

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

DIANNE L. TOUSSAINT, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Fresno, CA, Employer**

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**Docket No. 04-1200
Issued: November 2, 2004**

Appearances:
Dianne L. Toussaint, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 5, 2004 appellant filed a timely appeal from the April 18, 2003 merit decision of the Office of Workers' Compensation Programs, which denied her claim for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. The Board also has jurisdiction to review the Office's March 16, 2004 nonmerit decision denying reconsideration of her claim.

ISSUES

The issues are: (1) whether appellant has more than an 18 percent permanent impairment of the left upper extremity, for which she received a schedule award; and (2) whether the Office properly denied appellant's December 12, 2003 request for reconsideration.

FACTUAL HISTORY

On May 20, 1996 appellant, then a 44-year-old tax examining assistant, filed a claim alleging that her left elbow condition was a result of her federal employment. The Office

accepted her claim for left lateral epicondylitis and left carpal tunnel syndrome. After surgery on both sites, she received a schedule award for an 18 percent permanent impairment of the left upper extremity. The period of the award ran from June 23, 1997 to July 21, 1998.

The Office later accepted that appellant's left shoulder tendinitis was employment related. On October 19, 2000 appellant underwent a left shoulder arthroscopy with a resection of the distal clavicle. On January 30, 2001 she underwent manipulation of the left shoulder under anesthesia with injection of steroids. The Office referred her, together with the record and a statement of accepted facts, to Dr. Mahendra Nath, a specialist in physical medicine and rehabilitation, for an evaluation of permanent impairment.

On May 10, 2002 Dr. Nath related appellant's history and complaints. Noting surgical scars of wrist, elbow and shoulder surgery, he described her range of motion as follows: "In the left abduction is almost full and external rotation is almost full. The range of motion of the elbows and the wrists is full." Grip strength on the left was 40, 45 and 43 pounds. Dr. Nath reported good resolution of symptoms, though appellant still had difficulty with prolonged over-the-shoulder activities, including pushing, pulling and lifting. He described the pain or discomfort as mild.

An Office medical consultant reviewed the file and determined that appellant had a 13 percent impairment of the left upper extremity: 10 percent for distal clavicle excision combined with 3 percent for pain.

In a decision dated June 28, 2002, the Office denied an increased schedule award for the left upper extremity. The Office found that impairment to appellant's left upper extremity had decreased from 18 percent to 15.

In a decision dated April 18, 2003, a hearing representative affirmed, finding that the medical evidence failed to support entitlement to a greater schedule award than appellant received in 1998.

On December 12, 2003 appellant requested reconsideration. In a decision dated March 16, 2004, the Office denied a merit review of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.¹ Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.²

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

To support a schedule award, the file must contain competent medical evidence that describes the impairment in sufficient detail for the adjudicator to visualize the character and degree of disability.³ The report of the examination must always include a detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment.⁴ The Office should advise any physician evaluating permanent impairment to use the fifth edition of the A.M.A., *Guides* and to report findings in accordance with those guidelines.⁵

ANALYSIS -- ISSUE 1

Impairment ratings for the upper extremity following arthroplasty of specific joints are listed in Table 16-27, page 506, of the A.M.A., *Guides*. According to this table, resection arthroplasty of the distal clavicle, which appellant underwent on October 19, 2000, represents a 10 percent impairment of the upper extremity. In the presence of decreased motion, however, motion impairments are derived separately and combined with arthroplasty impairment.⁶ The problem in this case is that the examining physician, Dr. Nath, described abduction and external rotation of the left shoulder as “almost full,” an indication of decreased motion but not a specific goniometric finding of the loss in degrees of active motion. This vague description prevents any adjudicator from using Figure 16-43, page 477, and Figure 16-46, page 479, of the A.M.A., *Guides* to determine impairment of the upper extremity due to lack of abduction or external rotation. Further, Dr. Nath reported no goniometric findings for shoulder flexion, extension, adduction or internal rotation. Without these measurements, it is impossible to determine whether appellant has more than an 18 percent permanent impairment of the left upper extremity due to resection arthroplasty and loss of motion. The Board will set aside the Office’s April 18, 2003 decision and remand the case for further development and an appropriate final decision on appellant’s claim for an increased schedule award for her left arm.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant has more than an 18 percent permanent impairment of the left upper extremity. Further development of the medical evidence is warranted. Because the Board is remanding the case for further development and a merit decision on appellant’s entitlement, the second issue on appeal, whether the Office properly denied appellant’s December 12, 2003 request for reconsideration, is moot.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.b(2) (August 2002).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.c(1) (August 2002).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (with noted exceptions).

⁶ A.M.A., *Guides* 505 (5th ed. 2001).

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: November 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member