

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, SOUTHEASTERN
POSTAL & DISTRIBUTION FACILITY,
Southeastern, PA, Employer**

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**Docket No. 09-1017
Issued: January 5, 2010**

Appearances:
Thomas R. Uliase, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2009 appellant filed a timely appeal from a December 17, 2008 decision of the Office of Workers' Compensation Programs denying a schedule award increase. 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 established that she sustained greater than a 10 percent impairment of the right upper extremity, for which she received a schedule award.

On appeal, appellant asserts that the opinion of Dr. James N. Nutt, III, an impartial medical examiner, was insufficient to represent the weight of the medical evidence. She contends that he did not provide new findings on examination, failed to include adduction measurements, mischaracterized appellant's surgical history and used improper methods to assess the percentage of permanent impairment.

FACTUAL HISTORY

This is the third appeal before the Board in this case. By decision issued January 17, 2008,¹ the Board set aside a January 8, 2007 decision of the Office denying a schedule award increase. The Board found that Dr. Nutt, a Board-certified orthopedic surgeon and impartial medical examiner, failed to provide range of motion measurements for adduction, flexion and extension of the right shoulder. The Board remanded the case to the Office to obtain a supplemental report from Dr. Nutt. The law and the facts of the case as set forth in the prior decision are hereby incorporated by reference.

In a February 26, 2008 letter, the Office requested a supplemental report from Dr. Nutt listing “range of motion measurements regarding adduction, flexion and extension of the right shoulder.” It emphasized that the American Medical Association, “*Guides to the Evaluation of Permanent Impairment*” (hereinafter, “A.M.A. *Guides*”) provided that these ranges of motion must be assessed when evaluating shoulder impairment. The Office provided an updated statement of accepted facts and the medical record.

In a March 3, 2008 report, Dr. Nutt explained that he did not measure shoulder adduction during his October 13, 2005 examination because appellant’s arm “was comfortably at her side at rest.” He stated that she had “no loss of range of motion compared to her left side” and no “actual loss of motion based on [his] and a consensus of the other examiners’ examinations.” Dr. Nutt assessed a one percent impairment due to pain causing a functional loss of abduction, “estimated from Figure 16-43, page 477.”²

On May 6, 2008 the Office referred Dr. Nutt’s March 3, 2008 report to an Office medical adviser for calculation of a schedule award. In a May 17, 2008 report, an Office medical adviser found that appellant had reached maximum medical improvement as of Dr. Nutt’s evaluation on March 17, 2006. The medical adviser concurred with Dr. Nutt that she underwent an acromioplasty and not a distal clavicle resection. He noted that Dr. David Weiss, an attending osteopathic physician, erred in his August 1, 2000 report by assessing a 10 percent upper extremity impairment for right shoulder surgery although the A.M.A., *Guides* did not “rate an acromioplasty.” The medical adviser concurred with Dr. Nutt’s assessment of full range of motion. He opined that appellant did not have any impairment due to pain. The medical adviser concluded that she had no more than a 10 percent impairment of the right upper extremity.

By decision dated May 29, 2008, the Office denied an additional schedule award. It found that Dr. Nutt’s opinion established that appellant did not sustain more than a 10 percent impairment of the right upper extremity, for which she received a schedule award. The Office stated that because Dr. Nutt “felt that there was full range of motion” in the right upper extremity, “there was no need to provide range of motion measurements regarding abduction, flexion and extension of the right shoulder.”

¹ Docket No. 07-1672 (issued January 17, 2008).

² Figure 16-43, page 477 of the fifth edition of the A.M.A., *Guides* is entitled, “Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder.”

In a June 3, 2008 letter, appellant requested an oral hearing, held October 27, 2008 by teleconference. At the hearing, appellant's attorney requested a review of the written record in lieu of the hearing.

By decision dated and finalized December 17, 2008, the Office affirmed the May 29, 2008 decision, finding that appellant had not established that she sustained more than a 10 percent impairment of the right upper extremity. It found that the weight of the medical evidence rested with Dr. Nutt, who properly applied the A.M.A., *Guides* to the clinical findings.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act³ provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁴

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.⁵ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, restricted motion, loss of sensation or loss of strength.⁶ Chapter 16 specifies that flexion, extension, abduction, adduction internal rotation and external rotation are all to be considered in evaluating impairments of shoulder motion.⁷ The A.M.A., *Guides* provides specific grading schemes for rating upper extremity impairments due to restricted motion, including a lack of flexion and extension of the shoulder.⁸

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

³ 5 U.S.C. §§ 8101-8193.

⁴ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁵ *See Paul A. Toms*, 28 ECAB 403 (1987).

⁶ A.M.A. *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

⁷ A.M.A. *Guides*, Chapter 16, "The Upper Extremities," p. 474, paragraph 16.4i, "Shoulder Motion Impairment."

⁸ Figure 16-40, page 476 of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder." *Supra* note 2. Figure 16-46, page 479 of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Internal and External Rotation of Shoulder."

shall appoint a third physician, who shall make an examination.⁹ 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.¹⁰ However, in a situation 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.¹¹

ANALYSIS

The Office accepted that appellant sustained bicipital tendinitis of the right shoulder and a right rotator cuff tear, requiring surgery on February 19, 1999. Pursuant to the first appeal, the Board found a conflict of medical evidence between an Office medical adviser and Dr. Weiss, an attending osteopath, regarding the percentage of permanent impairment. On remand of the case, the Office obtained an impartial medical opinion from Dr. Nutt, a Board-certified orthopedic surgeon. Based on Dr. Nutt's opinion, the Office awarded appellant a schedule award for a 10 percent impairment to the right upper extremity. Pursuant to the second appeal, the Board remanded the case to obtain a supplemental report from Dr. Nutt, with specific measurements for right shoulder motion. Dr. Nutt submitted a March 3, 2008 addendum explaining why he did not provide complete range of motion measurements. By decisions issued May 29 and December 17, 2008, the Office found that appellant had not established more than a 10 percent impairment of the right upper extremity, based on Dr. Nutt's opinion as the weight of the medical evidence. The Board finds, however, that his opinion is insufficient to resolve the conflict of medical opinion in this case.

The A.M.A., *Guides* provides that adduction, flexion and extension of the shoulder must be assessed when evaluating range of motion.¹² The Office explained this to Dr. Nutt in its February 26, 2008 letter requesting a supplemental report. Yet, Dr. Nutt did not provide these measurements. In his March 3, 2008 report, he admitted that he did not measure shoulder adduction during his October 13, 2005 examination. Dr. Nutt provided two reasons for this omission. First, a visual inspection revealed no apparent loss of adduction. However, the A.M.A., *Guides* requires that actual measurements be obtained.¹³ Merely, visualizing the affected limb is insufficient. Second, Dr. Nutt found that appellant had "no loss of range of motion compared to her left side." However, the A.M.A. *Guides* does not recognize comparing one limb to another as a valid method for assessing range of motion. As Dr. Nutt failed to provide complete range of motion measurements for the upper extremities, the Board cannot

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

¹⁰ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹¹ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

¹² *Supra* note 7.

¹³ *Id.*

fully visualize the extent of appellant's impairment due to the accepted conditions.¹⁴ Additionally, he estimated a one percent impairment for functional loss of abduction due to pain. The speculative nature of this opinion further diminishes its probative quality.¹⁵ Due to these deficiencies, the Board finds that the Office's reliance on Dr. Nutt's opinion was improper.

As stated, if an impartial medical specialist is unable to clarify his opinion as requested, the case should be referred to another appropriate impartial medical specialist.¹⁶ Dr. Nutt was unable to clarify his report as requested. The case will be remanded to the Office for appointment of a new impartial medical examiner to resolve the still outstanding conflict of medical opinion between Dr. Weiss and an Office medical adviser. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

On appeal, appellant asserts that Dr. Nutt's opinion could not represent the weight of the medical evidence as he did not provide complete range of motion measurements, misstated her surgical history and used nonstandard methods to assess range of motion. As stated, the Board finds that Dr. Nutt's opinion was incomplete and speculative. Therefore, it was insufficient to resolve the conflict of medical opinion. On remand of the case, the Office will appoint a new impartial medical examiner.

CONCLUSION

The Board finds that the case is not in posture for a decision as there is a conflict of medical opinion. The case will be remanded to the Office for further development.

¹⁴ *A.L.*, 60 ECAB ____ (Docket No. 08-1730, issued March 16, 2009).

¹⁵ *D.D.*, 57 ECAB 734 (2006).

¹⁶ *Guiseppe Aversa*, 55 ECAB 164 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 17, 2008 is set aside and the case remanded for further development consistent with this decision.

Issued: January 5, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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