United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 10-152**
	)	**Issued: July 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 20, 2009 appellant filed a timely appeal from the August 17, 2009 merit decision of the Office of Workers' Compensation Programs granting him a schedule award. 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 met his burden of proof to establish that he has more than five percent permanent impairment of his left arm, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that on March 8, 2008 appellant, then a 55-year-old city carrier, sustained sprains of his neck, left rotator cuff and left upper arm due to a fall at work.[1] Appellant received compensation from the Office for periods of disability.

[1] The Office later accepted that appellant sustained a left rotator cuff tear.

Appellant received treatment shortly after his March 8, 2008 injury from Dr. William T. Pennington, a Board-certified orthopedic surgeon. In May 2008, Dr. Pennington indicated that diagnostic testing showed that appellant had a full thickness tear of the supraspinatus tendon of his left shoulder. On June 6, 2008 he performed a rotator cuff repair and subacromial decompression surgery on appellant's left shoulder. The procedure was authorized by the Office.

In a December 17, 2008 report, Dr. Pennington stated that on examination appellant was distally neurovascularly intact and that the passive motion of his left shoulder was smooth.[2] Appellant's left shoulder incisions were well healed and the active and passive motion of his left shoulder had improved since previous examination. Dr. Pennington stated that appellant had some mild weakness and loss of motion of the left arm when compared with the opposite arm and noted that he complained of some pain and stiffness with repetitive activities. He indicated that, due to these persistent complaints, appellant had "seven percent permanent partial disability at the level of the left shoulder."

In late 2008, appellant filed a claim for a schedule award due to his March 8, 2008 work injury.

On March 9, 2009 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an Office medical adviser, reviewed appellant's chart for the purpose of determining the permanent impairment to his left shoulder. He indicated that Dr. Pennington recommended a seven percent impairment rating for the left arm based on loss of motion and strength "but this is not quantified." Dr. Garelick stated that, in the absence of any specific range of motion measurements or quantification of strength loss based on the 0/5 through 5/5 scale, the file was not in a position to be rated. He recommended that Dr. Pennington be asked to "delineate the glenohumeral [range of motion] and strength."

In an April 15, 2009 report, Dr. Pennington advised that appellant returned for evaluation of his left shoulder so that clarification could be provided regarding the extent of impairment. Appellant had previously been rated for a seven percent impairment of the left shoulder "due to postoperative pain, weakness and stiffness as well as loss of function."[3] Dr. Pennington indicated that appellant's examination was unchanged from his last visit and stated:

> "[Appellant] does have continued weakened forward flexion and abduction. He does have some continued capsular stiffness as well as easy fatigue upon strength testing. To reinforce [appellant's] permanent partial impairment reading, I have performed dynametric as well as side-to-side motion testing. His right shoulder forward flexion is 180 degrees versus 175 degrees on the left, abduction 175 degrees versus 160 degrees, external rotation 90 degrees versus 80 degrees and internal [rotation] 60 degrees versus 45 degrees. The dynametric testing is as follows for the right shoulder versus left shoulder, forward flexion to 31 degrees

[2] The report was dictated by Brian Bartz, a physician's assistant, on behalf of Dr. Pennington.

[3] The report was dictated by Mr. Bartz on behalf of Dr. Pennington.

versus 20 degrees, abduction 32 degrees versus 16 degrees, internal rotation 33 degrees versus 30 degrees and external rotation 33 degrees versus 28 degrees.

"[Appellant] clearly does have functional deficit as well as loss of strength and motion. I do believe these numbers are in support of his seven percent permanent partial disability."

On May 18, 2009 Dr. Garelick stated that Dr. Pennington's April 15, 2009 report demonstrated weakness with forward flexion and abduction and shoulder range of motion was mildly diminished. He noted that, according to Table 15-5 on page 403 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), a five percent impairment of the left arm is awarded for a rotator cuff tear with some residual loss of function. He indicated that the date of maximum medical improvement was April 15, 2009, the date when appellant was last seen by Dr. Pennington.

In an August 17, 2009 decision, the Office granted appellant a schedule award for a five percent permanent impairment of his left arm. The award ran for 15.6 weeks from April 15 to August 4, 2009.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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 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.[6] For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[7]

In determining impairment under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper limb to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 403. Then the associated class is determined from the shoulder regional grid and the adjustment grid and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class,

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] *See* FECA Bulletin No. 9-03 (issued March 15, 2009).

modified by the adjustments as calculated.[8] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[9]

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[10] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[11]

ANALYSIS

The Office accepted that on March 8, 2008 appellant sustained a rotator cuff tear in his left shoulder and sprains of his neck, left rotator cuff and left upper arm due to a fall at work. On June 6, 2008 Dr. Pennington, an attending Board-certified orthopedic surgeon, performed a rotator cuff repair and subacromial decompression surgery on appellant's left shoulder. The Office granted appellant a schedule award for a five percent permanent impairment of his left arm.

The Office based its schedule award on a May 18, 2009 evaluation of Dr. Garelick, a Board-certified orthopedic surgeon serving as an Office medical adviser. Dr. Garelick discussed the examination findings and impairment ratings provided by Dr. Pennington.[12] Dr. Garelick stated, that, according to Table 15-5 on page 403 of the sixth edition of the A.M.A., *Guides* (6th ed. 2009), five percent impairment of the left arm is awarded for a rotator cuff tear with some residual loss of function.[13]

The Board finds that the impairment rating of Dr. Garelick is incomplete and requires further clarification. Dr. Garelick made reference to the shoulder regional grid on page 403 of the A.M.A., *Guides* and selected a diagnosis category and associated class rating which he felt were appropriate given appellant's left shoulder condition. However, he did not provide any evaluation of the grade modifiers that applied to appellant's case. As noted, grade modifiers

[8] *See* A.M.A., *Guides* 389-90 (6th ed. 2009).

[9] *Id.* at 23-24.

[10] *Russell F. Polhemus*, 32 ECAB 1066 (1981).

[11] *See Robert F. Hart*, 36 ECAB 186 (1984).

[12] In March 9 and May 18, 2009 reports, Dr. Pennington provided an opinion that appellant had a seven percent permanent impairment of his left arm. On appeal to the Board, appellant argued that this impairment rating should be accepted. The Board finds that Dr. Pennington's ratings are of diminished probative value because he provided no explanation of how they were derived in accordance with the A.M.A., *Guides*.

[13] *See* A.M.A., *Guides* 403, Table 15-5 (Shoulder Regional Grid). It was appropriate for Dr. Garelick to use the sixth edition of the A.M.A., *Guides* as the Office issued its schedule award decision after May 1, 2009. *See supra* note 7.

should be considered for functional history, physical examination and clinical studies and these grade modifiers can change the extent of a given impairment rating.[14]

For these reasons, the impairment rating of Dr. Garelick is in need of clarification.[15] Dr. Garelick should further address the medical evidence consistent with the sixth edition of the A.M.A., *Guides.* If he is unwilling or unable to do so, the Office shall undertake additional medical development to arrive at a reasoned determination regarding the impairment to appellant's left arm. After such development it deems necessary, the Office shall issue an appropriate decision on his claim for a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than five percent permanent impairment of his left arm.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for proceedings consistent with this decision of the Board.

Issued: July 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] *See supra* note 8.

[15] *See supra* notes 9 through 11.