United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
	)	**Docket No. 08-588**
and	)	**Issued: July 21, 2008**
	)	
U.S. POSTAL SERVICE, BULK MAIL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2007 appellant filed a timely appeal from a December 7, 2007 decision of the Office of Workers' Compensation Programs granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

This is the third appeal in this case.[1] By decision dated September 25, 2007, the Board set aside a March 21, 2007 Office decision and remanded the case for further development of the

[1] *See* Docket No. 07-1244 (issued September 25, 2007); Docket No. 06-417 (issued September 28, 2006). Appellant dislocated his right shoulder on May 5, 1978. He underwent a surgical repair of recurrent right shoulder posterior dislocations on May 18, 1978.

medical evidence. The Board directed the Office to determine whether appellant was entitled to an increased schedule award based on worsening of range of motion of his right upper extremity as reported by Dr. George L. Rodriguez, a Board-certified physiatrist. By decision dated September 28, 2006, the Board affirmed a December 6, 2005 Office decision, granting appellant a schedule award for a four percent impairment of his right upper extremity.[2] The law and the facts of the previous Board decisions are incorporated herein by reference.

In a January 19, 2007 report, Dr. Rodriguez noted the history of appellant's condition and provided findings on physical examination. He stated:

> "CLINICAL OBSERVATION
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> "It is clear from a review of the records, as well as my examination of [appellant] that he is, in fact suffering significantly from right shoulder pain and dysfunction. I believe that maximum medical improvement had been reached on August 5, 1978. His examination and my review of the medical records have been consistent and there does not appear to be any evidence of symptom magnification or nonphysiological complaints…."
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> "CLINICAL DISCUSSION
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> "There is a clear difference between the Impairment Rating Evaluation performed by [Dr. Zamarin] on April 11, 2005 and mine today. This is easy to explain.
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> "First, 21 months have elapsed since Dr. Zamarin evaluated [appellant]. During this time [he] has been avoiding many painful activities, thereby allowing his range of motion to be further limited. Additional motions have lost range in response to the earlier losses of the primary motions of flexion and abduction as his disuse related loss of range of motion progresses. Dr. Zamarin, himself, noted in his current complaints section, 'He is not able to do any overhead activity.' Self-restriction of motion in all directions is to be expected in the presence of postsurgical residual pain, partly due to the natural expected outcome of any surgery. This leads to further loss in range of motion overtime."

Dr. Rodriguez found that appellant had a combined 18 percent right upper extremity impairment, according to the fifth edition of the A.M.A., *Guides* including 13 percent for decreased range of motion. Based on Figure 16-40 at page 476 of the A.M.A., *Guides*, Figure 16-43 at page 477 and Figure 16-46 at page 479, he rated three percent impairment for five degrees of extension, three percent for 130 degrees of flexion, one percent for 150 degrees of

[2] The December 6, 2005 Office schedule award decision was based on an April 11, 2005 report from Dr. Richard I. Zamarin, an attending Board-certified physiatrist, who determined that appellant had a four percent right upper extremity impairment, including three percent for 130 degrees of flexion, according to Figure 16-40 at page 476 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), (5th ed., 2001) and one percent for 150 degrees of abduction, according to Figure 16-43 at page 477.

abduction, zero percent for 50 degrees of adduction, one percent for 50 degrees of external rotation and five percent for 5 degrees of internal rotation.[3]

Following the September 25, 2007 Board's remand of the case, the Office asked Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an Office medical adviser, to review the January 19, 2007 report of Dr. Rodriguez. It asked Dr. Berman whether appellant was entitled to an increased schedule award based on a worsening of his right upper extremity range of motion. Dr. Berman stated that Dr. Rodriguez did not note any specific event, change in activity level or other clinical orthopedic activity that should have been expected to reduce the range of motion during the 21 months since examination by Dr. Zamarin. He stated:

> "Because there was a very long period of observation between 1978 and 2005, it provided a long period of observation to determine whether or not there was a pattern of reduced range of motion or worsening of the condition.
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> "The observations made by Dr. Zamarin did not indicate that there was a trend towards worsening of the condition. This fact is combined with the observation that Dr. Rodriguez does not make any observation that there has been a cause for worsening of range of motion in the 21 months between Dr. Zamarin's and Dr. Rodriguez' exam[inations].
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> "On a clinical basis, there would not be expected to be a reduced range of motion unless there is some specific event, injury or other occurrence that could reduce the range of motion. Absent that observation by Dr. Rodriguez as well as [appellant], there should not be an expected decreased range of motion or clinical deterioration.
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> "Although it is possible to reach maximum medical improvement, it is conceivable there could be deterioration of the condition with decreased range of motion. However, this deterioration of range of motion should not occur without a cause, *i.e.*, injury, change of activity level or a specific event that could have been associated with the range of motion.
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> "In addition, Dr. Rodriguez does not state that there has been an increase in pain during the 21[-]month interval since Dr. Zamarin's report. It would be a highly unusual finding[,] clinically based upon my orthopedic surgical experience[,] that there would be a decreased range of motion without an associated increased pain. If there was a cause for the decreased range of motion, that decreased range of motion would be at least in part due to pain that prevents range of motion. If the range of motion decreases, it is typically associated with increased pain.

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[3] As noted, Dr. Zamarin found a three percent impairment for 130 degrees of flexion, according to Figure 16-40 at page 476 and one percent for 150 degrees of abduction, according to Figure 16-43 at page 477. Dr. Rodriguez determined the same impairment for flexion and abduction. The increase in loss of range of motion determined by Dr. Rodriguez equals a 9 percent additional impairment due to decreased right shoulder extension and internal and external rotation (13 percent minus the 4 percent previously awarded for flexion and abduction).

> "Therefore, in conclusion, Dr. Rodriguez does not provide the appropriate correlation between the range of motion and the other orthopedic aspects that would be expected to cause the decreased range of motion. He did not provide information indicating those factors and, therefore, on a clinical basis[,] this decreased range of motion during that 21-month period between Dr. Zamarin's examination and Dr. Rodriguez' examination would not be expected.
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> "For these reasons, I believe that Dr. Zamarin's examination should be considered the weight of the medical evidence and should represent a clinical correlation that is appropriately associated with the range of motion and related schedule award impairment.
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> "For these reasons, I would not make the recommendation to alter Dr. Zamarin's recommendations and do not believe it would be reasonable to accept Dr. Rodriguez' recommendation for 18 percent impairment of the right upper extremity."

By decision dated December 7, 2007, the Office found that appellant had no more than a four percent impairment of his right upper extremity for which he received a schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[4] 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*.[5]

Section 8123(a) of the Act provides that if there is 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.[6] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

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[4] 5 U.S.C. § 8107.

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

[6] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots,* 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan),* 45 ECAB 207 (1993).

[7] *See Roger Dingess,* 47 ECAB 123 (1995); *Glenn C. Chasteen,* 42 ECAB 493 (1991).

ANALYSIS

The Board finds that this case is not in posture for a decision due to a conflict in medical opinion between Dr. Rodriguez and Dr. Berman as to the extent of permanent impairment to appellant's right shoulder.

In a January 19, 2007 report, Dr. Rodriguez noted that appellant suffered significantly from right shoulder pain and dysfunction. He found no evidence of symptom magnification or nonphysiological complaints. Dr. Rodriguez noted that 21 months had elapsed since Dr. Zamarin evaluated appellant. During this time he had been avoiding many painful activities, thereby allowing his range of motion to be further limited. Appellant experienced additional loss of range of motion in response to the earlier losses of the primary motions of flexion and abduction as his disuse related loss of range of motion progressed. Dr. Rodriguez stated that self-restriction of range of motion in all directions was to be expected in the presence of postsurgical residual pain and led to further loss in range of motion overtime. He found that appellant had a combined 18 percent right upper extremity impairment, including 13 percent for decreased range of motion. The impairment for range of motion was based on Figure 16-40 at page 476 of the A.M.A., *Guides*, Figure 16-43 at page 477 and Figure 16-46 at page 479 and included a three percent impairment for 5 degrees of extension, three percent for 130 degrees of flexion, one percent for 150 degrees of abduction, one percent for 50 degrees of external rotation and five percent for 5 degrees of internal rotation. Dr. Rodriguez' findings represented decreased range of motion in extension, external rotation and internal rotation, totaling a nine percent additional impairment.

Dr. Berman found insufficient rationale in Dr. Rodriguez' report for his findings of decreased range of motion. He stated that Dr. Rodriguez did not note any specific event, change in activity level or other clinical orthopedic activity that should have been expected to reduce the range of motion during the 21 months between Dr. Zamarin's examination and Dr. Rodriguez' examination. Dr. Berman asserted that Dr. Rodriguez did not make any observation that there had been a cause for appellant's worsening of range of motion. He indicated that appellant's condition could have deteriorated and resulted in decreased range of motion but stated that this deterioration of range of motion should not occur without a cause such as injury, change of activity level or a specific event that could have been associated with the range of motion. Dr. Berman noted that Dr. Rodriguez did not state that there had been an increase in pain during the 21-month interval since Dr. Zamarin's report and opined that it would be highly unusual that there would be a decreased range of motion without an associated increased pain. If there was a cause for the decreased range of motion, that decreased range of motion would be at least in part due to pain that prevents range of motion. Dr. Berman stated that Dr. Rodriguez did not provide the appropriate correlation between the range of motion and the other orthopedic aspects that would be expected to cause the decreased range of motion. He concluded that Dr. Rodriguez' report was not sufficient to establish that appellant was entitled to an additional schedule award for decreased range of motion.

CONCLUSION

The Board finds that there is a conflict in the medical opinion evidence between Dr. Rodriguez and Dr. Berman on the issue of whether appellant is entitled to an increased

schedule award based on worsening of range of motion of his right upper extremity. On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist, for an examination and evaluation in order to resolve the conflict.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 7, 2007 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: July 21, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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