United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
and	)	**Docket No. 10-1794**
	)	**Issued: February 15, 2011**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2010 appellant filed a timely appeal from a May 13, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a four percent right arm permanent impairment.

FACTUAL HISTORY

On November 15, 2005 appellant, then a 37-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on October 27, 2005 he sustained a right shoulder injury in the performance of duty. He stated that he was attempting to clear a jammed piece of luggage. On December 29, 2005 appellant underwent an acromioplasty of the right

shoulder. On March 21, 2006 the Office accepted the claim for a right rotator cuff tear and appellant began receiving compensation for wage loss.[1]

Appellant underwent arthroscopic right shoulder surgery on September 5, 2006.[2] Dr. Jeffrey Greenspoon, an orthopedic surgeon, described the procedure as arthroscopic subacromial decompression, arthroscopic-assisted distal clavicle resection, labral debridement and manipulation. He diagnosed impingement syndrome, acromioclavicular (AC) joint arthritis, shoulder synovitis and labral superior labral from anterior to posterior (SLAP) tear. In March 2007, appellant was referred for vocational rehabilitation services.

In a form report dated September 4, 2008, Dr. Greenspoon opined that appellant had 15 percent right arm impairment due to loss of shoulder range of motion. In a report dated September 22, 2008, an Office medical adviser opined that appellant had a 24 percent right arm permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He reported the date of maximum medical improvement as September 4, 2008.

By letter dated January 21, 2009, the Office advised appellant that he could not get both compensation for wage loss and a schedule award covering the same period. In a February 27, 2009 letter, it advised appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as an electronic drafter. An Office worksheet found appellant's loss of wage-earning capacity was 26 percent. By decision dated April 8, 2009, it reduced appellant's compensation pursuant to 5 U.S.C. § 8115.

In a letter dated April 15, 2009, appellant stated that he would like to receive a schedule award instead of wage-loss compensation based on loss of wage-earning capacity. By report dated May 7, 2009, an Office medical adviser opined that appellant had a four percent right arm permanent impairment under the sixth edition of the A.M.A., *Guides*. He identified Table 15-5, a Class 1 impairment with a default value of three percent. The Office medical adviser calculated a net adjustment of +1, resulting in four percent right arm impairment.

By report dated June 1, 2009, Dr. Greenspoon indicated that appellant continued to receive treatment for an employment-related right shoulder injury. He indicated that he was not sure why the impairment rating needed to be changed to a new edition.

In a decision dated August 18, 2009, the Office issued a schedule award for a four percent right arm permanent impairment. The period of the award was 12.48 weeks from August 2, 2009.

Appellant requested a hearing before an Office hearing representative, which was held on February 5, 2010. In a report dated February 22, 2010, Dr. Greenspoon noted that appellant underwent surgery on September 5, 2006, provided results on examination and stated that the

[1] A June 17, 2006 statement of accepted facts reported that the claim was also accepted for a right shoulder sprain.

[2] The surgery was authorized by the Office in an August 5, 2006 letter.

clinical history presentation was consistent with ongoing right shoulder capsulitis and pain. With respect to permanent impairment, Dr. Greenspoon identified Table 15-5, Class 1 for AC joint injury, status post distal clavicle resection. He indicated there was 10 percent right arm impairment pursuant to this table.

In a decision dated March 30, 2010, the hearing representative remanded the case for further development. The hearing representative indicated that the Office medical adviser should provide an impairment rating and explain why the distal clavicle resection diagnosis was not appropriate.

By report dated April 26, 2010, the Office medical adviser stated that there was little objective evidence of the need for a resection, a June 30, 2006 magnetic resonance imaging scan did not mention the AC joint, x-ray dated February 22, 2010 showed no AC abnormality and therefore "the resection, if any, was minimal." He also stated that arthritis of the AC joint was not an accepted condition.

In a decision dated May 13, 2010, the Office reissued the prior schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[5] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to a referee physician, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[6]

ANALYSIS

The Office found the weight of the medical evidence, with respect to a permanent impairment, rested with the Office medical adviser. The medical adviser applied Table 15-5,

[3] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[4] *A. George Lampo*, 45 ECAB 441 (1994).

[5] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064 (1989).

identifying a Class 1 impairment with a range of one to five percent, with a default value of three percent.[7] It appeared that the corresponding diagnosis was a rotator cuff tear. The Office medical adviser indicated that he did not believe a resection was warranted for the employment injury and that the resection was minimal.

The attending surgeon who performed the September 5, 2006 surgery, Dr. Greenspoon, indicated that the surgery involved a distal clavicle resection and he applied Table 15-5 for a Class 1 impairment involving AC joint injury, status post distal clavicle resection. Table 15-5 of the A.M.A., *Guides* provides a range of 8 to 12 percent arm impairment, with a default of 10 percent. While the hearing representative stated that Dr. Greenspoon applied Table 15-5 without further explanation, he performed the surgery that included a distal clavicle resection, identified the specific diagnosis as stated in Table 15-5, and supported causal relationship with the employment injury. He opined, for example, in reports dated July 19, 2006 and February 9, 2007, that appellant's condition was employment related. The Board also notes that the Office authorized the arthroscopic surgery.

The Board finds a conflict exists under 5 U.S.C. § 8123 and the case will be remanded to resolve the conflict. On remand the referee physician should provide a rationalized medical opinion as to the degree of permanent impairment resulting from the October 27, 2005 employment injury under the sixth edition of the A.M.A., *Guides*. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds a conflict in the medical evidence as to the degree of permanent impairment to the right arm.

[7] A.M.A., *Guides* 403, Table 15-5. For rotator cuff injuries, full thickness tear, Table 15-5 provides a range of one to five percent for residual symptoms without consistent objective findings. For AC joint injuries the table provides a range of one to five for residual loss, functional with normal motion. As to a diagnosis of status post distal clavicle resection, the arm impairment range is from 8 to 12 percent.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 15, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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