

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 Dennis Shelby, Claimant; Employed by the U.S. Postal Service, Nashville, Tennessee; Case number 062069616.

Merit consideration of the case file was conducted in Washington, D.C. Based on this review, the Office's decision of November 9, 2005 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 September 24, 1955, is employed as a letter carrier with the U.S. Postal Service in South Carolina. On September 30, 2002 the claimant, then employed by the Postal Service in Tennessee, filed a timely Notice of Traumatic Injury and Claim for Compensation, claiming that on September 30, 2002 he sustained an injury to his right shoulder after loading a tray of flats on a rack. In 2003 the claimant was transferred from Tennessee to South Carolina.

On October 24, 2002 the Office accepted the claim for right shoulder impingement. On October 31, 2002 the claimant underwent authorized right shoulder arthroscopy and rotator cuff repair surgery. On December 2, 2002 the claimant returned to work in a full time limited duty capacity.

On September 30, 2003 the claimant underwent authorized right shoulder arthroscopy with repair of the glenoid labral tear, conducted by John M. Graham, Jr., MD, an orthopedic surgeon. The claimant stopped work on the date of surgery. Dr. Graham released the claimant to full duty effective March 19, 2004.

On April 15, 2004 the claimant filed a form CA7 to claim a schedule award in connection with the accepted injury. The claimant submitted a report by Dr. Graham dated April 15, 2004. Dr. Graham 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 Harry L.

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

Collins, MD in a report dated May 19, 2004 stated that Dr. Graham's report was insufficient to support a rating and that additional information was required.

On May 20, 2004 the Office wrote to Dr. Graham requesting a detailed report. On June 21, 2004 Dr. Graham submitted a report which contained his examination findings from the April 15, 2004 examination. Dr. Graham 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 Gerald D. Shuster, MD, a board certified orthopedic surgeon, for a second opinion medical examination. In a report dated January 20, 2005 Dr. Shuster provided examination findings and opined as to 16% permanent impairment of the right upper extremity. Dr. Shuster 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 James W. Dyer, MD, in a report of February 17, 2005 opined as to 6% permanent impairment of the right upper extremity based on findings provided by Dr. Shuster. Dr. Dyer stated that table 17-2 of the *AMA Guides* precluded cross usage combining impairment for both range of motion (ROM) deficit and weakness.

On March 9, 2005 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 August 24, 2005 an Office hearing representative set aside the March 9, 2005 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. Dyer 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 September 28, 2005 Dr. Graham opined as to 12-16% permanent impairment of the right upper extremity. Dr. Graham reported no change in the claimant's condition since his examination of April 15, 2004.

On remand DMA G.M. Posadas, MD, in a report dated November 3, 2005 opined that there was no basis for rating impairment due to weakness as Dr. Dyer had indicated. Dr. Posadas noted that Dr. Dyer relied on table 17-2, which applies to the lower extremities. Dr. Posadas 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 November 9, 2005 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 November 9, 2005 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. Graham, the treating physician, conflicts with the opinions of Dr. Shuster, the second opinion medical examiner, and Dr. Posadas, the DMA. Dr. Graham and Dr. Shuster 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, FM-3-500-4(a)

⁶ *Connie Johns*, 44 ECAB 560 (1993)

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

	Dr. Shuster	Dr. Graham
Internal rotation	70 degrees (20 degree loss)	45
External rotation	75	60
Forward elevation	160	160
Backward elevation	no loss	30
Abduction	135	90
Adduction	30	30

Dr. Shuster and Dr. Graham disagreed as to the percentage of impairment, relying upon different tables in the *AMA Guides* as well as different examination findings. In turn, Dr. Posadas disagreed with Dr. Graham 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 November 9, 2005 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.



ALAN STEIN
Hearing Representative
for
Director, Office of Workers'
Compensation Programs

⁸ The claim file contains reports of MRI of the right shoulder dated April 8, 2003 and right shoulder MR arthrogram dated July 18, 2003.