

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

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**J.P., Appellant**

**and**

**DEPARTMENT OF LABOR, MINE SAFETY &  
HEALTH ADMINISTRATION, Vincennes, IN,  
Employer**

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**Docket No. 09-2083  
Issued: May 11, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On August 11, 2009 appellant filed a timely appeal from the March 31, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether appellant is entitled to a schedule award.

**FACTUAL HISTORY**

On June 13, 2007 appellant, then a 56-year-old coal mine inspector, sustained an injury in the performance of duty when he used his arms to pull himself out of a mantrip.<sup>1</sup> The Office accepted his claim for left rotator cuff tear, left ruptured biceps tendon and sprain of the left

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<sup>1</sup> A train-like vehicle that brings the miners down to and up from the coal mine.

shoulder, upper arm and rotator cuff. On February 28, 2008 appellant underwent arthroscopic subacromial decompression with rotator cuff repair.

Appellant claimed a schedule award. On September 2, 2008 Dr. Terry Fenwick, the attending orthopedic surgeon, examined appellant's left shoulder and found that appellant had pain with end range of motion. A supraspinatus isolation test showed 5-/5 biceps strength. There was medial mid-substance tenderness from a prior rupture. Dr. Fenwick diagnosed left bicep tendon muscle tear or rupture and sprains and strains of the shoulder and upper arm. He indicated that appellant was at maximum medical improvement. On December 16, 2008 Dr. Fenwick stated that appellant had a six percent impairment of his left arm based on loss of strength and pain.

On February 26, 2009 Dr. Richard T. Katz, a physiatrist, professor of clinical neurology and Office referral physician, provided a second opinion. He related appellant's history of injury, reviewed an imaging study and noted appellant's complaints. Dr. Katz described his findings on physical examination. There was no pain upon palpating the acromioclavicular joint or subdeltoid bursa. There was no pain over the proximal insertion of the biceps muscle, but there was tenderness in the mid portion of the biceps medially, and Yergason's sign was positive at the mid portion of the biceps. There was no focal tenderness over the medial or lateral epicondyles and no epicondylar pain with provocative maneuvers. Dr. Katz reported normal ranges of left shoulder motion and no weakness postarthroscopic surgery for a partial rotator cuff tear. He also reported normal ranges of left elbow motion with no evidence of loss of biceps function proximally or distally.

On March 10 2009 an Office medical adviser reviewed the medical evidence and determined that Dr. Katz found no impairment to the left upper extremity.

In a decision dated March 31, 2009, the Office denied appellant's schedule award claim.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>2</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>3</sup>

### **ANALYSIS**

To support his claim for a schedule award, appellant submitted a December 16, 2008 rating from Dr. Fenwick, his orthopedic surgeon, who found that appellant had a six percent impairment of his left upper extremity based on loss of strength and pain; however, he did not explain the basis for his rating. On September 2, 2008 Dr. Fenwick reported 5-/5 biceps strength

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

with medial mid-substance tenderness from a prior pain with end of range of motion. He failed to address how he calculated his impairment rating using specific tables or figures in the A.M.A. *Guides*.

The A.M.A., *Guides* cautions against the use of strength evaluations and places a burden on the evaluating physician to show that loss of strength represents an impairing factor that has not been considered adequately by other methods, that the loss of strength is based on unrelated etiologic or pathomechanical causes, and that decreased motion or painful conditions do not prevent effective application of maximal force in the region being evaluated.<sup>4</sup> Because Dr. Fenwick did not show that appellant was one of those rare cases that justified a rating for strength, his impairment rating carries little probative value.

Dr. Katz, the second opinion physiatrist, reported some positive findings on February 26, 2009. There was tenderness in the mid portion of the biceps medially, and Yergason's sign was positive at the mid portion of the biceps. Dr. Katz concluded there was normal range of motion and no weakness or loss of biceps function, but he did not address appellant's complaint of pain, the finding of biceps tenderness or the positive Yergason's sign.

The Board finds that this case is not in posture for decision as further medical development is warranted. The Office should obtain clarification from Dr. Katz or the Office medical adviser on whether appellant has permanent impairment based on his complaint of pain, tenderness in the mid portion of his biceps or his positive Yergason's sign. The clarification should be well reasoned and based on the protocols of the A.M.A., *Guides*. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award.

### **CONCLUSION**

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

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<sup>4</sup> A.M.A., *Guides* 507-08 (5<sup>th</sup> ed. 2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: May 11, 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