United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 09-1351**
	)	**Issued: March 15, 2010**
U.S. POSTAL SERVICE, BARRY PLACE STATION, Stamford, CT, Employer	)	

Appearances:
Peter J. Somma, Esq., 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 28, 2009 appellant, through counsel, filed a request for review of a merit decision of the Office of Workers' Compensation Programs dated December 1, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established greater than 13 percent impairment of the right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On September 2, 2005 appellant, then a 61-year-old letter carrier, filed a traumatic injury claim alleging that on October 1, 2002 he injured his left leg, right shoulder and hand when he was struck from behind while making a curbside delivery. The Office accepted the claim for right rotator cuff impingement and rotator cuff tear.

Appellant filed a claim for a schedule award. In support of his claim for a schedule award, he submitted a September 3, 2004 report from Dr. Marc D. Peyser, a treating

chiropractor, and a January 10, 2005 report from Dr. Russell J. Cavallo, a treating Board-certified orthopedic surgeon.

Dr. Peyser, in his September 3, 2004 report, diagnosed a lateral C4-6 flexion subluxation by x-ray interpretation, cervical radiculopathy and brachial neuritis. He noted that appellant was involved in an employment-related automobile accident in October 2002. A physical examination revealed decreased cervical range of motion in all areas except forward flexion. Appellant related that he underwent surgery for distal clavicular excision and massive rotator cuff tear. In concluding, Dr. Peyser opined that appellant had a five percent whole person impairment due to his injury using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and that "[a]dditional impairment is obvious to his shoulder injury and should be combined with this evaluation for a whole person impairment."

In a January 10, 2005 report, Dr. Cavallo stated that he first saw appellant in 2003 for his shoulder pain and noted that appellant had been involved in an employment-related accident in which his truck was struck from behind by an automobile. He diagnosed rotator cuff tear and glenohumeral and acromioclavicular mild arthritis. Dr. Cavallo reported that appellant subsequently underwent rotator cuff surgery on April 30, 2004 which involved massive rotator cuff tear repair with subacromial decompression and distal clavicle excision. A physical examination revealed 150 degrees active forward flexion, right external rotation of 20 degrees, 30 degrees left external rotation, no subacromial tenderness and 5-/5 right shoulder strength. As to internal rotation, Dr. Cavallo stated it "was to L2 on the right, L1 on the left." He opined that appellant had a 50 percent right shoulder functional loss. In support of this determination, Dr. Cavallo stated that appellant had a 15 percent loss for forward flexion, 10 percent for mild internal and external rotation loss, 10 percent for distal clavicle excision and 15 percent for rotator cuff tear and repair.

On October 25, 2007 Dr. David I. Krohn, an Office medical adviser and Board-certified internist, concluded that appellant had a 13 percent right upper extremity permanent impairment. He determined that there was a 10 percent impairment using Table 16-27, page 506 for appellant's distal clavicle excision. As to loss of range of motion, Dr. Krohn concluded that appellant had a two percent impairment for 150 degrees of flexion using Figure 16-40, page 476 and a zero percent impairment for external rotation as there was only a 10 degree difference between the shoulders. Next, he related that the A.M.A., *Guides* do not have a table "that correlates internal rotation to a vertebral segment rather than in degrees of range of motion," but found a one percent right upper extremity impairment for internal rotation. Next, the Office medical adviser related that the A.M.A., *Guides* do not provide an impairment rating for repair of a massive rotator cuff tear beyond that assigned for diminished range of motion. Lastly, Dr. Krohn noted that the A.M.A., *Guides* do not allow combining values for decreased strength and decreased motion.

By decision dated April 15, 2008, the Office issued appellant a schedule award for a 13 percent permanent impairment of the right upper extremity.

In a letter dated May 2, 2008, appellant's counsel requested an oral hearing before an Office hearing representative and a telephonic hearing was held on October 6, 2008.

By decision dated December 1, 2008, the Office hearing representative affirmed the April 14, 2008 schedule award decision.[1]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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 should be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.[4] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[5]

ANALYSIS

The Office accepted the claim for right rotator cuff impingement and rotator cuff tear. On April 15, 2008 it granted appellant a schedule award for a 13 percent impairment of the right upper extremity. An Office hearing representative affirmed this determination in a December 1, 2008 decision. The issue to be resolved is whether appellant has established that he has a greater than 13 percent right upper extremity permanent impairment.

In support of his claim, appellant submitted reports from Drs. Cavallo and Peyser, chiropractors. Dr. Peyser concluded that appellant had a five percent whole person impairment due to his injury, but did not identify the tables or figures from the A.M.A., *Guides* that he relied upon. Moreover, it is well established that whole person impairments are not permitted under the Act.[6]

In a January 10, 2005 report, Dr. Cavallo opined that appellant had a 50 percent right shoulder functional loss. In support of this conclusion, he determined that appellant had a 15 percent loss for forward flexion, 10 percent for mild internal and external rotation loss, 10 percent for distal clavicle excision and 15 percent for rotator cuff tear and repair. Dr. Cavallo

[1] The Board notes that appellant's counsel submitted new medical evidence with his appeal. The Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*. at § 10.404(a).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). *See S.K.*, 60 ECAB ___ (Docket No. 08-848, issued January 26, 2009).

[6] *A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009); *Marilyn S. Freeland*, 57 ECAB 607 (2006). The Board notes that Dr. Peyser is considered a "physician" as defined under the Act as he diagnosed subluxation by use of an x-ray. *See* 5 U.S.C. § 8101(2).

did not, though, identify the relevant tables from the A.M.A., *Guides* that he relied upon in reaching this determination. Board precedent is well settled that when an attending physician's report gives an estimate of impairment but does not address how the estimate is based upon the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he has properly applied the A.M.A., *Guides*.[7]

Dr. Krohn, the Office medical adviser, based upon a review of the reports from Drs. Cavallo and Peyser, concluded that appellant had 13 percent right upper extremity impairment. He properly found 10 percent impairment for the distal clavicle using Table 16-27, page 506, and a 2 percent impairment using Figure 16-40, page 476 for 150 degrees of flexion. It is unclear how Dr. Krohn determined appellant's impairment rating for internal and external rotation. With respect to external rotation, he noted that, as the difference between the right and left shoulders was only 10 degrees, there was a zero percent impairment. However, a review of Figure 16-46, page 479 reveals that 10 degrees results in two percent impairment for external rotation. Moreover, Dr. Krohn did not provide any explanation as to why he determined the difference in external rotation between the two shoulders instead of the actual range of motion found by Dr. Cavallo for the right shoulder. As to his determination for range of motion for internal rotation of the right shoulder, he stated that there was no correlation in the A.M.A., *Guides* for range of motion loss for internal rotation related to a vertebral segment, but then concluded there was a one percent impairment without any explanation or reference to a table or figure in the A.M.A., *Guides*.

On remand the Office should obtain a revised impairment rating from Dr. Krohn or another Office medical adviser that addresses these two issues regarding appellant's right shoulder range of motion impairment. After such further development as it deems necessary, it should issue a *de novo* decision on his claim for a schedule award for his right upper extremity.

CONCLUSION

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

[7] *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008); *Laura Heyen*, 57 ECAB 435 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2008 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 15, 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