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

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| **T.B., Appellant** | ) | |
| **and** | ) | **Docket No. 07-2325** |
| | ) | **Issued: May 12, 2008** |
| **DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Colts Neck, NJ, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, Esq.,* for the appellant
*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
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On September 12, 2007 appellant filed a timely appeal from a March 21, 2007 Office of Workers' Compensation Programs' hearing representative decision which affirmed a September 15, 2006 schedule award decision. 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 six percent permanent impairment of his right upper extremity for which he received a schedule award.

### ***FACTUAL HISTORY***

On July 19, 1990 appellant, then a 46-year-old warehouse worker, filed a traumatic injury claim alleging that, on July 17, 1990, he pulled a muscle in his right shoulder in the performance

of duty.[1] On August 15, 1990 the Office accepted his claim for strained right shoulder. Appellant received appropriate compensation benefits.

On March 5, 2003 Dr. David Weiss, an osteopath and treating physician, noted appellant's history of injury and rated his permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*). Regarding appellant's right arm, he provided range of motion measurements. Dr. Weiss noted that appellant had forward elevation of 160/180 degrees and referred to Figure 16-40 and indicated that, for range of motion deficit and right shoulder flexion, appellant had one percent impairment.[2] He also advised that appellant had abduction of 140/180 degrees and referred to Figure 16-43 to determine appellant's abduction. Dr. Weiss opined that he was entitled to two percent impairment.[3] He added these values to determine that appellant had a three percent impairment of the right arm. Dr. Weiss also indicated that appellant had a pain-related impairment of three percent pursuant to Figure 18-1.[4] He combined the values for range of motion and pain and opined that appellant was entitled to an impairment of six percent for the right arm. Dr. Weiss stated that appellant reached maximum medical improvement on March 5, 2003. On April 30, 2003 appellant claimed a schedule award.

By decision dated March 8, 2005, the Office denied appellant's claim for a schedule award. On March 14, 2005 appellant's representative requested a hearing.

On December 2, 2005 the Office hearing representative found that the case was not in posture as Dr. Weiss' report was sufficient to warrant further development of the record. He set aside the March 8, 2005 decision and remanded the case for referral of appellant to a second opinion examination to determine the extent of permanent impairment.

On February 7, 2006 the Office referred appellant to Dr. Bryant Bloss, a Board-certified orthopedic surgeon. In a March 2, 2006 report, Dr. Bloss noted appellant's history of injury and treatment. He noted that appellant had 70 degrees of internal rotation, which was equal to one percent impairment according to Figure 16-46.[5] For external rotation, Dr. Bloss noted that appellant had 30 degrees and one percent impairment according to Figure 16-46.[6] Regarding forward elevation, he determined that 160 degrees of forward elevation was equal to one percent according to Figure 16-40.[7] Regarding backward elevation, or extension, Dr. Bloss noted that appellant had 40 degrees or one percent impairment.[8] He noted that appellant had 165 degrees of

[1] The record reflects that appellant also has an accepted claim for a right knee contusion on December 27, 1990.

[2] A.M.A., *Guides* 476.

[3] *Id*. at 477.

[4] *Id*. at 574.

[5] *Id*. at 479.

[6] *Id.*

[7] *Id*. at 476.

[8] *Id.*

abduction and 35 degrees of adduction equating to impairments of one percent each.[9] Dr. Bloss determined that appellant had a total six percent impairment based on loss of shoulder motion. He advised that appellant had additional impairment for loss of function due to weakness, atrophy, pain and loss of sensation, which he estimated at 19 percent. Dr. Bloss explained that he obtained this value from the 15 percent to the upper extremity of the glenohumeral joint and 4 percent for the acromioclavicular (AC) joint according to Figure 16-18 due to preexisting osteoarthritis which reduced this value by 50 percent.[10] He recommended an impairment rating of 25 percent of the right arm.

In a March 14, 2006 report, an Office medical adviser opined that appellant only had three percent impairment to the right upper extremity. On March 16, 2006 the Office medical adviser noted that Dr. Bloss utilized the A.M.A., *Guides* properly when he calculated impairment based on loss of range of motion and determined that appellant had six percent impairment of the upper extremity. However, he explained that the 19 percent impairment rating that Dr. Bloss provided for weakness, atrophy, pain and loss of sensation was not made in accordance with the section 16.8a.[11]

On April 25, 2006 the claims examiner requested clarification from the Office medical adviser. He responded that "decreased strength" could "not be rated in the presence of decreased motion, pain and deformities" pursuant to section 16.8a.[12]

By letter dated May 18, 2006, the Office requested that Dr. Bloss review the Office medical adviser's April 25, 2006 report and provide a response.

In a June 14, 2006 report, Dr. Bloss reviewed the Office medical adviser's report and explained that he was in partial agreement. He noted that appellant had six percent impairment of the upper extremity due to loss of range of motion. Dr. Bloss added that appellant had significant muscle atrophy which was "far in excess of what one would expect with the pathology of restricted range of motion." He indicated that he would reduce the 19 percent impairment previously noted to 10 percent. Dr. Bloss combined the 10 percent with the 6 percent and opined that appellant had 15 percent impairment of the right arm.

On June 29, 2006 the Office referred appellant along with a statement of accepted facts, and the medical record to Dr. Charles A. Barlow, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve a conflict in opinion between the Office medical adviser and Dr. Weiss regarding the extent of appellant's impairment.

In a July 20, 2006 report, Dr. Barlow noted appellant's history of injury and treatment. He conducted a physical examination and referred to Figures 16-43, 16-46 and 16-10.[13]

[9] *Id*. at 477.

[10] *Id*. at 499.

[11] *Id*. at 508.

[12] *Id.*

[13] *Id*. at 477, 479, 476.

Dr. Barlow indicated that, for abduction, appellant had 160 degrees which resulted in one percent impairment. He noted that appellant had adduction of 40 degrees, which would warrant 1 percent impairment, external rotation of 30 degrees for 1 percent impairment, internal rotation of 70 degrees for 1 percent impairment, flexion of 160 degrees for 1 percent impairment and extension of 40 degrees for 1 percent impairment. Dr. Barlow added the values for loss of range of motion to find six percent impairment of the right upper extremity. Regarding additional impairment for loss of strength, he referred to section 16.8a and advised that "in a rare case, if the examiner thinks that a strength loss is due to a factor that has not been adequately considered by other methods, the strength loss may be rated separately."[14] Dr. Barlow noted an example of strength loss due to a severe muscle tear and noted that it was only "if based on unrelated etiologic or patho mechanical causes." He opined that "Otherwise, the impairment ratings based on objective anatomic findings takes precedence." Dr. Barlow concluded that appellant was not entitled to an additional 10 percent impairment, as provided by Dr. Bloss, for strength loss. He also noted that maximum medical improvement was reached on May 5, 2003.

On September 15, 2006 the Office granted appellant a schedule award for six percent impairment of the right upper extremity. The award covered a period of 18.72 weeks from March 5 through July 14, 2003.

On September 21, 2006 appellant's representative requested a hearing, which was held on January 24, 2007.

By decision dated March 21, 2007, the Office hearing representative affirmed the September 15, 2006 decision. The Office hearing representative found that Dr. Barlow was a second opinion physician, as the conflict arose between the Office medical adviser and the Office second opinion physician.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act[15] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[16] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[17] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[18]

[14] *Id*. at 508.

[15] 5 U.S.C. §§ 8101-8193.

[16] 5 U.S.C. § 8107.

[17] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[18] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

## ***ANALYSIS***

The Office accepted that appellant sustained a strained right shoulder in the performance of duty.

In support of his claim for a schedule award, appellant submitted a March 5, 2003 report from Dr. Weiss, his treating physician, who utilized the A.M.A., *Guides* and provided range of motion measurements for the right upper extremity. The Board finds that he correctly referred to Figure 16-40 and determined that forward elevation of 160/180 degrees would result in a one percent impairment for right shoulder flexion.[19] Dr. Weiss also referred to Figure 16-43 to determine appellant's abduction and determined that abduction of 140/180 degrees resulted in a two percent impairment.[20] The Board also notes that he correctly added these shoulder range of motion values as the A.M.A., *Guides* provide that impairment due to abnormal shoulder motion is calculated by adding the impairment values contributed by each motion unit.[21] However, the Board finds that Dr. Weiss did not explain why appellant was entitled to a pain-related impairment of three percent pursuant to Figure 18-1.[22] The Board notes that Chapter 18 of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain and provides a qualitative method for evaluating impairment due to chronic pain. However, Chapter 18 should not be used to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides.* Office procedures state that a separate pain calculation under Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapter 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*.[23] Thus, Dr. Weiss' report only supports a three percent impairment of the upper extremity.

In a March 2, 2006 report, Dr. Bloss noted appellant's history and utilized the A.M.A., *Guides*. The Board notes that he correctly determined that appellant was entitled to a six percent impairment based on loss of shoulder motion. Dr. Bloss provided range of motion findings which included 70 degrees for internal rotation and 30 degrees for external rotation or an impairment of one percent for each according to Figure 16-46.[24] Regarding forward elevation, he determined that appellant had 160 degrees of forward elevation and 40 degrees of backward elevation, which correlated to one percent impairment for each according to Figure 16-40.[25] Regarding abduction, Dr. Bloss determined that appellant had 165 degrees of abduction and 35

[19] A.M.A., *Guides* 476.

[20] *Id*. at 477.

[21] *See id.* at 474.

[22] *Id*. at 574.

[23] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at section 18.3(b); *T.H.*, 58 ECAB ____ (Docket No. 06-1500, issued January 31, 2007).

[24] A.M.A., *Guides* 479.

[25] *Id*. at 476.

degrees of adduction equating to impairments of one percent each.[26] He added these values and determined that appellant was entitled to a six percent impairment based on loss of shoulder motion. The Board finds that Dr. Bloss correctly applied the A.M.A., *Guides* for appellant's range of motion. He also opined that appellant was entitled to an additional impairment for loss of function due to weakness, atrophy, pain and loss of sensation, which he estimated at 19 percent pursuant to Table 16-18 of the A.M.A., *Guides*.[27] However, Dr. Bloss' explanation does not comport with the A.M.A., *Guides.* Chapter 16.7 of the A.M.A., *Guides*, "Impairment of the Upper Extremities Due to Other Disorders," addresses use of Table 16-18 and provides that "the criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of the impairments."[28] While Dr. Bloss stated that he used Table 16-18 because appellant had significant muscle atrophy "far in excess of what one would expect with the pathology of restricted range of motion," this does not adequately explain why other criteria in the A.M.A., *Guides* do not adequately address the extent of appellant's impairment. For example, Dr. Bloss did not explain why other provisions in Chapter 16 of the A.M.A., *Guides* for rating arm impairment due to weakness, atrophy, pain and loss of sensation would not adequately encompass appellant's impairment.[29]

The Office subsequently determined that a conflict had occurred between Dr. Weiss and the Office medical adviser and referred appellant to Dr. Barlow. However, as found by the Office hearing representative, there was no conflict. The Board notes that Dr. Weiss' report, as noted, did not conform to the A.M.A., *Guides* with regard to his assignment of impairment for pain under Chapter 18 and that the medical adviser otherwise agreed with Dr. Weiss' impairment finding. Thus, the referral to Dr. Barlow was for a second opinion evaluation, and not to resolve a conflict.

In his July 20, 2006 report, Dr. Barlow utilized the A.M.A., *Guides* to determine the impairment to appellant's right shoulder. Applying Figures 16-40, 16-43 and 16-46 of A.M.A., *Guides*[30] Dr. Barlow assigned 1 percent impairment for 160 degrees of abduction, 1 percent for 40 degrees of adduction, 1 percent for 30 degrees of external rotation, 1 percent for 70 degrees of internal rotation, 1 percent for 160 degrees of flexion, and 1 percent for 40 degrees of extension. The Board notes these findings are accurate except that, for adduction, Figure 16-43 provides for no impairment for 40 degrees of adduction. Consequently, the Board finds that Dr. Barlow's report supports that appellant has five percent impairment for loss of motion in his right shoulder. Dr. Barlow further opined that loss of strength was not ratable under the A.M.A., *Guides*.

[26] *Id*. at 477.

[27] *Id.* at 499.

[28] *Id*.

[29] *See, e.g., id*. at Table 16-10 (sensory deficit or pain), 16-11 (motor and loss of power deficit).

[30] A.M.A., *Guides* 476, 477, 479.

Accordingly, the Board finds that the medical evidence establishes that appellant has no more than six percent permanent impairment of the right arm for which he received a schedule award.

## ***CONCLUSION***

The Board finds that appellant has no more than a six percent permanent impairment of his right upper extremity.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 21, 2007 is affirmed.

Issued: May 12, 2008
Washington, DC

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

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

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