

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of
Claimant; Employed by the
Case number

Merit consideration of the case file was conducted in Washington, D.C. Based on this
review, the Office's decision of is set aside for the reasons set forth
below.

The issue for determination is whether the Office properly determined that the claimant is
not entitled to an additional schedule award.

The claimant, born is employed as a letter carrier with the
in On the claimant, then employed
by filed a timely Notice of Traumatic Injury and Claim
for Compensation, claiming that on he sustained an injury to his right
shoulder after loading a tray of flats on a rack. In he claimant was transferred from

On the Office accepted the claim for right shoulder impingement. On
the claimant underwent authorized right shoulder arthroscopy and
rotator cuff repair surgery. On the claimant returned to work in a full
time limited duty capacity.

On the claimant underwent authorized right shoulder arthroscopy
with repair of the glenoid labral tear, conducted by , MD, an
orthopedic surgeon. The claimant stopped work on the date of surgery. Dr.
released the claimant to full duty effective

On the claimant filed a form CA7 to claim a schedule award in connection
with the accepted injury. The claimant submitted a report by Dr. dated
Dr. opined as to 12% permanent impairment of the right upper extremity
"as per examination findings" but the doctor did not state his actual findings.

The Office referred the file to the District Medical Advisor (DMA) for a calculation of
the percentage of permanent impairment under the *AMA Guides to the Evaluation of
Permanent Impairment*, 5th edition, pursuant to Office procedures.¹ DMA

¹ Office Procedure Manual, Ch. 2-808-6(d)

MD in a report dated _____ stated that Dr. _____ report was insufficient to support a rating and that additional information was required.

On _____ the Office wrote to Dr. _____ requesting a detailed report. On _____ Dr. _____ submitted a report which contained his examination findings from the _____ examination. Dr. _____ opined as to 12% impairment of the right upper extremity, based upon his examination findings as well as residual joint laxity covered by table 16-26.

Pursuant to 5 U.S.C. 8123 the Office prepared a Statement of Accepted Facts (SOAF) and questions for the medical examiner and referred the claimant to _____, MD, a board certified orthopedic surgeon, for a second opinion medical examination. In a report dated _____ Dr. _____ provided examination findings and opined as to 16% permanent impairment of the right upper extremity. Dr. _____ cited the *AMA Guides* at tables 16-35, 16-40, and 16-43.

The Office referred the file to the DMA for a calculation of impairment rating. DMA _____ MD, in a report of _____ opined as to 6% permanent impairment of the right upper extremity based on findings provided by Dr. _____. Dr. _____ stated that table 17-2 of the *AMA Guides* precluded cross usage combining impairment for both range of motion (ROM) deficit and weakness.

On _____ the Office notified the claimant that he was entitled to a schedule award for 6% permanent impairment of the right upper extremity. The claimant disagreed with the decision and requested an oral hearing.

By a decision of _____ an Office hearing representative set aside the _____ decision and remanded the case to the Office with instructions to obtain rationale from the DMA supporting his calculation of impairment. The hearing representative noted that Dr. _____ based his assessment in part on reference to table 17-2 of the *AMA Guides*, which table pertained to the lower and not the upper extremities.

In a report dated _____ Dr. _____ opined as to 12-16% permanent impairment of the right upper extremity. Dr. _____ reported no change in the claimant's condition since his examination of _____.

On remand DMA _____ MD, in a report dated _____ opined that there was no basis for rating impairment due to weakness as Dr. _____ had indicated. Dr. _____ noted that Dr. _____ relied on table 17-2, which applies to the lower extremities. Dr. _____ explained that section 16-35b, page 517 of the *AMA Guides* prohibited the combination of ROM deficit and weakness with respect to rating the upper extremities.

On _____ the Office notified the claimant that he was not entitled to an additional schedule award for the right upper extremity. The claimant disagreed with the decision and requested an oral hearing.

I find that the case is not in posture for a hearing. Based upon a review of the evidence of record, the Office's decision should be set aside in order to resolve a conflict of medical opinion.

The schedule award provisions of the Federal Employees' Compensation Act (FECA) provide for compensation to employees sustaining impairment from loss, or loss of use of, specified members of the body. The FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants.² The *AMA Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.³

The FECA provides for the appointment of an impartial (also called a "referee") physician to resolve a conflict of medical opinion in a case.⁴ An impartial examination is needed when the Office determines that a conflict exists between medical opinions of approximately equal value. A conflict exists when there is a disagreement between the opinions of an attending physician and a physician designated by the United States. To establish whether a conflict exists, the medical evidence must be weighed. The specific factors considered are: whether a physician is a specialist in the appropriate field; whether the physician's opinion is based upon a complete and accurate medical and factual history; the nature and extent of findings on examination; whether the physician's opinion is rationalized; and whether the physician's opinion is stated unequivocally and without speculation.⁵ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the FECA, to resolve the conflict in the medical evidence.⁶ The DMA may create a conflict of medical opinion with a treating physician.⁷

In the case at hand, the opinions of Dr. _____, the treating physician, conflicts with the opinions of Dr. _____, the second opinion medical examiner, and Dr. _____ the DMA. Dr. _____ and Dr. _____ reported different examination findings with respect to the right upper extremity:

² *Janet L. Adamson*, 52 ECAB 431 (2001)

³ *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001)

⁴ 5 U.S.C. 8123(a)

⁵ Office Procedure Manual, PM-3-500-4(a)

⁶ *Connie Johns*, 44 ECAB 560 (1993)

⁷ *Harold Travis*, 30 ECAB 1071 (1979)

| | Dr. : | Dr. |
|--------------------|----------------------------|-----|
| Internal rotation | 70 degrés (20 degree loss) | 45 |
| External rotation | 75 | 60 |
| Forward elevation | 160 | 160 |
| Backward elevation | no loss | 30 |
| Abduction | 135 | 90 |
| Adduction | 30 | 30 |

Dr. _____ and Dr. _____ disagreed as to the percentage of impairment, relying upon different tables in the *AMA Guides* as well as different examination findings. In turn, Dr. _____ disagreed with Dr. _____ as to the calculation of impairment. The physicians of record referred to varying examination findings and disagreed as to application of the tables in the *AMA Guides*. A conflict of medical opinion thus exists and an impartial medical examination is required to resolve such conflict.

Accordingly, the Office's decision of _____ is hereby set aside and REMANDED.

Upon return of the case file, the Office should prepare an updated SOAF as well as questions for the impartial examiner, and then refer the claimant along with the case file, SOAF, and questions to an appropriate board certified medical specialist for an impartial medical examination. The claimant should be instructed to bring to the impartial examination diagnostic films of his right shoulder.⁸

The impartial medical examiner should be asked to provide findings upon examination as well as a rationalized medical opinion as to (1) the percentage of permanent impairment of the right upper extremity in accord with the *AMA Guides*, 5th edition, and (2) the date the claimant reached maximum medical improvement. Upon receipt of the impartial medical specialist's report, and any additional development deemed necessary, the Office should issue a *de novo* decision as to the award of compensation benefits.

Dated: **AUG 21 2006**
Washington, D.C.

Hearing Representative
for
Director, Office of Workers'
Compensation Programs

⁸ The claim file contains reports of MRI of the right shoulder dated _____
arthrogram dated _____

and right shoulder MR