United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 10-586**
	)	**Issued: November 16, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Truckee, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 December 30, 2009 appellant filed a timely appeal from a November 25, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for an increased schedule award. 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 a 28 percent permanent impairment of her right upper extremity.

FACTUAL HISTORY

On January 30, 2004 appellant, then a 33-year-old rural carrier, filed a traumatic injury claim alleging that she sustained a right shoulder injury while delivering mail on December 24, 2003.[1] The Office accepted the claim for a right shoulder strain; right rotator cuff

[1] Appellant's September 28, 2002 traumatic injury claim was accepted for right shoulder tendinitis and impingement syndrome (File No. xxxxxx112). File No. xxxxxx112 was consolidated with the instant case, which serves as the master file, for more efficient handling.

tear; and adhesive capsulitis of the right shoulder. On January 11, 2005 appellant underwent an authorized right shoulder arthroscopy with subacromial decompression and distal clavicle resection with limited open rotator cuff repair. On October 11, 2005 she underwent a right shoulder arthroscopy with arthroscopic manipulation under anesthesia and arthroscopic adhesolysis.

On March 29, 2007 appellant requested a schedule award. The Office referred her to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, for an examination and an opinion as to whether she had any permanent impairment of her right arm due to the accepted injury and, if so, the degree of impairment. In a May 11, 2007 report, Dr. Swartz found that appellant had decreased motor function in the right shoulder (4/5 on the right, as compared to 5/5 on the left). He characterized her shoulder discomfort as interfering with daily activities, noting that she had difficulty reaching above chest level. Range of motion measurements for the right shoulder (r), as compared to the left (l), were as follows: flexion -- 110 degrees (r), 160 degrees; extension -- 40 degrees (r), 80 degrees (l); abduction -- 100 degrees (r), 180 degrees (l); adduction -- 30 degrees (r), 60 degrees (l); internal rotation -- 50 degrees (r), 80 degrees (l); external rotation -- 70 degrees (r), 90 degrees (l). Dr. Swartz opined that the date of maximum medical improvement would have been one year from the date of appellant's last surgery, or January 11, 2007.

The Office referred the case file to the district medical adviser, Dr. Ellen Pichey, Board-certified in family medicine, for her review and an opinion as to whether appellant had permanent impairment of her right upper extremity. On June 20, 2007 Dr. Pichey reviewed the report of Dr. Swartz and found that appellant had a 28 percent permanent impairment of her right upper extremity. Referencing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), she found a five percent impairment due to loss of flexion and a one percent impairment for loss of extension, pursuant to Figure 16-40 at page 476. Dr. Pichey found four percent and one percent impairments for lack of abduction and adduction respectively, under Figure 16-43 at page 477. She found 2 percent impairment for lack of internal rotation under Figure 16-46 at page 479, for a total impairment for loss of range of motion of 13 percent. Dr. Pichey rated 10 percent impairment due to appellant's distal clavical resection under Table 16-27 at page 506. Regarding loss of strength and impairment due to sensory deficit or pain, she assigned a Grade 3 level of severity to appellant's symptoms and selected a 40 percent severity under Table 16-10. Multiplying the grade of severity (40 percent) by the maximum upper extremity impairment value for sensory deficit of the suprascapular nerve (20 percent), she found an 8 percent impairment for loss of strength and impairment due to sensory deficit or pain (40 x 20 = 8) under Table 16-15 at page 492. Applying the Combined Values Chart at page 604, Dr. Pichey found a total right upper extremity impairment of 28 percent.

On July 11, 2007 the Office granted appellant a schedule award for a 28 percent impairment of her right upper extremity. The award ran for the period January 11, 2007 through September 13, 2008. The Office found that the date of maximum medical improvement was January 11, 2007.

In September 2008 appellant requested an increased schedule award.[2] She submitted a September 15, 2008 report from Dr. Deane A. Stites, an attending Board-certified orthopedic surgeon, who described the history of injury and treatment relative to appellant's accepted injury. On examination of the right shoulder, Dr. Stites found that external rotation was decreased by 20 to 30 degrees and wide abduction and forward flexion was decreased by 40 degrees. He noted some mild osteoporosis around the humeral head by x-ray. Dr. Stites opined that appellant was permanent and stationary.

On October 2, 2008 the Office again referred appellant and a statement of accepted facts to Dr. Swartz for an opinion as to the degree of appellant's permanent impairment to her right upper extremity. The record contains an internal memorandum reflecting that the Office was unable to locate another orthopedic surgeon in appellant's commuting area to perform second opinion examination.

In a December 9, 2008 report, Dr. Swartz reviewed the history of injury and treatment, indicating that appellant underwent a right shoulder arthroscopy with a subacromial decompression and distal clavicle resection with a limited open rotator cuff repair in January 2005. He noted that the pain in her right shoulder was uncomfortable and constant, and interfered with repetitive work, lifting over 20 pounds and lifting or reaching above shoulder level. Examination of the right shoulder revealed tenderness to lighter palpation, 4/5 motor function and intact sensation. Range of motion of the right shoulder as compared to the left shoulder was as follows: flexion 110/160 degrees; abduction 120/175 degrees; adduction 15/45 degrees; internal rotation 40/70 degrees; external rotation 60/90 degrees; extension 20/50 degrees. Dr. Swartz opined that the date of maximum medical improvement was December 9, 2008, the date of his examination.

The Office routed the case file to Dr. Pichey for review. In a February 17, 2009 report, Dr. Pichey reviewed Dr. Swartz's December 9, 2008 report. Applying the tables and figures of the 5th edition of the A.M.A., *Guides* to Dr. Swartz's examination findings, she concluded that appellant had a 27 percent impairment of her right upper extremity. Dr. Pichey rated five percent impairment due to loss of flexion and two percent impairment for loss of extension, pursuant to Figure 16-40 at page 476. Dr. Pichey found three percent and one percent impairments for lack of abduction and adduction respectively, under Figure 16-43 at page 477. She rated three percent impairment for lack of internal rotation under Figure 16-46 at page 479, for a total impairment for loss of range of motion of 14 percent. Dr. Pichey rated a 10 percent impairment due to appellant's distal clavical resection under Table 16-27 at page 506. Regarding loss of strength and impairment due to sensory deficit or pain, she assigned a Grade 4 level of severity to appellant's symptoms and selected a 25 percent severity under Table 16-10 and 16-11 at pages 482 and 484. Multiplying the grade of severity (25 percent) by the maximum upper extremity impairment value for sensory deficit of the suprascapular nerve (20 percent), Dr. Pichey found a 5 percent impairment for loss of strength and impairment due to sensory deficit or pain (25 x 20 = 5) under Table 16-15 at page 492. Applying the Combined Values Chart at page 604, Dr. Pichey found a total right upper extremity impairment of 27 percent.

By decision dated April 15, 2009, the Office denied appellant's request for an increased schedule award. It found that the reports of Dr. Swartz and Dr. Pichey represented the weight of

[2] The record does not contain a copy of a Form CA-7 or a letter requesting an increased schedule award.

the medical evidence and established that she had a 27 percent impairment of her right upper extremity.

On April 22, 2009 appellant requested a telephonic hearing. At the August 11, 2009 hearing, counsel for appellant contended that Dr. Swartz should not have served as a second opinion physician for the purpose of determining appellant's permanent impairment as he had previously served as a second opinion physician at the time of the initial schedule award determination.

Appellant submitted reports from Dr. Stites dated August 3 and November 18, 2009. On August 3, 2009 Dr. Stites opined that appellant was permanent, stable and ratable. On November 18, 2009 he stated that her condition was consistent with prior reports, noting that she lacked 30 to 40 degrees of full abduction of the right shoulder.

By decision dated November 25, 2009, an Office hearing representative affirmed the April 15, 2009 decision denying appellant's request for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act, and its implementing federal regulations, 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.[3] However, the Act does not specify the manner in which the percentage of loss shall 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 standard 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]

The Act and its implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.[6] Benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[7]

[3] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[4] 20 C.F.R. § 10.404(a).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). FECA Bulletin No. 09-3 (issued March 15, 2009) provides that any initial schedule award decision issued on or after May 1, 2009 will be based on the sixth edition of the A.M.A., *Guides*. The bulletin also explains that, as with previous revisions to the A.M.A., *Guides*, awards made prior to May 1, 2009 should not be recalculated merely because a new edition of the A.M.A., *Guides* is in use. FECA Bulletin No. 09-03 (issued March 15, 2009). In this case, the hearing representative's November 25, 2009 decision did not consider new and relevant medical evidence, but merely affirmed an April 15, 2009 decision, which was issued prior to the effective date of the A.M.A., *Guides*. Therefore, the decision was properly based on the fifth edition of the A.M.A., *Guides*.

[6] 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

[7] *Id.* at § 10.404(c)(1), (2).

ANALYSIS

On July 11, 2007 the Office granted appellant a schedule award for a 28 percent impairment of appellant's right upper extremity based on Dr. Pichey's application of the A.M.A., *Guides* to Dr. Swartz's reported findings. When appellant requested an additional schedule award in September 2008, the Office again sought a second opinion from Dr. Swartz and routed the case file to Dr. Pichey for review. Based upon Dr. Pichey's report, the Office denied appellant's request for an increased schedule award. The Board finds that this case is not in posture for a decision because of the impairment rating by Dr. Pichey.

In a December 9, 2008 report, Dr. Swartz reviewed the history of injury and treatment, indicating that appellant underwent a right shoulder arthroscopy with a subacromial decompression and distal clavicle resection with a limited open rotator cuff repair in January 2005. He noted that the pain in her right shoulder was uncomfortable and constant, and interfered with repetitive work, lifting over 20 pounds and lifting or reaching above shoulder level. Examination of the right shoulder revealed tenderness to lighter palpation, 4/5 motor function and intact sensation. Dr. Swartz provided: right shoulder range of motion measurements revealing flexion – 110 degrees; abduction -- 120 degrees; adduction -- 15 degrees; internal rotation 40 -- degrees; external rotation -- 60 degrees; and extension 20 degrees.

The Office properly routed the case file to Dr. Pichey, who concluded, based upon Dr. Swartz's December 9, 2008 findings, that appellant had a 27 percent impairment of the right upper extremity. The Board has held that in schedule award cases where an examining physician has provided a description of physical findings but failed to properly apply the A.M.A., *Guides,* a detailed opinion by the Office medical adviser giving an impairment rating based on the reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.[8] Office procedures state that, when an Office medical adviser explains his opinion, shows values and computation of impairment based on the A.M.A., *Guides* and considers each of the reported findings of impairment, his opinion may constitute the weight of the medical opinion evidence.[9] The Board finds, however, that the impairment rating provided by the district medical adviser is not sufficiently rationalized to constitute the weight of medical opinion.[10]

In her February 17, 2009 report, Dr. Pichey properly rated 10 percent impairment due to appellant's distal clavical resection under Table 16-27 at page 506.[11] She correctly applied the 5th edition of the A.M.A., *Guides* to Dr. Swartz's range of motion (ROM) measurements. Dr. Pichey found impairments of 5 and 2 percent respectively due to loss of flexion and extension under Figure 16-40 at page 476;[12] impairments of 3 and 1 percent for lack of abduction

[8] *J.Q.*, 59 ECAB 366 (2008); *Linda Beale*, 57 ECAB 429 (2006).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (April 1993). *See also Tommy R. Martin*, 56 ECAB 273 (2005).

[10] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010) (as a matter of course, the Office medical adviser should provide rationale for the percentage of impairment specified).

[11] A.M.A., *Guides* 506, Table 16-27.

[12] *Id.* at 476, Figure 16-40.

and adduction under Figure 16-43 at page 477;[13] and 3 percent impairment for lack of internal rotation under Figure 16-46 at page 479,[14] for a total ROM impairment of 14 percent.

Regarding loss of strength and impairment due to sensory deficit or pain, Dr. Pichey assigned a Grade 4 level of severity to appellant's symptoms and selected a 25 percent severity under Table 16-10 and 16-11 at pages 482 and 484.[15] Multiplying the grade of severity (25 percent) by the maximum upper extremity impairment value for sensory deficit of the suprascapular nerve (20 percent), she found a 5 percent impairment for loss of strength and impairment due to sensory deficit or pain (25 x 20 = 5) under Table 16-15 at page 492.[16] Dr. Pichey failed, however, to explain the basis for assigning a Grade 4 level of severity with a 25 percent deficit, rather than a Grade 3 level of severity with a 40 percent deficit, which she previously assigned in 2007 based upon similar physical findings by Dr. Swartz.[17] Absent adequate rationale her rating is of diminished probative value as to this aspect.

On appeal, appellant's representative argues that Dr. Swartz was improperly selected to perform the 2008 second opinion evaluation, as he served as the second opinion examiner in 2007. The Office's procedures provide for the selection of second opinion physicians from a roster of specialists in the appropriate branch of medicine.[18] The methods for selecting second opinion physicians are more flexible than those used for impartial medical examiners, which requires the use of a strict rotational system.[19] The record in this case reflects that the Office attempted unsuccessfully to identify another physician in appellant's area of residence who would perform the examination for the Office. The Board finds that the Office did not abuse its discretion in requesting that Dr. Swartz reexamine appellant and provide an updated impairment rating.

The Board finds that the impairment rating provided by the Office medical adviser is not sufficient. The November 25, 2009 decision will be set aside and remanded for further medical development as the Office deems necessary to determine the degree of permanent impairment of appellant's right upper extremity in accordance with the appropriate edition of the A.M.A., *Guides*. Following such development, the Office shall issue a *de novo* decision.

[13] *Id.* at 477, Figure 16-43.

[14] *Id.* at 479, Figure 16-46.

[15] *Id*. at 482, 484, Tables 16-10 and 16-11.

[16] *Id.* at 492, Table 16-15.

[17] The Board notes that in 2007 Dr. Swartz described appellant's shoulder discomfort as interfering with daily activities, noting that she had difficulty reaching above chest level. On December 9, 2008 he noted that the pain in her right shoulder was uncomfortable and constant, and interfered with repetitive work, lifting over 20 pounds and lifting or reaching above shoulder level.

[18] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3 (April 1993).

[19] *See id.* at Chapter 3.500.7(a) (March 1994).

CONCLUSION

The Board finds that this case is not in posture for a decision because the opinion of the Office medical adviser is insufficient to establish appellant's permanent impairment rating. The case is remanded for further medical development followed by an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: November 16, 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