

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

W.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Brecksville, OH, Employer**

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**Docket No. 09-2181
Issued: June 10, 2010**

Appearances:

*Alan J. Shapiro, 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 September 1, 2009 appellant filed a timely appeal from an August 7, 2009 Office of Workers' Compensation Programs' schedule award decision. Under 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 sustained any permanent impairment to a scheduled member causally related to her accepted right shoulder condition warranting a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

On February 2, 2001 appellant, a 59-year-old nurse, injured her right shoulder while assisting a patient. She filed a claim for benefits on February 10, 2001, which the Office accepted for right shoulder strain. On November 14, 2008 appellant filed a schedule award claim based on a partial loss of use of her right upper extremity.

By letter dated December 1, 2008, the Office advised appellant that the most recent medical report of record was dated December 10, 2001. It requested updated medical evidence from appellant to establish that she sustained impairment due to her accepted condition. The Office requested a comprehensive medical report addressing the February 2, 2001 work injury and a detailed description of findings on physical examination, results of any diagnostic tests, the diagnosis related to the February 2, 2001 work injury and medical opinion on whether her accepted right shoulder condition resulted in permanent impairment.

In a December 24, 2008 report, Dr. Timothy Morley, an osteopath, found that appellant had 10 percent permanent impairment to her right upper extremity based on her accepted right shoulder condition pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (the A.M.A., *Guides*). He rated three percent impairment for 140 degrees, loss of flexion;¹ one percent impairment for 30 degrees, loss of adduction; four percent impairment for 90 degrees, loss of abduction;² and two percent impairment for 60 degrees, loss of internal rotation.³ This totaled 10 percent impairment due to loss of range of motion “with respect to the recognized diagnosis under claim [number] xxxxxx582.” Dr. Morley found the date of maximum medical improvement to be May 2002.

By decision dated January 7, 2009, the Office denied appellant’s claim for a schedule award. It found that causal relationship had not been established to warrant an award as Dr. Morley did not address the eight years between appellant’s injury and his impairment rating.

On January 9, 2009 appellant’s attorney requested an oral hearing, which was held on May 21, 2009.

By decision dated August 7, 2009, an Office hearing representative affirmed the January 7, 2009 decision. She found that the injury sustained by appellant, a right shoulder strain “is generally considered a minor injury with no permanent residuals.”

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act⁴ 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 loss of use.⁵ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule

¹ A.M.A., *Guides* 476, Figure 16-40.

² *Id.* at 477, Figure 16-43.

³ *Id.* at 479, Figure 16-46.

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

⁵ *Id.* at § 8107(c)(19).

losses.⁶ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.

ANALYSIS

The Office accepted that appellant sustained a right shoulder rotator cuff strain. Appellant filed a schedule award claim and submitted the December 24, 2009 report of Dr. Morley, who found that she had 10 percent impairment to the right upper extremity based on her accepted right shoulder condition. The Office hearing representative found that Dr. Morley's report was not a sufficient basis on which to grant a schedule award. She stated that the accepted strain was generally considered a minor injury that did not result in permanent residuals. Causal relation or the determination of permanent impairment is a medical question to be left to qualified physicians. The question of permanent impairment must be established by the medical evidence of record, not rules of general application.⁷ Dr. Morley based his rating on the applicable tables of the A.M.A., *Guides* and attributed appellant's loss of range of motion to her accepted injury. He rated a total 10 percent impairment due to loss of range of motion "with respect to the recognized diagnosis under claim [number] xxxxxx582."

The Office accepted a claim for right shoulder strain, rotator cuff, as a result of the February 2, 2001 work incident. In response to its request, appellant submitted an updated medical report from Dr. Morley, who provided findings on examination and rated the degree of permanent impairment from appellant's accepted February 2, 2001 right shoulder condition.⁸ The Office did not refer the medical evidence from Dr. Morley to an Office medical adviser for review and comment.

The August 7, 2009 decision will be set aside and the case remanded for referral of Dr. Morley's January 5, 2009 report to an Office medical adviser for review and an opinion on whether it establishes any permanent impairment related to appellant's accepted injury. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

CONCLUSION

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

⁶ 20 C.F.R. § 10.404.

⁷ When a hearing representative or claims examiner finds it necessary to explain or further elaborate on the medical evidence of record, the proper course would be to obtain the services of a medical adviser. See *Diane J. Vaccaro*, 47 ECAB 263, 267.

⁸ The Board notes that the description of a claimant's impairment obtained from a physician, must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. See *Peter C. Belkind*, 56 ECAB 580, 585 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2009 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: June 10, 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