United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 10-1529**
	)	**Issued: April 5, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer	)	

Appearances:
J. Steven Huffines, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2010 appellant filed a timely appeal from the March 18 and April 30, 2010 merit decisions of the Office of Workers' Compensation Programs granting schedule award compensation. 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 met her burden of proof to establish that she has more than an eight percent permanent impairment of her right arm, for which she received schedule awards.

FACTUAL HISTORY

The Office accepted that on November 29, 2004 appellant, then a 55-year-old mail handler, sustained a sprain/strain of the subscapularis muscle of her right shoulder. It paid her compensation for periods of compensation.

On October 30, 2008 appellant requested a schedule award for permanent impairment of her right arm. In an April 14, 2009 decision, the Office granted her a schedule award for a two

percent permanent impairment of her right arm. The award was calculated under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

Appellant disagreed with the April 14, 2009 decision and requested an oral hearing before an Office hearing representative. In a July 10, 2009 decision, the Office hearing representative remanded the case to the Office for additional development of the medical evidence. In a September 15, 2009 decision, the Office granted appellant a schedule award for an additional six percent permanent impairment of her right arm (for a total of eight percent) under the standards of the sixth edition of the A.M.A., *Guides*.

Appellant requested reconsideration of her claim and submitted a September 25, 2009 report of Dr. Robert Macht, an attending Board-certified general surgeon. Under the standards of the sixth edition of the A.M.A., *Guides*, Dr. Macht determined that she had a 12 percent impairment of her right arm. He indicated that using Table 15-5 on page 403 of the sixth edition there was a rotator cuff injury with full-thickness tear and he found that this condition warranted a five percent impairment rating of the right arm under the Class 1 diagnostic category. Appellant was also determined to have a superior labrum anterior to posterior (SLAP) lesion or torn labrum and Dr. Macht posited that, since there was range of motion deficit for that impairment, he would select the range of motion deficit for use instead of the impairment for the labral tear. Applying Table 15-34 on page 475 yielded a three percent impairment of the left arm for loss of flexion, a one percent impairment for loss of extension and a three percent impairment for loss of abduction. These figures added together to yield a total seven percent impairment of the right arm. When combined together with the figure for rotator cuff tear, there was a total 12 percent permanent impairment of appellant's right arm. Dr. Macht further stated:

> "The sixth edition of the [A.M.A., *Guides*] requires that a physician establish the diagnosis. In [appellant's] case, there are tears of the labrum and rotator cuff. It would be erroneous to choose only one of these diagnoses for her impairment since she is a patient that has both diagnoses. One could use the shoulder regional grid to assign an impairment post diagnosis, but on page 405 at the end of [Table 15-5] it says 'If motion loss is present, this impairment may alternatively be assessed using [s]ection 15.7 [r]ange of [m]otion impairment. A range of motion impairment stands alone and is not combined with the diagnosis impairment.' So therefore I did not combine the impairment for labral injury with the range of motion impairment. I just used the range of motion impairment for that diagnosis. There was the other diagnosis of rotator cuff injury, which I combined with the figure for the impairment due to range of motion."

On March 17, 2010 Dr. Morley Slutsky, a Board-certified orthopedic surgeon serving as an Office medical adviser, determined that appellant had a four percent permanent impairment of her right arm under the standards of the sixth edition of the A.M.A., *Guides*. He asserted that Dr. Macht incorrectly stated that, because appellant had more than one diagnosis in her right shoulder, the range of motion method should be used for rating purposes. The A.M.A., *Guides* specifically states that there will be times when multiple diagnoses in the shoulder will be present and the evaluator must choose the most significant diagnosis and rate only that diagnosis using the diagnosis-based method under Table 15-5. Dr. Slutsky also noted that range of motion

impairment rating (which is carried out in compliance with the requirements of section 15.7) may be used as an alternative rating method but not in conjunction with a diagnosis-based rating method. He also opined that the range of motion measurements documented by Dr. Macht (one measurement per shoulder motion) did not meet the requirements outlined in section 15.7 and were not valid for rating purposes.

Dr. Slutsky further noted that under Table 15-5 (Shoulder Regional Grid) on page 402 appellant fell within the diagnostic category of partial rotator cuff tear under Class 1 with a default value of three. Appellant had a functional history Grade Modifier 2, a physical Grade Modifier 1 and a clinical studies Grade Modifier 0. This meant that her impairment shifted one space to the right from the default value under Table 15-5 and therefore the total impairment rating for her right arm was four percent.

In a March 18, 2010 decision, the Office denied appellant's request for modification of its prior schedule award decisions. It found that Dr. Slutsky properly evaluated the evidence of record on March 17, 2010 to calculate appellant's right arm impairment of four percent under the sixth edition of the A.M.A., *Guides*. Dr. Slutsky correctly pointed out errors in Dr. Macht's September 25, 2006 impairment assessment, including his impermissible inclusion of both a diagnosis-based impairment rating under Table 15-5 and an impairment rating based on limited shoulder motion under Table 15-34.

In a March 31, 2010 report, Dr. Macht asserted that his evaluation methods, including the manner in which he measured appellant's range of motion, were valid.

In an April 29, 2010 report, Dr. Craig Uejo, a Board-certified occupational medicine physician, serving as an Office medical adviser, determined that appellant had a four percent impairment of her right arm under the sixth edition of the A.M.A., *Guides*. He indicated that her right shoulder condition fell under Class 1 of the SLAP tear portion of Table 15-5 on page 404. The various modifiers moved appellant one place to right of the default value of three and therefore she had a total right arm impairment of four percent.

In an April 30, 2010 decision, the Office affirmed its March 18, 2010 decision. It found that the April 29, 2010 evaluation of Dr. Uejo (four percent impairment of the right arm) showed that appellant was not entitled to additional schedule award compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

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.[3] For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used for evaluating permanent impairment.[4]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the upper extremity for the present case, reference is initially made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. Then the associated class is determined from the Shoulder Regional Grid and the adjustment grid and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class as modified by the adjustments as calculated.[5] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[6]

ANALYSIS

The Office accepted that on November 29, 2004 appellant sustained a sprain/strain of the subscapularis muscle of her right shoulder. Appellant received schedule awards for a total right arm impairment of eight percent. She submitted September 25, 2009 and March 31, 2010 reports of Dr. Macht, an attending Board-certified general surgeon, which contained a higher impairment rating.

The Board notes, however, that the March 17, 2010 evaluation of the Dr. Slutsky and the April 29, 2010 evaluation of Dr. Uejo, both of whom served as Office medical advisers, properly concluded that appellant only had a four percent permanent impairment of her right arm.[7] Both Dr. Slutsky and Dr. Uejo pointed out errors in Dr. Macht's evaluation.

In his March 17, 2010 report, Dr. Slutsky noted that under Table 15-5 (Shoulder Regional Grid) on page 402 appellant fell under the diagnostic category of partial rotator cuff tear under Class 1 with a default value of three. Appellant had a functional history Grade Modifier 2, a physical Grade Modifier 1 and a clinical studies Grade Modifier 0. This meant that her impairment shifted one space to the right from the default value under Table 15-5 and therefore the total impairment rating for her right arm was four percent. Dr. Slutsky explained that

[3] *Id*.

[4] *See* FECA Bulletin No. 09-03 (issued March 15, 2009). For Office decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

[5] *See* A.M.A., *Guides* (6th ed. 2009) 405-12.

[6] *Id.* at 23-28.

[7] Dr. Slutsky is a Board-certified orthopedic surgeon, and Dr. Uejo is a Board-certified occupational medicine physician.

Dr. Macht incorrectly stated that, because appellant had more than one diagnosis in her right shoulder, the range of motion method should be used for rating purposes. The A.M.A., *Guides* specifically states that there will be times when multiple diagnoses in the shoulder will be present and the evaluator must choose the most significant diagnosis and rate only that diagnosis using the diagnosis-based method under Table 15-5.[8]

In his April 29, 2010 report, Dr. Uejo determined that appellant had a four percent impairment of the right arm under the sixth edition of the A.M.A., *Guides*. He indicated that her right shoulder condition fell under Class 1 of the SLAP tear portion of Table 15-5 on page 404. The various modifiers moved appellant one place to right of the default value of three and therefore she had a total right arm impairment of four percent.

Although Dr. Slutsky and Dr. Uejo used different diagnosis-based conditions to perform their evaluations under Table 15-5, their reports both show that appellant is not entitled to receive additional schedule award compensation. Each properly found that appellant only has a four percent impairment of her right arm and the Office properly denied her claim for additional compensation.

On appeal, counsel argued that the Office should have applied the standards of the fifth edition of the A.M.A., *Guides* rather than those of the sixth edition of the A.M.A., *Guides*. However, the Board properly applied the sixth edition of the A.M.A., *Guides* in connection with its March 18 and April 30, 2010 schedule award determinations as these decisions were issued after the sixth edition of the A.M.A., *Guides* became effective on May 1, 2009.[9]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than an eight percent permanent impairment of her right arm, for which she received schedule awards.

[8] Dr. Slutsky also correctly noted that Dr. Macht's September 25, 2006 impairment assessment impermissibly included both a diagnosis-based impairment rating under Table 15-5 and an impairment rating based on limited shoulder motion under Table 15-34

[9] On appeal, counsel also argued that the reports of Dr. Macht justified the granting of additional schedule award compensation. For the reasons described above, the reports of Dr. Macht do not support the granting of a higher level schedule award compensation than appellant already received.

ORDER

IT IS HEREBY ORDERED THAT the April 30 and March 18, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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