

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

B.R., Appellant

and

**U.S. POSTAL SERVICE, ASHBUN POST
OFFICE, Chicago, IL, Employer**

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**Docket No. 09-2120
Issued: May 25, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2009 appellant, through her representative, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated June 24, 2009. Pursuant to 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 has more than eight percent impairment of her right upper extremity for which she received a schedule award.

FACTUAL HISTORY

On November 30, 2005 appellant, then a 51-year-old full-time carrier, filed a traumatic injury claim alleging that she injured her right arm and hand when she fell down steps in the performance of duty on November 29, 2005. The Office accepted her claim for contusion of the right shoulder, pain in the right shoulder joint and contusion of the right arm.

Appellant underwent right shoulder surgery on April 11, 2006. Dr. H. Nallapareddy, a Board-certified orthopedic surgeon, performed arthroscopic debridement and removal of osteochondral loose body, subacromial decompression and reconstruction of a complex retracted tear of the right rotator cuff. Appellant returned to work eight hours a day on May 30, 2006.

The Office accepted her claim for the additional condition of right rotator cuff tear on July 14, 2006.

In a report dated February 19, 2007, Dr. N.H. Reddy, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement. He stated that appellant had no tenderness in her shoulder, but that abduction and flexion were limited by five degrees. Appellant demonstrated full internal rotation, external rotation and adduction with no loss of muscle strength. Dr. Reddy provided work restrictions.

Appellant requested a schedule award on May 18, 2007. The Office requested that Dr. Reddy provide appellant's permanent impairment for schedule award purposes in a letter dated May 29, 2007. Dr. Reddy informed the Office that he did not perform schedule award evaluations.

In a report dated May 22, 2008, Dr. Lafayette Singleton, a Board-certified neurologist, examined appellant and found that she had 90 degrees of abduction, 25 degrees of adduction on the right, 110 degrees of flexion and 45 degrees of extension. Appellant demonstrated 30 degrees of internal rotation and 50 degrees of external rotation. Dr. Singleton found on manual muscle testing that appellant had 4/5 in abduction and flexion and extension and external rotation. Appellant's internal rotation was 3/5. Dr. Singleton applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and found that appellant had five percent impairment due to loss of flexion.¹ He found four percent impairment due to loss of abduction and one percent impairment due to loss of adduction.² Dr. Singleton found one percent impairment due to loss of external rotation and four percent impairment due to loss of internal rotation.³ He added these impairments to reach 16 percent impairment of the right upper extremity due to loss of range of motion. Dr. Singleton found that appellant was not entitled to a diagnosis-based estimate as she did not undergo an arthroplasty. He further stated that appellant sustained an osteochondral fracture of the humeral head and accorded her three percent impairment for this condition. Dr. Singleton combined these impairments to reach 19 percent impairment of the right upper extremity.

The Office referred Dr. Singleton's report to the district medical director, to determine appellant's permanent impairment for schedule award purposes. Dr. David H. Garelick, a Board-certified orthopedic surgeon, found that appellant had eight percent impairment of her right upper extremity. He found that Dr. Reddy found that appellant's muscle power was diminished and that appellant had two percent impairment for loss of strength in the suprascapular nerve. Dr. Garelick relied on Dr. Reddy's measurements in reports predating his finding that appellant had reached maximum medical improvement and found that she had six percent impairment due to loss of range of motion. He stated that there were conflicts in the physical examinations and that he believed that appellant's physical condition was not represented by Dr. Singleton's report.

By decision dated September 4, 2008, the Office granted appellant a schedule award for eight percent impairment of her right upper extremity. Appellant requested a review of the

¹ A.M.A., *Guides* 476, Figure 16-40.

² *Id.* at 477, Figure 16-43.

³ *Id.* at 479, Figure 16-46.

written record on October 1, 2008. In a note dated September 29, 2008, Dr. Singleton explained that he utilized active range of motion as required by the A.M.A. *Guides* rather than passive ranges of motion.

By decision dated November 24, 2008, the Branch of Hearings and Review set aside the Office's September 4, 2008 decision and remanded the case for addition review by Dr. Garelick and if he continued to disagree with Dr. Singleton, referral to an impartial medical examiner.

Dr. Garelick reviewed the case file on December 8, 2008 and found that appellant's humeral head fracture should not be included as the osteochondral fragment was successfully removed and as impairments for pain and loss of range of motion could not be combined. He continued to support eight percent impairment due to loss of range of motion and motor strength.

By decision dated January 5, 2009, the Office denied appellant's claim for an additional schedule award. Appellant again requested a review of the written record on February 1, 2009.

By decision dated March 10, 2009, an Office hearing representative set aside the Office's January 5, 2009 decision and remanded the claim for the Office to resolve the conflict of medical opinion evidence.

The Office referred appellant to Dr. Jarlaw Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical examination on April 8, 2009. In a report dated May 6, 2009, Dr. Dzwinyk found slight atrophy over the infraspinous portion of the scapula on the posterior aspect of the right shoulder. He reported elevation and abduction of 160 degrees, internal rotation to T12 and 90 degrees of abduction, 100 degrees of external rotation, and 60 degrees of internal rotation. Dr. Dzwinyk found trace weakness of the anterior and middle deltoids and supraspinatus on manual testing. He concluded that appellant had two percent impairment of both the suprascapular nerve and axillary nerve due to loss of strength,⁴ that she had one percent loss of range of motion in abduction and forward flexion for an additional two percent impairment.⁵ Dr. Dzwinyk concluded that appellant had eight percent impairment of the right upper extremity.

Dr. Amon Perry, the Office medical adviser, reviewed Dr. Dzwinyk's report and concluded that appellant had no more than eight percent impairment of her right upper extremity.

By decision dated June 24, 2009, the Office denied appellant's claim for an additional schedule award.

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

⁴ *Id.* at 455, Table 16-11 and 492, Table 16-15.

⁵ *Id.* at 479, Figure 16-46.

⁶ 5 U.S.C. §§ 8101-8193, § 8107.

⁷ 20 C.F.R. § 10.404.

sustaining permanent impairment from loss or loss of use, of scheduled 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

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.⁹ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS

The Office accepted that appellant sustained contusion of the right shoulder, pain in the right shoulder joint and contusion of the right arm as well as right rotator cuff tear as a result of her accepted November 29, 2005 employment injury. Appellant filed a claim for a schedule award and submitted a report from Dr. Singleton, a Board-certified neurologist, opining that she had 16 percent impairment of her right upper extremity. The Office referred appellant's case record to the district medical director, Dr. Garelick, a Board-certified orthopedic surgeon, for review. Dr. Garelick opined that appellant had no more than eight percent impairment due to loss of strength and loss of range of motion.

An Office hearing representative conducted a review of the written record at appellant's request and determined that there was an unresolved conflict of medical opinion evidence between Drs. Singleton and Garelick. The Office properly referred appellant to Dr. Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his May 6, 2009 report, Dr. Dzwinyk listed appellant's range of motion as flexion¹¹ and abduction of 160 degrees each,¹² one percent impairment each. He found 100 degrees of external rotation,¹³ and 60 degrees of internal rotation, two percent impairment.¹⁴ Dr. Dzwinyk reported trace weakness of the anterior and middle deltoids and supraspinatus on manual testing. He applied the A.M.A. *Guides* to his findings and concluded that appellant had Grade 4 impairment ranging between 1 and 25 percent impairments due to motor deficits of both the suprascapular nerve which has a maximum value of 16 percent and axillary nerve with a

⁸ See *id.*; see also *David W. Ferrall*, 56 ECAB 362 (2005).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *P.B.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹¹ *Supra* note 1.

¹² *Supra* note 2.

¹³ This is not a ratable impairment under the A.M.A., *Guides*. A.M.A., *Guides* 479, Figure 16-46.

¹⁴ *Supra* note 3.

maximum value of 35 percent due resulting in 2 percent impairment of each of these nerves.¹⁵ Dr. Dzwinyk concluded that appellant had no more than eight percent impairment of her right upper extremity. The Board finds that Dr. Dzwinyk provided detailed medical findings, applied the A.M.A., *Guides* and properly concluded that appellant had no more than eight percent impairment of her right upper extremity entitling her to a schedule award. As the impartial medical examiner, Dr. Dzwinyk's report is entitled to special weight and as such establishes the extent of appellant's permanent impairment for schedule award purposes.

CONCLUSION

The Board finds that appellant has no more than eight percent permanent impairment of her right upper extremity for which she has received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 25, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Supra* note 4.