

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

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B.A., Appellant	)	
	)	
and	)	<b>Docket No. 09-1512</b>
	)	<b>Issued: March 2, 2010</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PATROL, Honolulu, HI,</b>	)	
<b>Employer</b>	)	

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*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 May 11, 2009 appellant filed a timely appeal from a February 18, 2009 decision of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.<sup>1</sup>

**ISSUE**

The issue is whether appellant has more than a seven percent impairment of the left upper extremity, for which he received a schedule award.

On appeal, appellant contends that the Office should not have accorded the second opinion specialist the weight of the medical evidence. He asserts that the specialist performed only a cursory examination and was generally unfamiliar with his case.

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<sup>1</sup> After appellant's May 11, 2009 appeal to the Board, an Office hearing representative issued a June 4, 2009 decision on the same issue. Under *Douglas E. Billings*, 41 ECAB 880 (1990), the June 4, 2009 decision is null and void.

## **FACTUAL HISTORY**

The Office accepted that on August 1, 2002 appellant, then a 49-year-old supervisory canine enforcement officer, sustained a left shoulder strain, left biceps tendon rupture, left rotator cuff tendinitis and other unspecified pathologies of the left shoulder when he fell from a shipping container. He returned to light-duty work following the injury. Appellant underwent left shoulder arthroscopy with tendon repair on August 31, 2005.<sup>2</sup> He remained under medical care for left trapezius spasms and pain. The Office accepted a recurrence of disability commencing November 13, 2007. Appellant underwent biceps tendonesis with screw placement on November 14, 2007. He returned to limited duty in early 2008.

On September 8, 2008 appellant claimed a schedule award. The Office requested that Dr. Jerry Van Meter, an attending Board-certified orthopedic surgeon, provide an impairment assessment according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*). Dr. Van Meter responded that he did not perform such evaluations.

The Office referred appellant, the medical record and a statement of accepted facts to Dr. Bernard M. Portner, a Board-certified physiatrist, for a second opinion and impairment assessment.

In a December 4, 2008 report, Dr. Portner reviewed the medical record and statement of accepted facts. He opined that appellant had reached maximum medical improvement. On examination, Dr. Portner found no weakness, atrophy or neurologic abnormalities of the left upper extremity. He observed the following ranges of motion of the left shoulder: full extension of 50/50 degrees; full adduction of 40/40 degrees; full backward elevation at 50/50 degrees; abduction limited to 155/170 degrees; forward elevation limited to 140/180 degrees; internal rotation of 60/80 degrees; and external rotation of 55/80 degrees. Dr. Portner commented that appellant had very mild pain symptoms not interfering with activities of daily living. He diagnosed persistent traumatic capsulitis and postsurgical status. Dr. Portner did not refer to the A.M.A., *Guides* in his report.

The Office referred the medical record and a statement of accepted facts to an Office medical adviser for review. In a February 2, 2009 report, the Office medical adviser opined that appellant had reached maximum medical improvement as of December 4, 2008. He applied Figure 16-40,<sup>3</sup> 16-43<sup>4</sup> and 16-46<sup>5</sup> of the A.M.A., *Guides* to Dr. Portner's findings. The medical adviser opined that appellant had the following percentages of impairment of the left upper extremity due to restricted shoulder motion: three percent for limitation of flexion to 140

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<sup>2</sup> A March 19, 2007 magnetic resonance imaging (MRI) scan of the left shoulder showed a complete rotator cuff tear with joint effusion. An April 20, 2007 arthrogram of the left shoulder showed a partial thickness tear of the supraspinatus tendon.

<sup>3</sup> Figure 16-40, page 476 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder."

<sup>4</sup> 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."

<sup>5</sup> Figure 16-46, page 479 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Impairments Due to Lack of Internal and External Rotation of Shoulder."

degrees according to Figure 16-40; one percent for abduction limited to 155 degrees according to Figure 16-43; two percent for internal rotation limited to 60 degrees and one percent for external rotation limited to 55 degrees according to Figure 16-46. The adviser added these impairments to total seven percent impairment to the left upper extremity.

By decision dated February 18, 2009, the Office granted appellant a schedule award for a seven percent permanent impairment of the left upper extremity.

### **LEGAL PRECEDENT**

The schedule award provisions of the Federal Employees' Compensation Act<sup>6</sup> 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.<sup>7</sup>

The standards for evaluation of 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.<sup>8</sup> 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, loss of sensation, or loss of strength.<sup>9</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a left shoulder sprain, left biceps tendon tear, left rotator cuff tendinitis and other pathologies of the left shoulder, necessitating two surgical repairs. Appellant claimed a schedule award on September 8, 2008. As his attending physician did not perform impairment assessments, the Office referred appellant to Dr. Portner, a Board-certified physiatrist, for a second opinion.

Dr. Portner submitted a December 4, 2008 report providing a detailed assessment of appellant's left upper extremity, including all ranges of left shoulder motion. His opinion was informed by the complete medical record and a statement of accepted facts. The thoroughness of Dr. Portner's opinion and the detailed examination findings noted negate appellant's contention on appeal that Dr. Portner performed only a cursory examination or was unfamiliar with his case.

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>8</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>9</sup> A.M.A., *Guides*, Ch. 16, "The Upper Extremities," pp. 433-521 (5<sup>th</sup> ed. 2001).

On February 2, 2009 an Office medical adviser reviewed Dr. Portner's findings and applied the A.M.A., *Guides* to the ranges of left shoulder motion observed. The medical adviser determined that appellant had a three percent impairment of the left upper extremity due to flexion limited to 140 degrees, a one percent impairment for abduction limited to 155 degrees, a two percent for internal rotation limited to 60 degrees and one percent for external rotation limited to 55 degrees. These impairments totaled seven percent impairment to the left upper extremity. On February 18, 2009 based on the Office medical adviser's review of Dr. Portner's findings, the Office granted appellant a schedule award for a seven percent permanent impairment of the left arm.

The Board finds that Dr. Portner performed a thorough examination and evaluation of the left upper extremity. The Office medical adviser applied the proper tables and grading schemes of the A.M.A., *Guides* to Dr. Portner's findings to calculate a seven percent impairment of the left upper extremity. Therefore, the February 18, 2009 schedule award decision was appropriate under the facts and circumstances of this case.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained more than a seven percent impairment of the left upper extremity for which he received a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 18, 2009 is affirmed.

Issued: March 2, 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