

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

S.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southeastern, PA, Employer**

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**Docket No. 06-1468
Issued: November 2, 2006**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYES, Alternate Judge

JURISDICTION

On June 19, 2006 appellant, through his attorney, filed a timely appeal from a February 6, 2006 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a two percent impairment of his left upper extremity for which he received a schedule award.

FACTUAL HISTORY

On July 5, 1995 appellant, then a 29-year-old mail handler, filed a claim for a traumatic injury occurring on that date when he fell backwards off a broken chair. The Office accepted his claim for a strain/sprain of the lumbar back and left shoulder.¹ Appellant stopped work on

¹ A magnetic resonance imaging (MRI) scan performed on July 28, 1995 revealed no evidence of a rotator cuff tear.

July 6, 1995 and returned to limited-duty employment on September 6, 1995. He resumed his usual employment on November 15, 1995.²

On August 16, 2004 appellant, through his attorney, filed a claim for a schedule award. By letter dated September 22, 2004, the Office requested that he provide an impairment rating from his physician addressing the extent of any left shoulder impairment or lower extremity impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

In a report dated April 27, 2004, Dr. David Weiss, an osteopath, discussed appellant's complaints of intermittent pain and stiffness of his left shoulder. He indicated that appellant classified his pain as "2-3/10 as objectified using the Visual Analogue Scale." Dr. Weiss stated:

"Examination of the left shoulder reveals anterior cuff tenderness noted. Range of motion reveals forward elevation of 160/180 degrees, abduction of 170/180 degrees, cross over adduction of 75/75 degrees [and] external rotation of 90/90 degrees. Posterior reach (internal rotation) was to T6. Circumduction is positive for crepitance within the acromioclavicular [(ACV)] joint. The Hawkin's impingement sign is mildly positive. The drop test is negative. The O'Brien's test is positive."

Dr. Weiss diagnosed post-traumatic rotator cuff tendinitis and ACV arthropathy with impingement of the left shoulder. He attributed appellant's complaints and the objective findings to his July 5, 1995 employment injury. Dr. Weiss concluded that appellant had a one percent impairment of the left shoulder due to loss of flexion according to Figure 16-40 on page 476 of the A.M.A., *Guides* and a three percent impairment due to pain according to Table 18-1 on page 574, which he added to find a four percent total impairment of the left upper extremity. He opined that appellant reached maximum medical improvement on April 27, 2004.

An Office medical adviser reviewed the findings of Dr. Weiss on December 12, 2004. He concurred that appellant had a one percent impairment due to loss of flexion. The Office medical adviser found, however, that appellant had only one percent impairment for intermittent pain according to Table 18-1 on page 574 of the A.M.A., *Guides*. He concluded that appellant had a two percent total impairment of the right upper extremity.³

By decision dated January 5, 2005, the Office granted appellant a schedule award for a two percent impairment of the right arm. The period of the award ran for 6.24 weeks, from April 27 to September 9, 2004.

On January 19, 2005 appellant, through his attorney, requested an oral hearing. At the hearing, held on November 17, 2005 counsel argued that a conflict in medical evidence existed between Dr. Weiss and the Office medical adviser.

² Appellant subsequently worked limited duty from January 11 to 31, 1996.

³ The Office medical adviser's finding that appellant had an impairment of the right rather than the left lower extremity is a typographical error.

In a decision dated February 6, 2006, the hearing representative affirmed the January 5, 2005 decision as modified to reflect that appellant had a two percent impairment of the left rather than right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,⁴ and its implementing federal regulation,⁵ 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 the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) as the uniform standard applicable to all claimants.⁶ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁷

ANALYSIS

The Office accepted that appellant sustained a strain of his lumbar back and left shoulder due to a July 5, 1995 employment injury. He filed a claim for a schedule award on August 16, 2004. In support of his claim, appellant submitted an April 27, 2004 report from Dr. Weiss, who diagnosed left shoulder post-traumatic rotator cuff tendinitis and ACV arthropathy. For the left shoulder, Dr. Weiss measured 160 degrees forward elevation, 170 degrees of abduction, 75 degrees of adduction, 90 degrees of external rotation and internal rotation to T6. He determined that 160 degrees of forward elevation constituted 1 percent impairment according to Figure 16-40 on pages 476 of the A.M.A., *Guides*. Dr. Weiss further found that appellant had a three percent impairment due to pain according to Table 18-1 on pages 574 of the A.M.A., *Guides*, which he added to the one percent loss of range of motion to find a total left upper extremity impairment of four percent.

An Office medical adviser reviewed Dr. Weiss' findings and concurred with his determination that appellant had a one percent impairment due to loss of flexion.⁸ The Board notes that the remaining range of motion measurements do not constitute a measurable impairment under the A.M.A., *Guides*.⁹ The Office medical adviser noted that Dr. Weiss allowed three percent for pain but found that one percent impairment for pain under Table 18-1 on pages 574 of the A.M.A., *Guides* was more appropriate as the pain was intermittent in nature. Chapter 18, however, should not be used to rate pain-related impairments for any condition that

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ 20 C.F.R. § 10.404(a).

⁷ See FECA Bulletin No. 01-5, issued January 29, 2001.

⁸ A.M.A., *Guides* at 476, Figure 16-40.

⁹ *Id.* at 476-79, Figures 16-40, 16-43, 16-46.

can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.¹⁰ Neither Dr. Weiss, nor the Office medical adviser explained why appellant's condition could not be adequately rated under other chapters. The Board, thus, finds that the evidence supports that appellant has only a one percent impairment of the left upper extremity. Consequently, he has not established entitlement to a schedule award greater than the two percent awarded by the Office.

On appeal, appellant asserts that there is an unresolved conflict in medical opinion evidence between Dr. Weiss and the Office medical adviser, necessitating resolution of the conflict by referral to an impartial medical specialist.¹¹ The evidence, however, is not in conflict as both Dr. Weiss and the Office medical adviser concurred that appellant had a one percent impairment due to loss of range of motion. The physicians differed in the percent of impairment rating due to pain under Chapter 18. However, as noted, Chapter 18 is not to be applied without an explanation of why pain cannot be rated in accordance with other chapters of the A.M.A., *Guides*.¹²

CONCLUSION

The Board finds that appellant has no more than a two percent impairment of his left upper extremity for which he received a schedule award.

¹⁰ *Id.* at 18.3(b); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (June 2003); *see also Philip A. Norulak*, 55 ECAB ___ (Docket No. 04-817, issued September 3, 2004).

¹¹ Section 8123(a) of the Act provides in pertinent part: "If there is a disagreement between the physician making an examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

¹² *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2006 is affirmed.

Issued: November 2, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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