United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 09-1268**
	)	**Issued: January 22, 2010**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL BUSINESS CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 April 16, 2009 appellant, through his representative, filed a timely appeal from the June 4, 2008 and February 4, 2009 schedule award decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than 14 percent right upper extremity impairment, for which he received a schedule award.

On appeal, appellant's attorney contends that the December 31, 2007 report of appellant's attending osteopath is in conflict with the opinion of the Office medical adviser.

FACTUAL HISTORY

On April 24, 2006 appellant, then a 61-year-old mason, filed an occupational disease claim alleging that his job aggravated a preexisting right shoulder condition. The Office

accepted his claim for rotator cuff tear of the right shoulder. On August 3, 2006 appellant underwent an acromioplasty and rotator cuff repair performed by Dr. John M. Fenlin, Jr., a Board-certified orthopedic surgeon. The Office paid medical and wage-loss compensation. Appellant returned to full-time light-duty work on March 5, 2007 and was released to full duty on May 22, 2007.

On July 30, 2007 appellant filed a schedule award claim. In a July 19, 2007 report, Dr. Fenlin stated his belief that appellant had lost 20 percent of his shoulder motion as a result of the work injury. He did not provide any range of motion findings. In an August 28, 2007 report, Dr. Fenlin stated that he had reviewed the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and would allow appellant two percent impairment for diminished adduction and two percent impairment for diminished forward flexion. He noted that appellant also had complaints of fatigue and pain with heavy use which should be compensated but which were not accounted for in the guidelines. Dr. Fenlin advised that maximum medical improvement was reached as of July 17, 2007. Again, he did not provide any specific range of motion measurements.

On September 21, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the medical evidence to find that appellant had 14 percent impairment of the right arm. He noted that the date of maximum medical improvement was July 17, 2007. Dr. Berman indicated that he rated impairment under the fifth edition of the A.M.A., *Guides*.[1] He stated that Dr. Fenlin's recommendation of two percent abduction impairment was equivalent to 140 degrees of abduction at Figure 16-43, page 477.[2] Under Figure 16-40, Dr. Berman determined that two percent diminished forward flexion was equivalent to 150 degrees.[3] Therefore, the total loss of range of motion was four percent. Dr. Berman applied the diagnosis-based impairment estimate of Table 16-27, page 506 to allow 10 percent impairment for the resection arthroplasty of the distal clavicle. Utilizing the Combined Values Chart, he found a total 14 percent impairment. Dr. Berman noted that Dr. Fenlin did not provide any basis for rating 20 percent impairment in the July 19, 2007 report.

In an October 16, 2007 decision, the Office granted appellant a schedule award for 14 percent right upper extremity impairment. The period of the award ran from July 17, 2007 to May 17, 2008.

On October 26, 2007 appellant, through counsel, requested an oral hearing that was held on February 27, 2008. At the hearing, he submitted a December 31, 2007 report from Dr. David Weiss, an osteopath, who rated impairment as 22 percent loss to the right arm. Dr. Weiss provided findings on physical examination. Range of motion of the right shoulder revealed forward flexion of 140 degrees which represented three percent impairment;[4] abduction of

[1] A.M.A., *Guides* (5th ed. 2001).

[2] The Board notes that the medical adviser was in error as Dr. Fenlin identified impairment due to adduction and not abduction.

[3] Dr. Berman mischaracterized this as 150 degrees of abduction rather than 150 degrees flexion.

[4] Figure 16-40, page 476.

90 degrees which represented four percent impairment;[5] internal rotation of 35 degrees which represented three percent impairment;[6] and external rotation of 80 degrees which was zero percent impairment. The total loss of range of motion was found to be 10 percent. Dr. Weiss also allowed 10 percent impairment for the resection arthroplasty which, when combined with the loss of range of motion, totaled 19 percent impairment to the arm. To this, he also combined 3 percent impairment for pain utilizing Figure 18-1 to find total impairment of 22 percent. Dr. Weiss advised that appellant reached maximum medical improvement as of December 31, 2007.

In a May 15, 2008 decision, an Office hearing representative set aside the October 16, 2007 schedule award and remanded the case for review of the medical evidence from Dr. Weiss.

On May 31, 2008 Dr. Berman again reviewed the medical record. He stated that he relied on the range of motion reported by Dr. Fenlin, the operating surgeon, who utilized the A.M.A., *Guides* to find two percent impairment for diminished abduction and two percent impairment for loss of forward flexion. Dr. Berman characterized Dr. Fenlin as an experienced orthopedic surgeon specializing in shoulder surgery and, for that reason, "his evaluation of range of motion I felt, took precedence over" that of Dr. Weiss. He also discounted the impairment rating of Dr. Weiss in that he rated pain at three percent under Chapter 18 rather than under the organ or body systems. Dr. Berman concluded that appellant did not have greater than 14 percent impairment of the right arm.

By decision dated June 4, 2008, the Office denied appellant's claim for an additional schedule award.

Appellant disagreed with the Office's decision and requested an oral hearing which was held on October 28, 2008 *via* videoconference.

By decision dated February 4, 2009, an Office hearing representative affirmed the June 4, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulations[8] 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. For consistent results and to ensure equal justice, under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that

[5] *Id*. at 477, Figure 16-43.

[6] *Id*. at 479, Figure 16-46.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses.[9]

Section 18.3d(c) of the A.M.A., *Guides* provides that an additional three percent impairment may be granted for pain that slightly increases the burden of a condition.[10] The A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in the other chapters.[11] Chapter 16 provides that, in consideration of resection arthroplasty of a joint, impairment may only be combined with that due to decreased motion. Pain and decreased muscle strength are not to be rated separately.[12]

Office procedures provide that, after obtaining all necessary medical evidence, the record 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.[13]

ANALYSIS

The Board finds that the case is not in posture for decision. A redetermination of the extent of permanent impairment is warranted.

The medical evidence of record consists of examinations of appellant by Dr. Fenlin, an attending surgeon, and Dr. Weiss, an attending osteopath. The Board notes that Dr. Fenlin provided only brief descriptions of two percent loss of adduction and two percent loss of forward flexion. Dr. Fenlin did not provide more than a general reference to the A.M.A., *Guides*. Dr. Berman an Office medical adviser, attempted to correlate the findings to the proper figures pertaining to shoulder range of motion. However, his September 21, 2007 report mischaracterized the reported loss of adduction as "abduction," even as it pertained to the utilization of Figure 16-40. This renders the loss of range of motion findings accepted by Dr. Berman of reduced probative value.

Dr. Weiss made specific findings of degrees in loss of range of motion on examination of appellant, as noted. Dr. Berman did not provide sufficient rationale for excluding the findings reported by Dr. Weiss from consideration. Especially, in light of the fact that he misinterpreted aspects of Dr. Fenlin's report. Citing the medical specialty of the respective attending physicians is an inadequate justification on which to favor Dr. Fenlin over Dr. Weiss. One medical report

[9] *See id*.; *see also David W. Ferrall*, 56 ECAB 362 (2005).

[10] A.M.A., *Guides*, *supra* note 2 at 573.

[11] *Id.* at 571. *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (November 2002).

[12] *Id*. at 504

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

should not be arbitrarily selected over the other.[14] Dr. Fenlin's reports do not provide any of the detail found in the report of Dr. Weiss. Although the Board has held that opinions by physicians who have training and knowledge in a specialized medical field may have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians,[15] no individual factor standing alone necessarily determines the weight of such medical evidence.[16] Dr. Weiss reported greater loss of range of motion than that rated by Dr. Berman. The case will be returned to the Office for further evaluation of his findings.

There is no conflict in medical opinion, as counsel urged the Board to consider, as the examinations on which the range of motion and other findings are based come from two attending physicians.[17] The reports of the Office medical adviser are of reduced probative value for the reasons noted. The Board notes that both Dr. Weiss and the Office medical adviser agreed that appellant has 10 percent impairment for the right shoulder resection arthroplasty under Table 16-27, page 506 of the A.M.A., *Guides*. Under Chapter 16.7a, impairment due to loss of range of motion can be combined with the bone and joint deformity represented in the resection arthroplasty rating.

As to the consideration of pain as an impairment, Dr. Weiss found that appellant had three percent impairment under Figure 18-1. However, there is nothing in his report to indicate that he performed a formal pain-related analysis under section 18.3d of the A.M.A., *Guides*. This section of the A.M.A., *Guides* specifically notes that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the rating systems found in other chapters, including Chapter 16. Even if Dr. Weiss had, however, the text at Chapter 16.7a must be followed to avoid duplication of certain impairments. At page 504, the A.M.A., *Guides* provide that shoulder impairment values, including resection arthroplasty at section 16.7b, "*may be combined only with impairments due to decreased motion (Section 16.4). Pain and decreased muscle strength are not rated separately.*" (Emphasis in the original.) For this reason, the three percent rating for pain by Dr. Weiss must be excluded as it is already incorporated in the impairment value of the resection arthroplasty under Table 16-27. While Dr. Berman was ultimately correct in dismissing the rating for pain, it is for the reason found in the text of Chapter 16.

[14] *See Skipper Walker*, 31 ECAB 790 (1980).

[15] *Mary S. Brock*, 40 ECAB 461 (1989).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.4b (October 2005) *see Michael S. Mina*, 57 ECAB 379 (2006) (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

[17] *See* 5 U.S.C. § 8123(a) which 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. *See, e.g., Roger W. Griffith*, 51 ECAB 491 (2000); *Noah Ooten*, 50 ECAB 283 (1999).

The case will be remanded to the Office for further consideration of the medical evidence. After such further development as it deems warranted, the Office should issue a *de novo* decision on the permanent impairment to appellant's right arm.

CONCLUSION

The Board finds the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2009 and June 4, 2008 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded to the Office for further action in conformance with this decision of the Board.

Issued: January 22, 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