

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

BENNY L. SMITH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Albany, NY, Employer**

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**Docket No. 04-1407
Issued: October 19, 2004**

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, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 3, 2004 appellant filed a timely appeal from an April 13, 2004 decision of a hearing representative of the Office of Workers' Compensation Programs that affirmed a June 3, 2003 schedule award for a 12 percent permanent impairment of the right arm. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d) the Board has jurisdiction to review the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than a 12 percent permanent impairment of his right arm.

FACTUAL HISTORY

Appellant, a 39-year-old mail handler, sustained a traumatic injury to his right shoulder on January 13, 1997 which the Office accepted for tendinitis of the right shoulder. On May 2, 2002 he filed a claim for a schedule award.

On September 10, 2002 the Office referred appellant to Dr. Paul G. Jones, a Board-certified orthopedic surgeon, for an evaluation of the permanent impairment of appellant's right shoulder. In a September 30, 2002 report, he stated that on examination of appellant's shoulder his flexion and abduction were limited to about 30 degrees, internal rotation and external rotation were markedly limited, adduction was normal, there was no atrophy or muscular spasm, his right forearm was one-fourth inch larger in circumference than his left and grip strength with manual testing was significantly diminished on the right side. Dr. Jones diagnosed "status post surgery to the right shoulder¹ with evidence of symptom magnification."

On December 24, 2002 the Office referred appellant to his attending physician, Dr. Robert Ablove, a Board-certified orthopedic surgeon, for an evaluation of the permanent impairment of his right shoulder. Dr. Ablove completed the Office form on January 22, 2003 indicating that appellant's loss of function due to pain was mild and, due to muscle weakness, mild to moderate. He reported ranges of motion of 125 degrees of forward elevation, 15 degrees of backward elevation, 115 degrees of abduction, 40 degrees of adduction, 50 degrees of internal rotation, 70 degrees of external rotation and 20 degrees of extension.

On May 3, 2003 an Office medical adviser reviewed Dr. Ablove's report and assigned 3 percent impairment for 125 degrees of forward elevation, 2 percent for 15 degrees of backward elevation, 3 percent for 115 degrees of abduction, 0 percent for 40 degrees of adduction, 2 percent for 50 degrees of internal rotation, 0 percent for 70 degrees of external rotation and 2 percent for 20 degrees of extension, for a total of 12 percent impairment of the right arm.

On June 3, 2003 the Office issued a schedule award for a 12 percent permanent impairment of appellant's right arm for 37.44 weeks for the period January 22 to October 11, 2003.

Appellant requested an oral hearing and submitted a September 8, 2003 report from Dr. Charles J. Kistler, an osteopath, who reported that on examination of appellant's right arm, his grip strength was 2 out of 5; there was numbness, tingling and weakness; and there was diminished motion of the shoulder, with internal rotation of 35 degrees, external rotation of 40 degrees, a flexion extension impairment of 15 percent and an abduction and adduction impairment of 10 percent. Dr. Kistler concluded that appellant had a 20 percent permanent impairment of his right arm. Appellant also submitted a May 22, 2003 report from Dr. Brian L. Bowyer, a Board-certified physiatrist, describing right shoulder pain-related give way weakness and limitations of flexion (80 degrees), external rotation (0 degrees) and abduction (30 degrees) and a July 23, 2003 report from Dr. Patrick Simon, an orthopedic surgeon, describing the pain and weakness of appellant's right shoulder.

Following a hearing held on January 13, 2004, an Office hearing representative, by decision dated April 13, 2004, affirmed the June 3, 2003 schedule award, finding that Dr. Kistler's report failed to note specific measurements and to explain how he arrived at his percentage of impairment.

¹ This surgery was performed for an injury sustained in the military service.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office proceeds to develop the evidence, it must do so in a fair and impartial manner.⁴ Where the Office refers appellant for an evaluation, it has a responsibility to have a full and complete evaluation done which will resolve the issue in the case.⁵ To support a schedule award, the file must contain competent medical evidence which describes the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability.⁶

ANALYSIS

The Office twice attempted to obtain an evaluation of the permanent impairment of appellant's right arm due to his accepted shoulder injury: first, by referring him to Dr. Jones, a Board-certified orthopedic surgeon, and second, by requesting appellant's attending Board-certified orthopedic surgeon, Dr. Ablove, to evaluate his permanent impairment. Neither of these reports is sufficient to rate his permanent impairment. Dr. Jones provided measurements of only two of the six shoulder motions for which the A.M.A., *Guides* provides for percentages of impairment. Dr. Ablove provided measurements of all shoulder motions and these were the basis of the Office's schedule award for 12 percent permanent impairment of the right arm. But Dr. Ablove also indicated that appellant had mild pain and mild to moderate weakness. The Office did not attempt to clarify these impairments or to rate them, despite the fact that they were also reported by physicians who examined him in 2003, Drs. Simon and Bowyer.

Dr. Kistler's report is insufficient as it provided only percentages of impairment, not actual measurements of motion, for flexion, extension, abduction and adduction. Like the other

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (2003).

⁴ *John H. Smith*, 41 ECAB 444 (1990); see *Henry G. Flores*, 43 ECAB 901 (1992); *Ralph E. Stewart*, 41 ECAB 996 (1990).

⁵ *Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6b (August 2002).

examining physicians, he reported weakness and also found numbness and tingling. The Office made no attempt to clarify or rate these impairments. The Office should have apprised appellant of the deficiencies of Dr. Kistler's report before denying his claim for an increased schedule award.⁷ The case will be remanded to the Office for further development of the medical evidence to obtain a report allowing a rating of all the permanent impairments of his right arm.

CONCLUSION

The case is not in posture for a decision on appellant's entitlement to a schedule award and is remanded to the Office for further development of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Issued: October 19, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁷ *Dale B. Larson*, 41 ECAB 481 (1990).