United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 09-2359**
	)	**Issued: September 16, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 from the merit decision of the Office of Workers' Compensation Programs dated July 6, 2009 granting a 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 22 percent permanent impairment of her right arm, for which she received a schedule award.

FACTUAL HISTORY

The Office accepted that appellant, then a 23-year-old letter carrier, sustained bicipital tendinitis, adhesive capsulitis and recurrent dislocation of her right shoulder due to the performance of her work duties. On February 26, 2002 she underwent arthroscopy of her right shoulder with open repair, open anterior inferior capsular shift and insertion of a pain pump. Because this surgery was unsuccessful, appellant had additional surgery on February 20, 2003,

including arthroscopy of her right shoulder with capsular advancement, debridement of the anterior glenoid and closure of the rotator cuff interval between the supraspinatus and subscapularis tendons. On July 20, 2005 she underwent right shoulder revision arthroscopic repair, capsular shift, rotator interval embrocation and biceps suspension surgery. These procedures were authorized by the Office and appellant received wage-loss compensation for periods of disability. On May 23, 2006 appellant filed a claim for a schedule award.

In a March 20, 2006 report, Dr. David Weiss, an attending osteopath and Board-certified orthopedic surgeon, determined that appellant had a 28 permanent impairment of her right arm under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). He found a 12 percent impairment of her right arm due to limited right shoulder motion, which was comprised of a 6 percent impairment due to 90 degrees of right shoulder flexion, a 5 percent impairment due to 80 degrees of right shoulder abduction and a 1 percent impairment due to 75 degrees of right shoulder internal rotation.[1] Dr. Weiss also found a 10 percent impairment for right distal clavicle resection arthroplasty[2] which he combined with the 12 percent loss in range of motion, under the Combined Values Chart on page 604 of the A.M.A., *Guides*, to rate a 25 percent impairment of the right arm.[3] To this figure, he combined a 3 percent impairment for pain-related impairment, for a total right arm impairment of 28 percent.[4]

In an October 4, 2006 report, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an Office medical adviser, stated that, based on the measurements provided by Dr. Weiss, appellant had a 13 percent impairment of her right arm due to limited right shoulder motion. The rating was comprised of six percent impairment due to 90 degrees of right shoulder flexion, a five percent impairment due to 80 degrees of right shoulder abduction, a one percent impairment due to 75 degrees of right shoulder internal rotation and a one percent impairment due to 45 degrees of right shoulder external rotation. Dr. Magliato used the Combined Values Chart to combine the 13 percent loss of motion rating with a 10 percent impairment rating for right distal clavicle resection arthroplasty to equal a 22 percent total impairment of the right arm. He advised that adding three percent for pain-related impairment was not warranted.

In a January 3, 2008 report, Dr. Zohar Stark, a Board-certified orthopedic surgeon serving as an Office referral physician, examined appellant's right shoulder and noted a one-

[1] Dr. Weiss applied Figures 16-40, 16-43 and 16-46 on pages 476, 477 and 479 of the A.M.A., *Guides*. He inadvertently indicated that appellant had a five percent impairment due to 75 degrees of right shoulder internal rotation, but the correct application of the A.M.A., *Guides* shows that one percent impairment for 75 degrees of internal rotation is appropriate. *See* Figure 16-46 on page 479 of the A.M.A., *Guides.* Dr. Weiss also reported that appellant had 35 degrees of right shoulder adduction and 45 degrees of right shoulder external rotation but posited that these findings did not warrant impairment ratings.

[2] Dr. Weiss used Table 16-27 on page 506 of the A.M.A., *Guides.*

[3] The Board notes that using the Combined Values Chart to combine the 10 and 12 percent values would actually equal a 21 percent impairment. *See* A.M.A., *Guides* 604, Combined Values Chart.

[4] Dr. Weiss derived the pain rating from Chapter 18 of the A.M.A., *Guides* at pages 569 to 586.

centimeter atrophy of the right upper arm musculature.[5] He indicated that she had a deltoid muscle strength loss of 4/5. For the right shoulder, Dr. Stark found that appellant had 165 degrees of flexion, 165 degrees of abduction, 40 degrees of adduction, 80 degrees of internal rotation and 70 degrees of external rotation.

In a January 14, 2008 decision, the Office granted appellant a schedule award for a 22 percent permanent impairment of her right arm. The award ran for 68.64 weeks from March 20, 2006 to July 13, 2007. The award was based on the impairment evaluation of Dr. Magliato.

An oral hearing was held on May 15, 2008. In an August 7, 2008 decision, the Office hearing representative set aside the January 14, 2008 decision and determined that the January 3, 2008 report of Dr. Stark should be sent to the Office medical adviser for review.

In a November 4, 2008 report, Dr. Magliato stated that the measurements obtained by Dr. Stark showed a two percent impairment for loss of right shoulder motion comprised of a one percent rating for 165 degrees of flexion and a one percent rating for 165 degrees of abduction. He noted, however, that Dr. Stark stated that appellant had deltoid muscle strength loss of 4/5 (with a one-centimeter right arm atrophy) which, based on Table 16-15 on page 492 of the A.M.A., *Guides*, constituted a seven percent impairment of the right arm. Dr. Magliato advised that she also had 10 percent impairment for the right clavicle resection arthroplasty and was entitled to a three percent rating for pain. He noted that range of motion in the right shoulder had increased significantly since Dr. Weiss' March 20, 2006 examination. As range of motion was almost normal, it was most appropriate to combine the muscle weakness, resection arthroplasty and pain ratings to arrive at a total right arm impairment of 20 percent.[6]

In a December 31, 2008 decision, the Office determined that appellant was not entitled to an additional schedule award. It found that the November 4, 2008 impairment rating of Dr. Magliato resulted in a lower impairment rating than previously found on October 4, 2006.

Appellant requested a hearing before an Office hearing representative. At the hearing held on March 19, 2009, counsel asserted that there was a conflict between the opinions of Dr. Weiss and Dr. Magliato. She further noted that Dr. Stark's examination did not consist of schedule award evaluation but rather to determine appellant's work capacity. Counsel contended that Dr. Stark performed active range of motion testing rather than passive testing and that these motions pushed appellant's right shoulder well into pain areas.

In a July 6, 2009 decision, the Office hearing representative affirmed the December 31, 2008 decision. He found that appellant did not establish that she had more than a 22 percent permanent impairment of her right arm, for which she received a schedule award.

[5] It appears that the referral to Dr. Stark was not for a schedule award evaluation but rather to determine appellant's work capacity.

[6] Dr. Magliato stated that range of motion ratings should not be included if there is motor loss and muscle atrophy.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulations[8] 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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

Chapter 18 of the A.M.A., *Guides* should not be used to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides.* This chapter provides detailed standards for evaluating pain-related impairment, which must be followed to justify such an impairment rating.[10]

Section 8123(a) of the Act provides in pertinent part: "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."[11] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[12]

ANALYSIS

The Office accepted that appellant sustained bicipital tendinitis, adhesive capsulitis and recurrent dislocation of her right shoulder due to the performance of her work duties. In a January 14, 2008 decision, it granted her a schedule award for a 22 percent permanent impairment of his right arm. The Board finds that the medical evidence of record establishes that appellant has a 23 percent permanent impairment of her right arm.

In a March 20, 2006 report, Dr. Weiss, an attending osteopath and Board-certified orthopedic surgeon, found that appellant had a 12 percent impairment of her right arm due to

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[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*.

[10] *See* A.M.A., *Guides* 565-86; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (June 2003). *See also Philip A. Norulak*, 55 ECAB 690 (2004) (a separate pain calculation under Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapters 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*).

[11] 5 U.S.C. § 8123(a).

[12] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

limited right shoulder motion, which was comprised of a 6 percent impairment due to 90 degrees of right shoulder flexion, a 5 percent impairment due to 80 degrees of right shoulder abduction and a 1 percent impairment due to 75 degrees of right shoulder internal rotation.[13] The Board notes that these impairment ratings are correct for the identified motions, but that he failed to note that 35 degrees of right shoulder adduction represented one percent impairment and that 45 degrees of right shoulder external rotation also constituted one percent impairment.[14] Therefore, application of the standards of the A.M.A., *Guides* to the findings of Dr. Weiss shows that appellant has a 14 percent impairment due to limited right shoulder motion. Dr. Weiss also found that she had a 10 percent impairment for right distal clavicle resection arthroplasty.[15] The Board notes that using the Combined Values Chart of the A.M.A., *Guides* to combine the 14 percent loss of motion with the 10 percent right distal clavicle resection arthroplasty impairment equals a 23 percent impairment of the right arm.[16]

Dr. Weiss also found that appellant was entitled to a three percent impairment rating for pain-related impairment. It is noted that the A.M.A., *Guides* on page 571 specifically states that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. Dr. Weiss did not adequately explain how his pain rating conformed to the A.M.A., *Guides* and therefore it was not warranted.[17]

On October 4, 2006 report Dr. Magliato, a Board-certified orthopedic surgeon serving as an Office referral physician, found that appellant had a 13 percent impairment of her right arm comprised of a 6 percent impairment due to 90 degrees of right shoulder flexion, a 5 percent impairment due to 80 degrees of right shoulder abduction, a 1 percent impairment due to 75 degrees of right shoulder internal rotation and a 1 percent impairment due to 45 degrees of right shoulder external rotation. However, he failed to note that she had a 1 percent impairment due to 35 degrees of adduction which resulted in right arm impairment for limited right shoulder motion of 14 percent. Dr. Magliato acknowledged that appellant had a 10 percent impairment rating for right distal clavicle resection arthroplasty. He properly determined that adding a three percent impairment rating for pain-related impairment was not warranted in this case. Dr. Magliato did not indicate that appellant had any other source of impairment of the right arm. His report therefore shows, after adjustment for a 1 percent impairment rating due to limited adduction, that she had a 14 percent impairment for limited right shoulder motion and a 10 percent impairment

[13] Dr. Weiss applied Figures 16-40, 16-43 and 16-46 on pages 476, 477 and 479 of the A.M.A., *Guides*. He inadvertently indicated that appellant had a five percent impairment due to 75 degrees of right shoulder internal rotation, but this extent of internal rotation would actually equal a one percent impairment.

[14] *See* A.M.A., *Guides* 479, Figure 16-46.

[15] Dr. Weiss used Table 16-27 on page 506 of the A.M.A., *Guides*.

[16] The Board notes that Dr. Weiss indicated that using the Combined Values Chart to combine the 10 and 12 percent values he derived for the right arm would equal a 25 percent impairment, but combining these values under this method would actually equal a 21 percent impairment. *See* A.M.A., *Guides* 604, Combined Values Chart.

[17] *See supra* note 10.

rating for right distal clavicle resection arthroplasty which when combined, using the Combined Values Chart, yields a total right arm impairment of 23 percent.[18]

Appellant subsequently underwent a second opinion examination with Dr. Stark, a Board-certified orthopedic surgeon acting as an Office referral physician, who provided examination findings, including those for strength and range of motion testing.[19] On November 4, 2008 Dr. Magliato determined that she had a 20 percent impairment of her right arm based on the examination findings reported by Dr. Stark. However, even if his 20 percent impairment rating is accepted as accurate, this impairment rating would be less than the 23 percent impairment rating noted above. Dr. Magliato properly indicated that Dr. Stark's findings showed that appellant had a 10 percent impairment for the right shoulder resection arthroplasty. He stated that she had a seven percent rating for deltoid muscle strength loss of 4/5 under Table 16-15 of the A.M.A., *Guides* but this rating cannot be accepted as valid because he did not identify a peripheral nerve as causing this weakness.[20] Dr. Magliato indicated that appellant also was entitled to a three percent rating for pain, but he failed to explain how such a rating comported with standards of Chapter 18 of the A.M.A., *Guides*. He stated that the measurements provided by Dr. Stark showed a two percent impairment for loss of right shoulder motion, comprised of a one percent rating for 165 degrees of flexion and a one percent rating for 165 degrees of abduction, but indicated that range of motion values should not be included when a muscle strength loss rating involving the same member is included. As noted, Dr. Magliato did not support the muscle strength loss rating. At best, Dr. Stark's findings could be interpreted to yield a 12 percent impairment of the right arm, comprised of a 10 percent impairment for the right shoulder resection arthroplasty combined with and a 2 percent rating for limited right shoulder motion. Therefore, the findings of Dr. Stark do not establish that appellant had more than a 23 percent permanent impairment of her right arm.

The Board finds that appellant has a 23 percent permanent impairment of her right arm. Appellant is entitled to receive a schedule award for an additional 1 percent impairment of her right arm.

CONCLUSION

The Board finds that appellant has a 23 percent permanent impairment of her right arm.

[18] On appeal, counsel argued that there was a conflict between the impairment rating opinions of Dr. Weiss and Dr. Magliato. However, when both opinions are corrected for frank errors in application of the standards of the A.M.A., *Guides*, they show the same level of impairment of appellant's right arm.

[19] On appeal, counsel suggested that the evaluation of Dr. Stark was invalid because his examination was not for a schedule award evaluation but rather to determine appellant's work capacity. While the reason for the second opinion referral was not for evaluation of permanent impairment, Dr. Stark provided range of motion and strength measurements and it was appropriate for the report to be sent to an Office medical adviser for evaluation. Counsel claimed that he performed active range of motion testing which pushed appellant's right shoulder well into pain areas. The A.M.A., *Guides* allows for active range of motion testing and there is no evidence that the manner in which Dr. Stark performed range of motion testing was improper. *See* A.M.A., *Guides* 474-79.

[20] *See* A.M.A., *Guides* 492, Table 16-15.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified, to reflect that appellant has a 23 percent permanent impairment of her right arm.

Issued: September 16, 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