 18 percent impairment of the right upper extremity (A.M.A., *Guides* 476-79, 510, Figures 16-40 to 16-46 and Table 16-35). He stated that appellant's claim was only accepted for a right shoulder condition.

The Office determined that a conflict existed in the medical opinion evidence between Dr. Shepard and Dr. Wilson regarding the extent of appellant's permanent impairment. By letter dated April 21, 2006, it referred him, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Gary W. Pushkin, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 18, 2006 report, Dr. Pushkin reviewed the history of appellant's March 28, 1997 employment injuries and medical treatment. On physical examination of the right shoulder, he reported some significant supraspinatus and infraspinatus atrophy, full passive range of motion, approximately 160 degrees of forward flexion and abduction each and good external rotation. Appellant experienced pain with abduction and with a positive impingement test. He also had pain with the lift-off test and significant weakness with resisted external rotation and resisted abduction. Dr. Pushkin reported negative speed, apprehension and belly test results. Regarding the left shoulder he reported the same range of motion findings as the right shoulder with no scapular winging. An x-ray of the right shoulder revealed degenerative changes with upriding of the humeral head. X-rays of the left shoulder demonstrated cystic changes about the greater tuberosity and what appeared to be a loose body or calcific tendinitis. Dr. Pushkin diagnosed rotator cuff arthropathy of the right shoulder and status post rotator cuff repair of the left shoulder. He noted that appellant had good range of motion and advised that the fifth edition of the A.M.A. *Guides* did not adequately represent the disability in his shoulders. Utilizing Table 16-35 on page 510 of the fifth edition of the A.M.A. *Guides*, Dr. Pushkin determined that appellant sustained a 25 percent impairment of the right shoulder and a 15 percent impairment of the left shoulder.

[1] This case has previously been before the Board. In a September 5, 2002 decision, the Board set aside the Office's denial of appellant's recurrence of disability claim. The Board remanded the case for the Office to determine whether there was a causal relationship between appellant's right shoulder condition and the accepted March 28, 1997 employment incident and whether he sustained consequential left shoulder and gastrointestinal conditions resulting from nonsteroidal and anti-inflamatory medication that required surgery. Docket No. 01-1232 (issued September 5, 2002).

On September 6, 2006 Dr. Willie E. Thompson, an Office medical adviser, reviewed Dr. Pushkin's May 18, 2006 findings. He noted that Table 16-35 addressed strength deficit primarily for the shoulder and elbow due to musculoskeletal disorders based on manual muscle testing. Dr. Thompson stated that Dr. Pushkin's impairment ratings were simply stated rather, than based on manual muscle testing of the shoulder for flexion, extension, abduction, adduction, internal rotation and external rotation measurements. He stated that, according to Table 16-35, strength deficit must be assessed and provided in increments between 5 percent and 50 percent for each affected range of motion. Dr. Thompson indicated that the strength deficit should then be multiplied by the relative value of the particular unit, be it shoulder or elbow to calculate the percentage of impairment. He concluded that Dr. Pushkin failed to properly apply the A.M.A., *Guides*. Dr. Thompson stated that an impairment rating could be determined based on Table 16-35 upon receipt of the above-noted measurements.

By letter dated October 25, 2006, the Office requested that Dr. Pushkin reexamine appellant and provide his measurements for muscle weakness and strength deficit of the upper extremities.

In a November 16, 2006 report, Dr. Pushkin advised that appellant's right shoulder had 125 degrees of abduction, 145 degrees of forward flexion, good external rotation and a mildly positive impingement sign. Manual muscle strength testing revealed 4/5 each in abduction, external rotation and adduction, 5/5 in forward flexion and 41/2/5 in internal rotation. There was no neurocirculatory deficit. Dr. Pushkin reported the same range of motion and strength deficit measurement for the left shoulder as the right shoulder with 41/2/5 in forward flexion and 5/5 in extension. Testing of both elbows revealed 4/5 biceps strength each in elbow flexion and supination. Dr. Pushkin determined that appellant sustained decreased strength in the right shoulder, 15 percent each in abduction, external rotation and adduction and 12.5 percent in internal rotation. He had no strength deficit for forward flexion. Appellant also sustained decreased strength in the right elbow, 15 percent each for flexion and supination (A.M.A., *Guides* 510, Table 16-35). Regarding the left shoulder and elbow, Dr. Pushkin calculated the same impairment ratings as the right shoulder and elbow.

On January 3, 2007 Dr. Thompson reviewed Dr. Pushkin's November 16, 2006 findings. Regarding the right shoulder, he determined that 145 degrees of flexion constituted a 2 percent impairment and 125 degrees of abduction constituted a 2 percent impairment, resulting in a 4 percent impairment (A.M.A., *Guides* 476, 477, Figures 16-40, 16-43). Dr. Thompson further determined that manual muscle testing which demonstrated 20 percent in abduction and adduction each represented a 2 percent impairment, 10 percent in internal rotation represented a 2 percent impairment and 20 percent in external rotation represented a 2 percent impairment, resulting in an 8 percent impairment (A.M.A., *Guides* 510, Table 16-35). He combined the 4 percent impairment for loss of range of motion and the 8 percent impairment for strength deficit to conclude that appellant sustained a 12 percent impairment of the right upper extremity (A.M.A., *Guides* 604, Combined Values Chart). Regarding the left shoulder, Dr. Thompson determined that 145 degrees of flexion constituted a 2 percent impairment and 145 degrees of abduction constituted a 1 percent impairment, resulting in a 3 percent impairment (A.M.A., *Guides* 476, 477, Figures 16-40, 16-43). He further determined that weakness of 20 percent in abduction and adduction each represented a 2 percent impairment and 10 percent in flexion and internal rotation each represented a 2 percent impairment, resulting in an 8 percent impairment

(A.M.A., *Guides*, 510, Table 16-35). Dr. Thompson combined the 3 percent impairment for loss of motion and the 8 percent impairment for strength deficit to calculate an 11 percent impairment of the left upper extremity (A.M.A., *Guides* 604, Combined Values Chart). He concluded that appellant reached maximum medical improvement on February 2, 2003.

By decision dated March 2, 2007, the Office granted appellant a schedule award for a 12 percent impairment of the right upper extremity and an 11 percent impairment of the left upper extremity. On March 19, 2007 appellant, through his attorney, requested an oral hearing before an Office hearing representative.

In a July 10, 2007 report, Dr. Shepard listed his range of motion and strength deficit findings and determined that appellant sustained a 30 percent impairment of the left upper extremity and a 50 percent impairment of the right upper extremity based on the fifth edition of the A.M.A., *Guides*.

On August 23, 2007 Dr. Morley Slutsky, an Office medical adviser, reviewed Dr. Shepard's July 10, 2007 findings. He requested that Dr. Shepard provide all of his range of motion measurements for the shoulder and an explanation for his impairment rating for such loss and strength deficit in light of section 16.8a on page 508 of the A.M.A., *Guides.*

By decision dated September 26, 2007, an Office hearing representative set aside the March 2, 2007 decision and remanded the case for an Office medical adviser to review Dr. Shepard's July 10, 2007 findings and provide an impairment rating for appellant's right and left upper extremities. She instructed the medical adviser to correlate his findings with the A.M.A., *Guides* and provide rationale to support his opinions.

By letter dated October 10, 2007, the Office requested that Dr. Shepard provide the information requested by Dr. Slutsky.

In a January 23, 2008 report, Dr. Shepard advised that his 30 percent impairment rating of the left upper extremity and 15 percent impairment rating of the right upper extremity were based on Figures 16-40, 16-43 and 16-46 on pages 476 through 479 and Table 16-35 on page 510 of the A.M.A., *Guides*. He stated that apparently subjective parameters such as pain and weakness and the subjective and objective effect of appellant's shoulder injuries influenced his capacity to carry out daily living activities and work and recreation pursuits were taken into account.

On February 12, 2008 Dr. Slutsky reviewed Dr. Shepard's January 23, 2008 report. He opined that the findings were not sufficient to establish that appellant sustained more than a 12 percent impairment of the right upper extremity and an 11 percent impairment of the left upper extremity. Dr. Slutsky explained that Dr. Shepard did not provide all six range of motion measurements for the shoulders. He failed to explain his impairment rating for decreased strength in the presence of loss of range of motion. Dr. Slutsky determined that appellant sustained a nine percent impairment of the right upper extremity and a three percent impairment of the left upper extremity based on Dr. Shepard's July 10, 2007 findings.

In a February 12, 2008 decision, the Office denied appellant's claim for an additional schedule award. It accorded special weight to Dr. Pushkin's impartial medical findings as

applied to the A.M.A., *Guides* by Dr. Thompson in finding that appellant sustained a 12 percent impairment of the right upper extremity and an 11 percent impairment of the left upper extremity. On February 28, 2008 appellant requested an oral hearing.

In reports dated May 23 and June 6, 2008, Dr. Neil Novin, a Board-certified surgeon, listed his range of motion and strength deficit measurements and impairment for pain. He determined that appellant sustained a 24 percent impairment of the right shoulder and a 22 percent impairment of the left shoulder (A.M.A., *Guides* 476, 479, 510, 576, 577, Figures 16-40, 16-46, Tables 16-35, 18-4, 18-5).

By decision dated August 4, 2008, the prior Office hearing representative set aside the February 12, 2008 decision and remanded the case for an Office medical adviser to review Dr. Novin's May 23 and June 6, 2008 findings and provide an impairment rating for appellant's right and left upper extremities. She instructed the medical adviser to correlate his findings with the A.M.A., *Guides* and provide rationale to support his opinions.

On August 6, 2008 Dr. Arnold T. Berman, an Office medical adviser, reviewed Dr. Novin's findings. He advised that the use of strength deficits was inappropriate based on section 16.8a on page 508 of the A.M.A., *Guides* which stated that decreased strength could not be rated in the presence of decreased motion or painful conditions. Dr. Berman further advised that an impairment rating for pain could not be recommended because Dr. Novin did not indicate whether appellant's conditions fell under section 18.3a on pages 570 through 571 or whether his pain could not be adequately rated under other chapters in accordance with section 18.3b on page 571 through 572 of the A.M.A., *Guides.* He advised that appellant's conditions had already been adequately rated. Dr. Berman applied the A.M.A., *Guides* to Dr. Novin's range of motion measurements to determine that appellant sustained an eight percent impairment of the right upper extremity and a six percent impairment of the left upper extremity (A.M.A., *Guides* 476-477, 479, Figures 16-40, 16-43, 16-46).

On August 19, 2008 the Office requested that Dr. Berman clarify whether appellant was entitled to an additional schedule award. On August 20, 2008 Dr. Berman advised that appellant was not entitled to an additional schedule award based on his calculations.

By decision dated August 21, 2008, the Office denied appellant's claim for an additional schedule award. The evidence was found to be insufficient to establish that he had more than a 12 percent impairment of the right upper extremity and an 11 percent impairment of the left upper extremity. On September 9, 2008 appellant requested an oral hearing.

In a May 7, 2009 decision, an Office hearing representative affirmed the August 21, 2008 decision.

On appeal, appellant contended that the Office should have granted him a schedule award based on Dr. Novin's rating of a 24 percent impairment of his right shoulder and a 22 percent impairment of his left shoulder. Alternatively, he contended that the Office should have granted him a schedule award based on Dr. Pushkin's rating of a 25 percent impairment of his right shoulder and a 15 percent impairment of his left shoulder. Appellant argued that the Office

should have referred him to another impartial medical specialist as it determined that Dr. Pushkin's opinion was not entitled to special weight accorded an impartial medical specialist.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

Section 8123 of the Act provides that, 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.[6] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

Where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[8] If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.[9] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act[10] will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[11]

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[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] *Supra* note 3.

[6] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[7] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[8] *Nancy Keenan*, 56 ECAB 687 (2005); *Harry T. Mosier*, 49 ECAB 688 (1998).

[9] *Guiseppe Aversa*, 55 ECAB 164 (2003).

[10] 5 U.S.C. § 8123(a).

[11] *Harold Travis*, 30 ECAB 1071 (1979).

ANALYSIS

The Board finds that this case is not in posture for decision. A conflict in the medical opinion evidence arose between Dr. Shepard, an attending physician, and Dr. Wilson, an Office referral physician, as to the extent of permanent impairment of appellant's upper extremities. Dr. Shepard opined that appellant sustained a 45 percent impairment of the right upper extremity and a 25 percent impairment of the left upper extremity. Dr. Wilson opined that appellant only sustained an 18 percent impairment of the right upper extremity. The Office properly referred appellant to Dr. Pushkin as the impartial medical specialist. The Board finds, however, that Dr. Pushkin's evaluation of appellant's impairment of the right and left upper extremities is not sufficient to resolve the conflict.

In a May 18, 2006 report, Dr. Pushkin listed his findings on physical and x-ray examination and determined that appellant sustained a 25 percent impairment of the right shoulder and a 15 percent impairment of the left shoulder (A.M.A., *Guides* 510, Table 16-35). Based on the September 6, 2006 opinion of Dr. Thompson, an Office medical adviser, who reviewed Dr. Pushkin's May 18, 2006 findings and stated that he failed to properly apply the A.M.A., *Guides* because he did not provide range of motion measurements for flexion, extension, abduction, adduction and internal and external rotation of appellant's shoulders and strength deficit measurements ranging from 5 to 50 percent for each affected range of motion, the Office properly requested clarification from Dr. Pushkin on October 25, 2006. Dr. Pushkin's November 16, 2006 report found that, regarding the right shoulder, abduction was 125 degrees, forward flexion was 145 degrees, external rotation was good and impingement sign was mildly positive. He advised that strength testing was 4/5 each in abduction, external rotation and adduction, 5/5 in forward flexion and 41/2/5 in internal rotation. Dr. Pushkin found no neurocirculatory deficit. He reported the same range of motion and strength deficit measurements for the left shoulder as the right shoulder with 41/2/5 in forward flexion and 5/5 in extension. Dr. Pushkin advised that testing of both elbows demonstrated 4/5 biceps strength each in flexion and supination. He determined that appellant sustained decreased strength in the right shoulder, 15 percent each in abduction, external rotation and adduction and 12.5 percent in internal rotation. Dr. Pushkin found no strength deficit for forward flexion. He found decreased strength in the right elbow, 15 percent each for flexion and supination (Table 16-35 (A.M.A., *Guides* 510, Table 16-35). Regarding the left shoulder and elbow, Dr. Pushkin calculated the same impairment ratings as the right shoulder and elbow. However, his impairment ratings for the right and left shoulders do not conform to the protocols of the A.M.A., *Guides*. Dr. Pushkin failed to apply his range of motion measurements for appellant's right and left shoulders to the tables and figures of the A.M.A., *Guides*. In addition to his range of motion findings, he also rated impairment due to loss of strength. Dr. Pushkin did not adequately address the principle stated at section 16.8 that: "[d]ecreased strength cannot be rated in the presence of decreased motion or other painful conditions."[12] (Emphasis in the original.) He did not address why, under the circumstances of this case, any impairment for strength deficit was appropriate.

The Office submitted Dr. Pushkin's report to Dr. Thompson, an Office medical adviser, for review. Dr. Thompson did not address the incomplete nature of Dr. Pushkin's opinion.

[12] A.M.A., *Guides* 507, § 16.8.

Rather, he applied the A.M.A., *Guides* to Dr. Pushkin's range of motion and strength deficit measurements and determined that appellant sustained a 12 percent impairment of the right upper extremity and an 11 percent impairment of the left upper extremity (A.M.A., *Guides* 476, 477, 510, 604, Figures 16-40, 16-43, Table 16-35, Combined Values Chart). The Board finds that Dr. Thompson substituted his judgment for that of the impartial specialist in determining appellant's permanent impairment.[13] The role of the medical adviser is to verify the correct application of the A.M.A., *Guides*. It is the impartial medical specialist, however, who must resolve the conflict on the degree of permanent impairment in accordance with the A.M.A., *Guides*.[14] The Office issued the February 12, 2008 schedule award finding a 12 percent impairment of the right upper extremity and an 11 percent impairment of the left upper extremity, based on Dr. Thompson's opinion.

For the stated reasons, the Board finds that Dr. Pushkin's opinion is insufficient to resolve the conflict in medical opinion. As there is an unresolved conflict in medical opinion, the case will be remanded to the Office. Due to the insufficiency of Dr. Pushkin's reports and the Office's prior request that he clarify his opinion, the Office should refer appellant, together with the case record and a statement of accepted facts, to another Board-certified specialist for an impartial medical evaluation of his permanent impairment.[15] Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that this case is not in posture for decision, as there is an unresolved conflict in the medical evidence concerning appellant's degree of permanent impairment of the right and left upper extremities.

[13] *See I.H.*, 60 ECAB ___ (Docket No. 08-1352, issued December 24, 2008) (a medical adviser may not clarify or expand upon the impartial medical examiner's opinion).

[14] *See Richard R. LeMay*, 56 ECAB 341 (2005). *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

[15] *Guiseppe Aversa, supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2009 and August 21, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: April 19, 2010
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