

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

D.B., Appellant	)	
	)	
and	)	<b>Docket No. 09-2341</b>
	)	<b>Issued: September 27, 2010</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, New York, NY, Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 23, 2009 appellant filed a timely appeal of a March 30, 2009 Office of Workers' Compensation Programs' decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the claim.

**ISSUE**

The issue is whether appellant has more than five percent impairment of her left arm for which she received a schedule award.

**FACTUAL HISTORY**

On November 30, 2001 appellant, then a 57-year-old management assistant, sustained a cervical sprain and strains of the left shoulder, right knee and back when she slipped on a wet carpet in the performance of duty. On January 2, 2002 the Office accepted her claim for cervical sprain/strain, left shoulder sprain/strain and right knee sprain/strain. In a letter dated August 12,

2002, the Office informed appellant of her periodic rolls payments. Appellant returned to work on January 5, 2004 with no loss of wage-earning capacity.

Dr. Jacquelin Emmanuel, an attending Board-certified orthopedic surgeon, supported appellant's continuing need for medical treatment.

Appellant requested a schedule award on November 29, 2006. In a letter dated December 1, 2006, the Office requested that Dr. Emmanuel address whether appellant sustained any permanent impairment for schedule award purposes. Dr. Emmanuel completed a report on January 10, 2007 and found that appellant had persistent pain in the neck and left shoulder radiating to the left hand with occasional numbness in the left upper extremity and some weakness. She reported loss of range of motion including 150 degrees of forward elevation, 140 degrees of adduction, 30 degrees of internal rotation, 30 degrees of external rotation and 30 degrees of adduction as well as 45 degrees of extension. Dr. Emmanuel concluded that appellant had 15 percent impairment of her left upper extremity.

The Office referred the record to Dr. Morley Slutsky, a Board-certified orthopedic surgeon and district medical adviser. On April 27, 2007 Dr. Slutsky stated that the A.M.A., *Guides* did not allow an impairment rating due to sprains. He also stated that appellant's cervical spine changes should not limit her shoulder range of motion. Dr. Slutsky found that there were no radicular effects of the cervical spine reported. He advised that A.M.A., *Guides* did not support an impairment rating for tendinitis.<sup>1</sup>

The Office found a conflict of medical opinion between Dr. Slutsky and Dr. Emmanuel as to whether appellant sustained any permanent impairment due to the accepted work injury. To resolve this conflict, it referred appellant to Dr. Paul Post, a Board-certified orthopedic surgeon.<sup>2</sup>

In an August 11, 2007 report, Dr. Post listed appellant's accepted conditions of cervical sprain, left shoulder sprain and left knee sprain. He reviewed diagnostic testing which demonstrated supraspinatus tendinitis, small glenohumeral joint effusion and cystic degenerative change of the humeral head. Dr. Post limited his evaluation to the left upper extremity. He found residuals of left shoulder disability and reported forward elevation of 150 degrees, abduction of 150 degrees, external rotation of 35 degrees and internal rotation accomplished to the area just below the inferior angle of the scapula. Dr. Post also noted subjective complaints of pain. He found that appellant's neurological evaluation was normal. Dr. Post stated, "As best as can be determined in keeping with the guidelines, it is my opinion that a 15 percent impairment of the left upper extremity is reasonable."

The district medical adviser, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon, reviewed Dr. Post's report on August 30, 2007 and found that appellant's range of motion losses totaled five percent impairment of the left arm. He noted that Dr. Post did not correlate his findings to the A.M.A., *Guides* or offer any explanation for his impairment rating.

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<sup>1</sup> A.M.A., *Guides* 507.

<sup>2</sup> Appellant initially failed to attend the scheduled evaluation. She provided reasons the Office found appropriate and scheduled a second appointment with Dr. Post which appellant attended.

On September 7, 2007 the Office requested a supplemental report from Dr. Post addressing how he rated impairment as 15 percent in accordance with the A.M.A., *Guides*. On September 27, 2007 Dr. Post stated, "I arrived at the 15 percent schedule loss of use of the left upper extremity by consulting the A.M.A., *Guidelines*, 5<sup>th</sup> edition, pages 474 and 475, particularly 16.41 and page 510, [T]able 16-35." He concluded that 15 percent impairment was consistent with these tables and his evaluation.

By decision dated March 31, 2008, the Office granted appellant a schedule award for five percent impairment of her left upper extremity.

On April 10, 2008 appellant disagreed with the extent of her schedule award and requested reconsideration. The Office requested that Dr. Magliato again review Dr. Post's reports and rate appellant's permanent impairment for schedule award purposes. In a report dated May 5, 2008, Dr. Magliato stated that Dr. Post referenced the wrong pages of the A.M.A., *Guides* and should have utilized page 476, 477 and 479 to rate impairment for loss of range of motion of the shoulder. He also stated that Dr. Post failed to set forth mathematically how he reached 15 percent impairment.

By decision dated June 12, 2008, the Office denied modification of the March 31, 2008 schedule award decision.

On January 9, 2009 appellant requested reconsideration. In a report dated December 17, 2008, Dr. Emmanuel reiterated that appellant had 15 percent impairment to her left arm. She stated her evaluation was in accordance with the A.M.A., *Guides*. On February 18, 2009 Dr. Magliato reviewed this report and stated that Dr. Emmanuel did not provide any additional information to substantiate her 15 percent impairment rating based on the A.M.A., *Guides*.

By decision dated March 30, 2009, the Office denied modification of the March 31, 2008 schedule award for five percent impairment of the left upper extremity.

### **LEGAL PRECEDENT**

The schedule award provision of the Act<sup>3</sup> and its implementing regulations<sup>4</sup> 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. 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 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*<sup>5</sup> has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

<sup>5</sup> A.M.A., *Guides*, 5<sup>th</sup> ed. (2000).

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of the Act which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.<sup>6</sup> This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>7</sup> In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>8</sup>

When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.<sup>9</sup> Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act, will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.<sup>10</sup>

### ANALYSIS

Appellant requested a schedule award and submitted a January 10, 2007 report from her attending physician, Dr. Emmanuel, a Board-certified orthopedic surgeon. She listed loss of range of motion including 150 degrees of forward elevation,<sup>11</sup> 140 degrees of adduction,<sup>12</sup> 30 degrees of internal rotation,<sup>13</sup> 30 degrees of external rotation<sup>14</sup> and 30 degrees of adduction<sup>15</sup> as well as 45 degrees of extension.<sup>16</sup> Dr. Emmanuel concluded that appellant had 15 percent

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<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

<sup>7</sup> *R.C.*, 58 ECAB 238 (2006).

<sup>8</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

<sup>9</sup> *Terrance R. Stath*, 45 ECAB 412, 420 (1994).

<sup>10</sup> *Harold Travis*, 30 ECAB 1071 (1979).

<sup>11</sup> A.M.A., *Guides* 476, Figure 16-40. This results in two percent impairment of the left upper extremity.

<sup>12</sup> *Id.* at 477, Figure 16-43. This results in two percent impairment of the left upper extremity.

<sup>13</sup> *Id.* at 479, Figure 16-46. This results in four percent impairment of the left upper extremity.

<sup>14</sup> *Id.* This results in one percent impairment of the left upper extremity.

<sup>15</sup> A.M.A., *Guides* 477, Figure 16-43. This results in one percent impairment of the left upper extremity.

<sup>16</sup> *Id.* at 476, Figure 16-40. This is not a ratable impairment under the A.M.A., *Guides*.

impairment of her left upper extremity.<sup>17</sup> The district medical adviser, Dr. Slutsky, a Board-certified orthopedic surgeon, reviewed this report on April 27, 2007 but concluded that appellant was not entitled to a schedule award as her accepted conditions were sprains and the A.M.A., *Guides* did not support any permanent impairment.<sup>18</sup> The Office properly determined that there was a conflict of medical opinion regarding whether appellant had a permanent impairment and the amount of the impairment, if any.

The Office referred appellant to Dr. Post, a Board-certified orthopedic surgeon. In an August 11, 2007 report, Dr. Post found that appellant had residuals to her left shoulder. He reviewed the medical records and demonstrated knowledge of appellant's history of injury and accepted conditions. However, Dr. Post did not correlate his finding of 15 percent impairment of the left arm to the A.M.A., *Guides*.

In regard to range of motion loss, Dr. Post reported findings of forward elevation of 150 degrees, abduction of 150 degrees, external rotation of 35 degrees and subjective complaints of pain. He found that appellant's neurological examination was normal. Dr. Post stated, "As best as can be determined in keeping with the guidelines, it is my opinion that a 15 percent impairment of the left upper extremity is reasonable." He did not provide citation to the A.M.A., *Guides* in support of his conclusion. Dr. Magliato, a Board-certified orthopedic surgeon, reviewed Dr. Post's impairment rating on August 30, 2007 and applied the provisions of the A.M.A., *Guides* to the findings. He determined that 150 degrees of forward elevation was two percent impairment<sup>19</sup> that abduction of 150 degrees was one percent impairment,<sup>20</sup> 35 degrees of external rotation was one percent impairment<sup>21</sup> and internal rotation of 70 degrees or one percent impairment.<sup>22</sup> Dr. Magliato concluded that appellant had five percent impairment of the left upper extremity.

The Office requested a supplemental report from Dr. Post who responded on September 27, 2007 and stated, "I arrived at the 15 percent schedule loss of use of the left upper extremity by consulting the A.M.A., *Guidelines*, 5<sup>th</sup> [e]dition, pages 474 and 475, particularly 16.41 and page 510, [T]able 16-35." Dr. Post stated that 15 percent impairment was consistent with these tables and his evaluation. Section 16.4i of the A.M.A., *Guides* is entitled *Shoulder Motion Impairment* and states, "The actual range-of-motion measurements are recorded and applied to the various impairment pie charts."<sup>23</sup> Table 16-35 of the A.M.A., *Guides* is entitled,

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<sup>17</sup> The Board finds that applying the A.M.A., *Guides* to the range of motion figures found by Dr. Emmanuel results in 10 percent impairment of the left upper extremity

<sup>18</sup> To the extent that Dr. Slutsky stated a strain could not result in permanent impairment, his opinion is not in keeping with Board precedent. *See H.J.*, Docket No. 09-2366 (issued June 23, 2010).

<sup>19</sup> A.M.A., *Guides* 476, Figure 16-40.

<sup>20</sup> *Id.* at 477, Figure 16-43.

<sup>21</sup> *Id.* at 479, Figure 16-46.

<sup>22</sup> *Id.*

<sup>23</sup> A.M.A., *Guides* 474-75.

*Impairment of the Upper Extremity Due to Strength Deficit from Musculoskeletal Disorders Based on Manual Muscle Testing of Individual Units of Motion of the Shoulder and Elbow.*<sup>24</sup> Dr. Magliato reviewed this report and found that it did not provide a thorough application of the A.M.A., *Guides*. Dr. Post relied on the general provisions for shoulder impairment rather than the specific figures providing impairment ratings. Dr. Magliato noted that Dr. Post cited to the table for strength deficit of the upper extremity but reported no findings of loss of strength.<sup>25</sup> The Board finds that Dr. Post's supplemental report did not cure the deficiencies pertaining to his application of the A.M.A., *Guides*.

An Office medical adviser may review a report to verify the correct application of the A.M.A., *Guides* and confirm the percentage of permanent impairment,<sup>26</sup> but it is the impartial medical specialist who must resolve a conflict in medical opinion.<sup>27</sup> It is well established that when a referee examination is arranged to resolve a conflict in medical opinion, the medical adviser is not to attempt clarification or expansion of the impartial medical specialist's opinion.<sup>28</sup> Dr. Magliato addressed the deficiencies in Dr. Post's report and applied the A.M.A., *Guides* to the range of motion measurements to rate five percent impairment of the left upper extremity. Dr. Magliato substituted his judgment for that of the impartial medical specialist in determining appellant's permanent impairment. It is the role of the medical adviser to verify a correct application of the A.M.A., *Guides*, but it is for an impartial medical specialist to resolve the conflict. The Office issued the March 30, 2009 decision finding five percent impairment of the left upper extremity based on Dr. Magliato's reports.

The Board finds that Dr. Post's reports are insufficient to resolve the conflict in medical opinion regarding the extent of appellant's permanent impairment. As there is an unresolved conflict in medical opinion, the case will be remanded to the Office. The Office should refer appellant, together with the case record and statement of accepted facts, to a new Board-certified specialist for an impartial medical evaluation of any permanent impairment. Following this and all other development deemed necessary, it shall issue an appropriate decision in the case.

### CONCLUSION

The Board finds the case not in posture for decision as there is an unresolved conflict in the medical evidence concerning appellant's degree of permanent impairment of the left upper extremity.

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<sup>24</sup> *Id.* at 510, Table 16-35.

<sup>25</sup> *Id.*

<sup>26</sup> *I.H.*, 60 ECAB \_\_\_ (Docket No. 08-1352, issued December 24, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(c) (April 1993).

<sup>27</sup> *I.H.*, *id.*; *Richard R. LeMay*, 56 ECAB 341, 348 (2005).

<sup>28</sup> *I.H.*, *supra* note 26; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2009 decision of Office of Workers' Compensation Programs is remanded for additional development consistent with this decision of the Board.

Issued: September 27, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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