

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

T.B., Appellant)	
)	
and)	Docket No. 09-1516
)	Issued: March 22, 2010
DEPARTMENT OF HOMELAND SECURITY,)	
TSA – FEDERAL AIR MARSHAL SERVICE,)	
West Orange, NJ, Employer)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Jeffrey P. Zeeland, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2009 appellant filed a timely appeal from a May 1, 2009 merit schedule award decision 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 schedule award decision.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. In a February 20, 2008 decision, the Board set aside the Office's July 10, 2007 schedule award finding three percent left arm impairment.¹ The Board noted that an Office medical adviser did not provide sufficient

¹ Docket No. 07-2034 (issued February 20, 2008).

reasoning to support rating pain under Chapter 18 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² The Board also found that the medical adviser did not consider all material information in the record. In a March 13, 2009 decision,³ the Board set aside the Office's June 4, 2008 decision denying appellant's claim for an additional schedule award.⁴ The Board found that the Office medical adviser did not provide a formal pain-related analysis under section 18.3d of the A.M.A., *Guides* or provided sufficient reasoning to explain why appellant's impairment could not be evaluated under Chapter 16 of the A.M.A., *Guides*. The case was remanded for further development. The law and the facts of the previous Board decisions are incorporated herein by reference.

On remand, the Office requested that Dr. Morley Slutsky, an Office medical adviser, provide a supplemental report addressing a pain-related analysis under section 18.3d of the A.M.A., *Guides* when he previously evaluated the reports of Dr. Joseph Corona, a Board-certified orthopedic surgeon, and Dr. George L. Rodriguez, a Board-certified physiatrist. Dr. Slutsky was also asked whether appellant's impairment could be evaluated under Chapter 16 of the A.M.A., *Guides*.

In a March 25, 2009 report, Dr. Slutsky noted that, since he was not an evaluating physician, he could not perform a formal pain-related analysis. He stated that the medical documentation clearly showed a situation where appellant's left shoulder pain increased the burden of his condition and limited his activities of daily living under section 2.4, page 18 of the A.M.A., *Guides*. In a March 5, 2007 report, Dr. Rodriguez reported that appellant experienced pain constantly and had limited his left shoulder due to pain during range of motion testing. Dr. Corona also stated, in a December 27, 2006 report, that appellant complained of persistent discomfort in his left shoulder. Dr. Slutsky noted that both physicians recommended three percent impairment for pain as they felt it limited his ability to function. He advised that appellant's impairment could not be evaluated under Chapter 16 of the A.M.A., *Guides*.⁵ The range of motion measurements obtained by Dr. Rodriguez were limited by pain and not a valid basis on which to rate impairment. He did not know whether Dr. Corona used a goniometer for his range of motion measurements, which the A.M.A., *Guides* at pages 475, 476 and 478 required for impairment rating purposes. Even if the range of motion measurements could be used, Dr. Corona found normal left shoulder range of motion so there would be no range of motion impairment. The surgical note of July 26, 2004 did not establish that appellant underwent a distal clavicle resection and he was not eligible for an impairment rating secondary to this procedure as assigned by Dr. Rodriguez. Regarding strength impairment, Dr. Slutsky noted Dr. Corona found normal strength and Dr. Rodriguez noted that strength should not be rated in the presence of pain. Therefore, no other left shoulder ratable deficits were identified in the medical reports of records. Dr. Slutsky reiterated his opinion that appellant had three percent impairment for pain under Chapter 18.3 of the A.M.A., *Guides* based on Dr. Corona's

² A.M.A., *Guides* (5th ed. 2001).

³ Docket No. 08-1907 (issued March 13, 2009).

⁴ *Id.*

⁵ While Dr. Slutsky opined that appellant's impairment could not be evaluated under Chapter 16 of the sixth edition of the A.M.A., *Guides*, his discussion of the evidence was under the fifth edition of the A.M.A., *Guides*.

evaluation. Section 18.3 was appropriate to rate sensory loss to appellant's left upper extremity as Dr. Corona's evaluation revealed appellant had excess pain in the context of a verifiable medical condition (left shoulder impingement status post arthroscopic decompression and debridement of an anterior labral tear) that caused pain, which could not be addressed by other impairment methods used in the A.M.A., *Guides*.

On April 13, 2009 the Office requested further clarification from Dr. Slutsky regarding whether appellant's impairment could be evaluated under Chapter 16 of the fifth edition of the A.M.A., *Guides*. In an April 13, 2009 report, Dr. Slutsky reiterated that appellant's impairment could not be evaluated under Chapter 16 with reference to the reports submitted by Dr. Rodriguez and Dr. Corona.

By decision dated May 1, 2009, the Office denied appellant's claim for an additional schedule award. It found that the medical evidence did not support that he had more than three percent impairment to his left arm.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule 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 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.⁸

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.⁹ 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.¹⁰

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the district medical adviser for an opinion concerning the nature and

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404; *see also* David W. Ferrall, 56 ECAB 362 (2005).

⁹ A.M.A., *Guides*, *supra* note 2 at 573.

¹⁰ *Id.* at 571. *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (November 2002).

percentage of impairment in accordance with the A.M.A., *Guides*, with the district medical adviser providing rationale for the percentage of impairment specified.¹¹

ANALYSIS

Appellant received a schedule award for a three percent impairment of his left arm for residual impairment due to his work-related conditions. The Board remanded the case for a supplemental opinion from the Office medical adviser addressing whether the provisions of Chapter 16 were not adequate to rate appellant's impairment and a formal pain-related analysis under section 18.3d of the A.M.A., *Guides*.

On March 25, 2009 Dr. Slutsky reviewed the reports of record and concluded that appellant had three percent impairment due to pain under Chapter 18.3 of the A.M.A., *Guides*. He could not perform a formal pain-related analysis on appellant, as he was not an examining physician. However, both Dr. Rodriguez and Dr. Corona had recommended three percent impairment for pain as they felt the left shoulder pain increased the burden of appellant's condition and limited his activities of daily living under section 2.4, page 18 of the A.M.A., *Guides*.

In his March 25 and April 13, 2009 reports, Dr. Slutsky further explained why the provisions of Chapter 16 were not adequate to rate appellant's pain impairment. He advised that Dr. Rodriguez incorrectly rated appellant for undergoing a distal clavicle resection, which was not supported by the surgical report. Dr. Slutsky also noted range of motion findings were influenced by pain avoidance on appellant's part which did not reflect the maximum active shoulder range of motion, as required. While it was not clear whether Dr. Corona used a goniometer for his range of motion measurements, he had found normal range of motion for the left shoulder. Therefore, range of motion was not a basis for rating impairment. Dr. Slutsky further found that there was no impairment due to loss of strength as Dr. Corona found normal strength. The medical adviser also noted that Dr. Rodriguez had noted that strength was not to be rated in the presence of pain.¹² The Board finds that Dr. Slutsky provided sound reasoning as to why the medical reports of Dr. Rodriguez and Dr. Corona could not be used to rate impairment under Chapter 16 of the A.M.A., *Guides*. Dr. Slutsky concluded that appellant had three percent impairment due to pain under Chapter 18.3d of the A.M.A., *Guides*. There is no other medical evidence, consistent with the A.M.A., *Guides* to establish greater impairment.

On appeal, appellant's attorney contends that appellant's physicians differ as to the extent of his impairment and an Office medical adviser should not be able to decide which physician is more credible. He asserts appellant should be sent for further medical examination. The Board previously found that Dr. Slutsky provided sound reasoning for why he did not use the range of motion and distal clavicle resection impairment ratings by Dr. Dr. Rodriguez. Based on Dr. Corona's evaluation, appellant had a three percent impairment of his left arm under the A.M.A., *Guides*. He explained that section 18.3 was appropriate to rate sensory loss to

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹² See A.M.A., *Guides*, 508, section 16.8a.

appellant's left upper extremity as Dr. Corona's evaluation revealed appellant had excess pain in the context of a verifiable medical condition (left shoulder impingement status post arthroscopic decompression and debridement of an anterior labral tear) that caused pain, which could not be properly rated by other impairment methods used in the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant has no more than a three percent impairment of his left upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2010
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board