

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

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R.N., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,  
CUSTOMS & BORDER PROTECTION,  
Nogales, AZ, Employer  
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**Docket No. 09-1617  
Issued: February 26, 2010**

*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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On June 10, 2009 appellant filed a timely appeal from an April 16, 2009 decision of the Office of Workers' Compensation Programs adjudicating his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has more than two percent impairment to his right upper extremity.

**FACTUAL HISTORY**

On December 11, 2005 appellant, then a 45-year-old supervisory border patrol agent, filed a claim for a traumatic injury to his right shoulder on December 8, 2005 as he moved crates with a hand cart while loading a truck. A January 31, 2006 magnetic resonance imaging (MRI) scan revealed a posterior labral tear in his right shoulder joint. On January 31, 2006 the Office accepted appellant's claim for a right shoulder strain and labral tear/closed dislocation of the

right shoulder. On April 3, 2006 he underwent right shoulder arthroscopic surgery, including posterior labral repair and acromioplasty, performed by Dr. John R. Klein, an attending orthopedic surgeon. On February 16, 2009 appellant filed a claim for a schedule award.

In a report dated July 23, 2008, Dr. Klein noted that appellant reported residual pain and decreased range of motion since his April 3, 2006 right shoulder surgery. He provided findings on physical examination that included pain with range of motion testing. Appellant lacked 5 to 10 degrees of forward flexion, abduction and internal rotation and external rotation. He had slight weakness with resisted external rotation. There was no atrophy. There were no sensory changes. Appellant's pain was localized to the right shoulder with range of motion testing. Dr. Klein stated that appellant had reached maximum medical improvement. He opined that, based on decreased range of motion and decreased strength, appellant had three percent impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*).

On February 2, 2009 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and an Office medical consultant, reviewed the case file and stated that appellant had status post right shoulder arthroscopy with arthroscopic posterior labral repair and acromioplasty. He noted that Dr. Klein had not provided an impairment rating based on the fifth edition of the A.M.A., *Guides*. Dr. Klein stated that appellant had no impairment due to decreased range of motion of the shoulder, based on Figure 16-40, 16-43 and 16-46 at pages 476, 477 and 479 of the A.M.A., *Guides*. He opined that appellant had 2 percent impairment to the right upper extremity due to mild weakness of external shoulder rotation, based on Table 16-35 at page 510.<sup>1</sup>

By decision dated April 16, 2009, the Office granted appellant a schedule award based on 2 percent right upper extremity for 6.24 weeks, from July 23 to September 4, 2008.<sup>2</sup>

### **LEGAL PRECEDENT**

The schedule award provision of the Act<sup>3</sup> and its implementing regulations,<sup>4</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

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<sup>1</sup> See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

<sup>2</sup> The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of the upper extremity. 5 U.S.C. § 8107(c)(10). Multiplying 312 weeks by 2 percent equals 6.24 weeks of compensation.

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

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>5</sup>

### ANALYSIS

The Board finds that appellant has not established that he has more than a two percent impairment to his right upper extremity. Dr. Klein provided findings on physical examination that included pain with range of motion testing. Appellant lacked 5 to 10 degrees of forward flexion, abduction and internal rotation and external rotation. He had slight weakness with resisted external rotation. There was no atrophy. There were no sensory changes. Dr. Klein opined that, based on decreased range of motion and decreased strength, appellant had three percent impairment based on the A.M.A., *Guides*. Dr. Klein did not, however, explain his impairment rating with reference to specific portions of the A.M.A., *Guides*. His report was properly referred to Dr. Harris, an Office medical consultant, for application of Dr. Klein's findings on physical examination to the A.M.A., *Guides*.

Dr. Harris stated that appellant had no impairment due to decreased range of motion of the shoulder, based on Figure 16-40, 16-43 and 16-46 at pages 476, 477 and 479 of the A.M.A., *Guides*. He opined that appellant had 2 percent impairment to the right upper extremity due to mild weakness of external shoulder rotation, based on Table 16-35 at page 510. In finding 2 percent impairment based on Table 16-35, Dr. Harris assigned Grade 4 to appellant's strength deficit in external rotation. Regarding Table 16-35, the A.M.A., *Guides* states at page 510 that "most weaknesses usually fall in the Grade 4 category.... Muscle strength graded 3 or lower is usually accompanied by other clinical findings such as atrophy." Dr. Klein found no atrophy of appellant's right shoulder muscles and noted that he had only slight weakness with resisted external rotation. Dr. Klein's findings on physical examination support a grade 4 strength deficit and 2 percent impairment for external rotation strength deficit.

Dr. Harris also properly concluded that appellant was not entitled to an additional award for right shoulder impairment due to loss of range of motion. Dr. Klein found that appellant lacked up to 10 degrees of flexion, abduction and internal and external rotation in his right shoulder range of motion. Although a 10 degree decrease in range of motion does not result in impairment due to abduction and external and internal rotation, according to Figure 16-43 and 16-46 at pages 477 and 479 of the A.M.A., *Guides*, a 10 degree deficit in flexion equals a one percent impairment, according to Figure 16-40 at page 476. According to Figure 16-40, 180 degrees of flexion is normal. If appellant could raise his right arm and shoulder to only 170 degrees, his impairment for decreased flexion is one percent, based on Figure 16-40. The Board has however determined that Table 17-2 of the A.M.A., *Guides* at page 526 is equally applicable to both lower and upper extremity impairment ratings.<sup>6</sup> Pursuant to this table, loss of strength impairment can not be combined in an award with loss of range of motion impairment. Appellant is entitled to the greater of either loss of motion or loss of strength impairment, therefore in this case appellant was entitled to the two percent award for loss of strength.

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<sup>5</sup> *Id.* at § 10.404.

<sup>6</sup> *James R. Taylor*, 56 ECAB 537 (2005).

On appeal appellant states that he sustained an earlier work-related shoulder injury for which he underwent surgery in 1995. He states that he was not compensated for that injury and did not file a claim. Appellant argues that the Office did not consider his first shoulder surgery in 1995 when evaluating his right shoulder impairment. The case on appeal concerns appellant's 2005 work-related right shoulder injury. The issue of whether he sustained a work-related shoulder injury for which he underwent surgery in 1995 is not before the Board.

**CONCLUSION**

The Board finds that appellant has not established that he is entitled to more than a two percent right upper extremity impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 16, 2009 is affirmed.

Issued: February 26, 2010  
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