United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 06-900**
	)	**Issued: August 15, 2006**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, New York, NY, Employer	)	

Appearances:
M.G., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 7, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 13, 2006 schedule award decision. The Board notes that the record also contains an August 30, 2005 merit decision terminating appellant's wage-loss compensation benefits effective August 30, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the termination and schedule award decisions.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation benefits effective August 30, 2005; and (2) whether appellant has established that he had sustained more than a 5 percent impairment to his right upper extremity impairment, for which he received a schedule award.

FACTUAL HISTORY

On September 12, 2000 appellant, then a 31-year-old supervisory detention enforcement officer, filed a traumatic injury claim for a right shoulder injury which occurred as a result of his

employment duties. On that date, appellant was in training performing "gun-side strikes" with a padded baton when his right shoulder dislocated as he struck another individual. He stopped work on September 13, 2000. The Office accepted the claim for right shoulder tendinitis and paid appropriate benefits.

Appellant came under the care of Dr. Sanford Ratzan, a Board-certified orthopedic surgeon, who recommended that appellant undergo arthroscopic decompression and possible rotator cuff repair of the right shoulder. The Office authorized the requested surgical procedure, but it was declined by appellant. The record reflects that appellant was released to return to work with restrictions effective February 6, 2001, but the employing establishment did not have any work available within his limitations. Accordingly, the Office placed appellant on the periodic rolls. The record reflects that appellant was self-employed beginning December 2000 but as no earnings were reported, the Office referred appellant to vocational rehabilitation services on June 29, 2001. The Office closed vocational rehabilitation services on March 3, 2003. The record reflects that appellant had worked in the private sector for a few weeks in June 22, 2005 and returned to a different position on August 30, 2005.[1]

On July 31, 2002 appellant filed a Form CA-7 requesting a schedule award. In an August 21, 2002 letter, the Office requested that Dr. Ratzan provide a permanent impairment rating based on a recent examination and in accordance with the standards set forth in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*). In a September 13, 2002 report, Dr. Ratzan noted that appellant refused to undergo the authorized arthroscopic decompression surgery and had pain with extremes of motion and activity. He advised that appellant had a permanent impairment of 15 percent loss of the use of the right arm. Examination findings were noted as being a 10 degree loss of anterior flexion, 10 degree loss of abduction, good internal/external rotation of the right shoulder and a positive impingement test.

In a December 2, 2002 letter, the Office advised Dr. Ratzan that it needed an assessment of permanent impairment in accordance to the A.M.A., *Guides*. The Office requested that Dr. Ratzan set forth specific information and include how he arrived at his impairment rating under the applicable tables of the A.M.A., *Guides*. In a January 27, 2003 report, Dr. Ratzan opined that appellant had a 17½ percent permanent impairment of his right shoulder causally related to his work-related injury. He advised that appellant had passively decreased 20 degrees abduction, passively decreased 10 degrees of flexion, and 10 degrees actively. External and internal rotation were decreased 10 degrees. A positive impingement test was also noted.

On April 8, 2003 an Office medical adviser reviewed Dr. Ratzan's narrative reports of September 13, 2002 and January 27, 2003. He opined that appellant had a five percent permanent impairment to the right upper extremity. The Office medical adviser stated that the date of maximum medical impairment was September 13, 2002, as that was when Dr. Ratzan first found a permanency in appellant's condition. The Office medical adviser advised that Dr. Ratzan did not cite to any tables, figures of pages of the A.M.A., *Guides* to explain the 17½ percent impairment rating. Utilizing the fifth edition of the A.M.A., *Guides*, the Office medical

[1] The record is devoid of any information concerning appellant's current employment.

adviser determined that a negative 20 degree abduction was a 1 percent impairment under Figure 16-43 page 477; a negative 10 degree flexion was a 1 percent impairment under Figure 16-40 page 476; and negative 10 degrees of external and internal rotation were a 0 percent impairment under Figure 16-46 page 479. The Office medical adviser added the impairments together to find a two percent impairment of the right upper extremity based on loss of range of motion. An additional three percent impairment was given for pain. Utilizing the Combined Values Chart on page 604, the Office medical adviser concluded that appellant had a five percent permanent impairment of the right upper extremity.

In a letter dated April 9, 2003, the Office advised Dr. Ratzan that its review of his January 27, 2003 report revealed a five percent permanent impairment of the right upper extremity. The Office again requested that Dr. Ratzan reference those specific tables, figures and pages of the A.M.A., *Guides* used to support the percentage of impairment in his January 27, 2003 report. The Office provided Dr. Ratzan 30 days to supply the requested information. No response was received from Dr. Ratzan.

In a September 2, 2003 letter, the Office noted that appellant requested evaluation by a physician who was more familiar with the A.MA., *Guides* and factors to be calculated in determining an upper extremity impairment.

In a December 4, 2003 report, Dr. Harvey R. Manes, a Board-certified orthopedic surgeon, noted the history of injury and that appellant had minimal complaints and occasional pain. A diagnosis of mild bursitis was provided based on a magnetic resonance imaging (MRI) scan. Examination of the right shoulder revealed no tenderness, full range of motion, no deformity and normal muscle strength. Dr. Manes opined that appellant had no evidence of disability and filled out the Office's impairment sheet, indicating such. He additionally opined that appellant could return to his job as a federal officer with no limitations and opined that there was no need for further treatment, aside from an occasional Advil.

In October 2004, the Office received notification from appellant that he was moving from New York to Florida.

In a February 8, 2005 letter, the Office requested that appellant provide updated medical information on his right shoulder condition. In a separate letter, the Office advised appellant that a second opinion evaluation would be scheduled to determine whether there were any remaining residuals of the September 12, 2000 injury and to determine any current work restrictions.

In a March 21, 2005 report, Dr. Michael D. Slomka, a Board-certified orthopedic surgeon and Office referral physician, noted the history of injury and provided examination findings. Physical examination revealed no visible atrophy in the shoulder or right upper extremity. Appellant had full range of motion of the shoulder with 180 degrees of elevation of the frontal and lateral planes and 90 degrees of internal and external rotation. No discomfort to palpation, apprehension signs or the tendency to sublux was noted. Although appellant had a little weakness on the right side, he demonstrated adequate elevation against strong resistance. Dr. Slomka opined that appellant had no significant residuals from his work-related injury which had resolved. He stated that there was no permanent physical impairment at the time of his examination and opined that appellant could work full-time unrestricted work as a supervisory

detention enforcement officer as described in the job description. A work capacity evaluation form was completed which indicated that appellant could work without restrictions.

In an April 21, 2005 report, Dr. Theodore P. Vlahos, a Board-certified orthopedic surgeon and appellant's new attending physician, noted the history of injury and appellant's report of right shoulder pain. Examination findings were provided, which included range of motion findings for the shoulder. For the right shoulder, this included a forward elevation to 170 degrees, internal rotation to L1, external rotation to 70 degrees. A slight atrophy of the right shoulder posteriorly was noted along with tenderness at the right acromioclavicular joint and right suprapinatus insertion and a positive impingement sign. Dr. Vlahos reviewed a January 11, 2001 MRI scan and cited the results contained in the report. He provided an impression of right shoulder impingement with possible right shoulder rotator cuff tear. Rotator cuff and scapular stabilization exercises with a course of nonsteroidal anti-inflammatory medication was recommended.

By letter dated May 24, 2005, the Office issued a notice of proposed termination of appellant's wage-loss compensation based on the reports of Dr. Manes and Dr. Slomka that appellant had no continuing disability as a result of the September 12, 2000 work-related injury.

Appellant submitted progress reports from Dr. Vlahos dated May 10 and June 6, 2005, which provided an impression of right shoulder impingement with possible partial rotator cuff tear and recommended that a repeat MRI scan be performed. On June 10, 2005 appellant underwent a second MRI scan of the right shoulder which noted tendinosis.

On June 22, 2005 appellant began working for a private security firm on June 22, 2005 with an annual salary of $24,960.00.

The Office found a conflict in the medical opinion evidence between Dr. Vlahos and Dr. Slomka with regard to whether appellant had any continuing employment-related residuals or disability. By letter dated July 22, 2005, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Robert P. Nantais, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an August 18, 2005 report, Dr. Nantais reviewed a history of injury and appellant's subsequent medical treatment. He noted that appellant had worked for security companies both in New York and in Florida in an office position. Dr. Nantais reported that the right shoulder had a forward flexion to 180 degrees, abduction to 160 degrees, internal rotation decreased by about two vertebral levels to L3, and full external rotation. Vague tenderness anteriorly in the area of the biceps were noted with minimal positive impingement. No pain was noted with rotator cuff strength and appellant was neurologically intact in the upper extremity. Dr. Nantais noted that the MRI scans of the right shoulder, the most recent one being 2005, showed some tendinosis of the supraspinatus and infraspinatus with the previous MRI scan noting some impingement. He diagnosed a history of right shoulder subluxation, now resolved, with some slight underlying impingement and tendinosis. Dr. Nantais opined that appellant had slight loss of internal rotation by about two vertebral levels which may be a permanent result of his injury due to adhesion of the capsule. He opined that appellant was capable of returning to full duty at his regular job as enclosed in the job description. Dr. Nantais found that appellant had no

disability from the work injury and opined that, although he had some slight decreased internal rotation, this would not affect him functionally. In a Form OWCP-5c also dated August 18, 2005, he stated that appellant could work his usual job with no physical limitations.

In a decision dated August 30, 2005, the Office terminated appellant's wage-loss benefits effective that date. It found that the evidence of record established that he did not have any continuing disability causally related to the January 21, 2000 injury and accorded special weight to Dr. Nantais' impartial medical opinion.

By decision dated February 13, 2006, the Office granted appellant a schedule award for a five percent right upper extremity impairment for the period September 13 to December 31, 2002.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

Office procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic rolls.[5] The Board has held that the Office must follow its procedures and provide notice an opportunity to respond prior to the termination of compensation benefits.[6]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right shoulder tendinitis. The record reflects that appellant was eventually retained on the periodic rolls and that he first started working in the

[2] *Paul L. Stewart*, 54 ECAB 824 (2003).

[3] *Elsie L. Price*, 54 ECAB 734 (2003).

[4] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(a) (March 1997).

[6] *Winton A. Miller*, 52 ECAB 405 (2001).

[7] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

private sector on June 22, 2005. By letter dated May 24, 2005, appellant was notified of the Office's pretermination notice advising him that the Office proposed to terminate his compensation benefits on the basis of the reports of Dr. Manes and Dr. Slomka that he had no continuing disability as a result of the September 12, 2000 work-related injury. The Office subsequently declared a conflict in medical opinion and, by decision dated August 30, 2005, terminated appellant's compensation based on the special weight accorded to its impartial medical specialist, Dr. Nantais.

The Board initially finds that, under the Office's procedures, appellant was properly advised that in the Office's May 24, 2005 pretermination notice that the Office proposed to terminate his compensation benefits and was accorded an opportunity to respond prior to the termination of his compensation benefits. As appellant had returned to work on June 22, 2005, the Office was not required to send out another pretermination notice noting that the basis of its proposed termination had changed.[8]

The Board notes that a conflict in the medical opinion evidence was created between Dr. Vlahos, appellant's attending physician, and Dr. Slomka, an Office referral physician, on the issue of whether appellant had any continuing residuals or disability causally related to his September 12, 2000 right shoulder injury. Dr. Vlahos found that appellant had a right shoulder impingement with a possible rotator cuff tear. Dr. Slomka opined that appellant had no significant residuals from the September 12, 2000 employment injury and that appellant could return to his date-of-injury position as a supervisory detention enforcement officer without restrictions. As there was a conflict in the medical opinion evidence, the Office properly referred appellant for an impartial medical examination by Dr. Nantais, a Board-certified orthopedic surgeon.[9]

In a detailed report dated August 18, 2005, Dr. Nantais reviewed the evidence of record and reported his findings upon examination and the contemporaneous evidence of record. He opined that appellant had some slight underlying impingement and tendinosis and a slight loss of internal rotation. Dr. Nantais further opined that appellant was capable of returning to full duty at his regular job without physical restrictions. He explained that appellant's slight decrease in internal rotation would not affect him functionally. Dr. Nantais completed a Form OWCP-5c which indicated that appellant could work eight hours per day with no limitations. The report of Dr. Nantais was based on an accurate factual and medical background, was comprehensive, complete and well rationalized. It is entitled to special weight in finding that appellant no longer had any disability causally related to his September 12, 2000 employment injury. The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation based on the impartial medical report from Dr. Nantais.

[8] Pretermination notice is not required when the claimant dies, returns to work, is convicted of defrauding the Federal Employees' Compensation Act program or forfeits compensation by failing to report earnings. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.8(d) (March 1997).

[9] 5 U.S.C. § 8123(a), in pertinent part, provides: If there is a 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.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[10] and its implementing regulation[11] sets 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 how 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 and guidelines so that there are uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses and the Board has concurred in such adoption.[12]

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[13] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides detailed grading schemes and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.[14]

ANALYSIS -- ISSUE 2

Appellant received a schedule award for five percent impairment to his right upper extremity due to the accepted employment injury of September 12, 2000. The record reflects that appellant's initial treating physician, Dr. Ratzan, provided two impairment ratings in reports dated September 13, 2002 and January 27, 2003. However, he did not refer to the appropriate tables or grading schemes in the A.M.A., *Guides*. Thus, these reports are of limited probative value as they merely provided a percentage of impairment without any explanation of how the physician arrived at his rating pursuant to the A.M.A., *Guides*.[15]

The Office referred the case to an Office medical adviser who, on April 8, 2003, utilized the findings provided by Dr. Ratzan. The Office medical adviser noted that, under the applicable figures and tables of the A.M.A., *Guides*, a negative 20 degree abduction equated to a 1 percent impairment under Figure 16-43 page 477; a negative 10 degree flexion equated to a 1 percent impairment under Figure 16-40 page 476 and negative 10 degrees of external and internal

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[13] *Belinda H. Wilson*, 57 ECAB ___ (Docket No. 05-1426, issued October 19, 2005).

[14] A.M.A. *Guides* 433-521, Chapter 16, The Upper Extremities, (5th ed. 2001).

[15] *See Shalanya Ellison*, 56 ECAB ___ (Docket No. 04-824, issued November 10, 2004) (schedule awards are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is irrelevant and not probative where it is not based on the A.M.A., *Guides*).

rotation equated to a 0 percent impairment under Figure 16-46 page 479. The Office medical adviser added the range of motion impairments together to find a two percent impairment of the right upper extremity. The Office medical adviser also provided a three percent impairment for pain.

The medical evidence submitted after the Office medical adviser's April 8, 2003 report fails to establish that appellant has more than the five percent upper extremity impairment awarded. The Board notes that Dr. Manes and Dr. Slomka reported a relatively normal examination of the right upper extremity. While Dr. Vlahos and Dr. Nantais provided some objective findings, they did not provide an opinion regarding appellant's impairment consistent with the criteria of the A.M.A., *Guides*. Thus, the Board finds that appellant has not established that he is entitled to more than the five percent permanent impairment, for which he received a schedule award.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation benefits effective August 30, 2005. The Board further finds that appellant has no more than a five percent permanent impairment of his right upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2006 and the August 30, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board