United States Department of Labor
Employees' Compensation Appeals Board

SIDNEY J. CROSS, Appellant	)	
and	)	**Docket No. 05-851**
	)	**Issued: July 12, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bethesda, MD, Employer	)	

Appearances:
Sidney J. Cross, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On February 28, 2005 appellant filed a timely appeal from the December 29, 2004 merit decision of the Office of Workers' Compensation Programs, which denied additional compensation for the permanent impairment of his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's schedule award decision.

ISSUE

The issue is whether appellant has more than an 18 percent permanent impairment of his right upper extremity.

FACTUAL HISTORY

On November 30, 2001 appellant, then a 41-year-old distribution clerk, sustained an injury in the performance of duty when he slipped and fell. He underwent a right shoulder arthroscopy on January 7, 2003, which included a resection of the distal clavicle. The Office accepted his claim for a fractured right shoulder and elbow and paid compensation for temporary

total disability on the periodic rolls. Appellant returned to limited duty full time on June 17, 2002.

On or about January 8, 2003 appellant filed a claim for a schedule award. On January 30, 2003 Dr. Uchenna R. Nwaneri, his orthopedic surgeon, noted a complaint of pain in the right shoulder going down the arm and neck. His findings included tenderness of palpation of the right shoulder with abduction to 120 degrees. He also noted limited internal and external rotation due to pain. Dr. Nwaneri concluded that appellant had a 25 percent impairment due to the right shoulder and a 3 percent impairment due to the right elbow.

On or about April 24, 2003 Dr. Nwaneri completed an impairment evaluation form supplied by the Office. He reported ranges of motion for both the shoulder and elbow, as well as decreased motor strength and decreased sensory perception in the right upper extremity. He described appellant's elbow discomfort or pain as intermittent, worse with repetitive motion of the right arm. Dr. Nwaneri reported that maximum medical improvement was April 24, 2003 for the shoulder and April 25, 2003 for the elbow. He indicated that he used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) in his evaluation.

On or about May 21, 2003 an Office medical adviser compared the ranges of motion reported by Dr. Nwaneri to the tables in the A.M.A., *Guides* and determined that appellant had a 17 percent impairment due to loss of shoulder motion.

The Office referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion. Dr. Hanley completed the same impairment evaluation form, noting ranges of motion and intense pain with pressure placed on the point of the right elbow. He stated that maximum medical improvement was May 30, 2002 and that he used the A.M.A., *Guides* in his evaluation. On July 2, 2003 Dr. Hanley reported that appellant had an 8 percent impairment due to loss of shoulder motion and a 10 percent impairment due to resection of the distal clavicle, for a total upper extremity impairment of 18 percent. He reported no elbow impairment.

In a decision dated August 27, 2003, the Office issued a schedule award for an 18 percent permanent impairment of the right upper extremity.[1]

Appellant requested a hearing before an Office hearing representative. After the hearing, he submitted a July 21, 2004 report from Dr. Harvey N. Mininberg, an orthopedic surgeon, who described appellant's complaints and his findings on physical examination, including right shoulder atrophy, abduction and forward flexion to 130 degrees and external rotation lacking 20 degrees. He concluded that appellant had a 36 percent impairment of the right shoulder in accordance with the A.M.A., *Guides* and taking into account pain, weakness, atrophy, loss of endurance and loss of function.

In a decision dated August 25, 2004, the hearing representative found the case not in posture for decision because the newly submitted report of Dr. Mininberg required review by an

[1] The Office typed "right upper shoulder."

Office medical adviser and an opinion on whether appellant had more than an 18 percent permanent impairment of his right upper extremity.

On November 23, 2004 an Office medical adviser reported that Dr. Mininberg provided no basis whatsoever for his rating and had referred to factors relevant to Maryland state workers' compensation. The medical adviser stated that he was in complete agreement with Dr. Hanley's estimate of impairment. He did not mention Dr. Nwaneri's findings.

In a decision dated December 29, 2004, the Office found that appellant had no more than an 18 percent permanent impairment of his right upper extremity and therefore was entitled to no additional compensation.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. 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 A.M.A., *Guides*.[3]

After obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment. The percentage should be computed in accordance with the A.M.A., *Guides*, fifth edition. As a matter of course, the Office medical adviser should provide rationale for the percentage of impairment specified. When more than one evaluation of the impairment is present, however, it will be especially important for the Office medical adviser to provide such medical reasoning.[4]

ANALYSIS

When the Office issued appellant's schedule award on August 27, 2003, two evaluations, performed approximately two months apart, showed significantly different estimates of impairment. On or about April 24, 2003 Dr. Nwaneri, appellant's orthopedic surgeon, completed an impairment evaluation form supplied by the Office. The ranges of motion he reported for the right shoulder reflected a 17 percent impairment of the right upper extremity under the A.M.A., *Guides*.[5] The ranges of motion he reported for the right elbow reflected a two percent impairment.[6] In the presence of decreased motion, motion impairments are derived separately

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.d (August 2002).

[5] A.M.A., *Guides* 476-79 (Figures 16-40, 16-43, 16-46: flexion 110, extension 15, abduction 120, adduction 20, internal rotation 10, external rotation 45).

[6] *Id*. at 472-74 (Figures 16-34, 16-37: flexion 130, extension 10, pronation 80, supination 70).

and combined with impairment due to arthroplasty.[7] Therefore, appellant's 19 percent impairment due to loss of motion combines with a 10 percent impairment for the resection arthroplasty of his right distal clavicle[8] for a 27 percent total impairment of the right upper extremity.[9]

On or about July 2, 2003 Dr. Hanley, the Office referral physician, completed the same impairment evaluation form. In every instance he reported a greater range of motion. And in 9 out of 10 cases, his measurements exceeded those reported by Dr. Nwaneri by more than 10 percent.[10] Two physicians, following the methods of the A.M.A., *Guides* to evaluate the same patient, should report similar results and reach similar conclusions.[11] But the ranges of motion Dr. Hanley reported for the right shoulder reflected an 8 percent impairment of the right upper extremity, or about half the impairment reported by Dr. Nwaneri.[12] And the ranges of motion he reported for the right elbow reflected no impairment at all.[13] When this 8 percent impairment due to loss of motion combines with a 10 percent impairment for the resection of the distal clavicle, the result is a 17 percent total impairment of the right upper extremity, significantly less than the 27 percent obtained from Dr. Nwaneri's recent measurements.

Dr. Hanley added impairment for loss of motion to impairment for the resection, and it was on this basis that the Office issued the August 27, 2003 schedule award for 18 percent. Although it was especially important for the Office medical adviser to provide rationale for selecting Dr. Hanley's measurements over Dr. Nwaneri's, he provided none. And it appears that he attempted no comparison.[14]

The record thus contains evaluations from two physicians within a span of about two months. The Office based its schedule award on the measurements of one without explanation. The Board finds that the case is not in posture for decision because further development of the

[7] *Id*. at 505.

[8] *Id*. at 506 (Table 16-27).

[9] *Id*. at 604 (Combined Values Chart).

[10] As with any biological measurements, some variability and normal fluctuations are inherent in permanent impairment ratings. Two measurements made by the same examiner using the A.M.A., *Guides* that involve an individual or an individual's functions would be consistent if they fell within 10 percent of each other. Measurements should also be consistent between two trained observers or by one observer on two separate occasions, assuming the individual's condition is stable. *Id*. at 20.

[11] *Id*. at 17.

[12] A.M.A., *Guides* 476-79 (Figures 16-40, 16-43, 16-46: flexion 160, extension 40, abduction 140, adduction 30, internal rotation 45, external rotation 90).

[13] *Id*. at 472-74 (Figures 16-34, 16-37: flexion 140, extension to 0, pronation 90, supination 90).

[14] On November 23, 2004 the Office medical adviser did review Dr. Mininberg's evaluation. He noted that Dr. Mininberg provided no basis for his rating and had referred to factors relevant to Maryland state workers' compensation. The Board agrees that Dr. Mininberg reported insufficient clinical findings to permit an estimate of permanent impairment under the A.M.A., *Guides*.

medical evidence is warranted.[15] The Board will set aside the Office's December 29, 2004 decision and remand the case for clarification by the Office medical adviser or, if necessary because maximum medical improvement was not established, for another evaluation of appellant's impairment in strict compliance with the A.M.A., *Guides*. After such further development as may be necessary, the Office shall issue an appropriate final decision on whether appellant has more than an 18 percent permanent impairment of his right upper extremity, for which he received a schedule award.[16]

CONCLUSION

The Board finds that this case is not in posture for decision. The Office medical adviser offered no rationale for selecting one physician's measurements over another's. Further development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 29, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: July 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[15] *See Irving Brichke*, 32 ECAB 1044 (1981) (the Office medical adviser provided no rationale for selecting one evaluation of the four that were conducted within a span of five months). *Cf. John C. Messick*, 25 ECAB 333 (1974) (when several audiograms are in the case record and all are made within approximately two years of one another and are submitted by more than one physician, the Office should give an explanation for selecting one audiogram over the others).

[16] The Office should take note that the normal ranges of motion printed on its impairment evaluation form do not reflect the normal ranges of motion set forth in the fifth edition of the A.M.A., *Guides*.