U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE GRANT and U.S. POSTAL SERVICE,
POST OFFICE, Sulphur Springs, TX

Docket No. 00-304; Submitted on the Record;
Issued November 22, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established that he has more than a three percent permanent impairment of his right upper extremity and more than a one percent permanent impairment of his left upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record under section 8124 of the Federal Employees' Compensation Act.

On October 22, 1997 appellant filed an occupational disease claim that was later accepted for cervical strain and bilateral shoulder strain.[1] On March 11, 1998 appellant requested a schedule award on account of his accepted condition.

Upon development of the evidence, the Office determined that there was a discrepancy in findings regarding appellant's range of motion of his left and right shoulder. Dr. Cora Alexander, appellant's attending physician, stated in a May 22, 1998 report that appellant's diagnosed bilateral shoulder and cervical strain had slightly improved after physical therapy and that examination of the right and left shoulder on May 18, 1998 revealed full range of motion. Dr. Ronnie Shade, a Board-certified orthopedic surgeon, who examined appellant on July 25, 1998 reported deficiencies of appellant's bilateral shoulder range of motion and determined that appellant had a 4 percent impairment of the bilateral wrists and a 14 percent impairment of the bilateral shoulders. The Office later referred appellant to Dr. James Sterling, a Board-certified specialist in physical medicine and rehabilitation, for a second opinion evaluation to resolve the discrepancy in the medical evidence.

[1] The Board notes that the Office previously accepted a claim for chondromalacia of both patellas and lumbar strain as work related in 1991 and appellant subsequently received a schedule award. Appellant accepted a permanent modified city carrier position with the employing establishment on June 26, 1993 due to his work-related condition.

In a November 19, 1998 report, Dr. Sterling noted weakness in appellant's rotator cuff and limited range of motion in internal rotation and diagnosed chronic bilateral subacromial impingement syndrome. He stated, however, that appellant had not reached a point of maximum medical improvement at that time and as such, he could not provide a permanent impairment rating for appellant's accepted condition.

The Office subsequently referred appellant, pursuant to section 8123(a) of the Act, to Dr. Samuel Bierner, a Board-certified specialist in physical medicine and rehabilitation, for an independent medical evaluation and permanent impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th edition).[2] On April 20, 1999 Dr. Bierner reviewed appellant's medical records, along with the statement of accepted facts and conducted an examination. He found that provocative tests of the shoulder, elbow and wrists were nonpainful, but that a Phalen's test was positive at the left wrist and radiated pain to the left shoulder. Dr. Bierner determined that a Phalen's test was negative on the right side.

After describing his findings on examination, Dr. Bierner reported that the right shoulder flexion of 155 degrees resulted in a 1 percent upper extremity impairment and extension of 70 degrees resulted in a 0 percent impairment. Right shoulder abduction was 165 degrees, which resulted in a 1 percent upper extremity impairment and adduction of 50 degrees resulted in a 0 percent impairment. The right shoulder external rotation of 82 degrees resulted in a 0 percent impairment and internal rotation of 75 degrees resulted in 1 percent upper extremity impairment. Dr. Bierner reported that the left shoulder flexion of 174 degrees resulted in a 0 percent upper extremity impairment and extension of 65 degrees resulted in a 0 percent impairment. Left shoulder abduction was 164 degrees, which resulted in a 1 percent upper extremity impairment and adduction of 55 degrees resulted in 0 percent impairment. The left shoulder external rotation of 70 degrees resulted in a 0 percent impairment and internal rotation of 78 degrees resulted in a 0 percent upper extremity impairment. Dr. Bierner concluded that appellant's impairment of the right upper extremity totaled three percent and was based on loss in range of motion. He further concluded that appellant's impairment of the left extremity totaled two percent and was based on loss in range of motion of appellant's shoulder and median nerve dysfunction assessed at the wrist, manifested by a positive Phalen's test.

An Office medical adviser, who reviewed Dr. Bierner's report on May 24, 1999, identified April 20, 1999 as the date of maximum improvement and rated the percent of impairment of appellant's upper extremities under the applicable figures of the A.M.A., *Guides*.[3] The Office medical adviser found that Dr. Bierner's assessment of permanent impairment of the right upper extremity was correct. He also found that Dr. Bierner correctly assessed one percent for loss in range of motion of the left upper extremity. The Office medical adviser stated, however, that no consideration could be given for the positive Phalen's test on appellant's left wrist, as it did not relate to appellant's accepted condition.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (hereinafter A.M.A., *Guides*).

[3] A.M.A., *Guides*, 43, 44, 45. Figures 38, 41, 44.

On May 25, 1999 the Office issued appellant a schedule award for a three percent impairment of the right upper extremity and a one percent impairment of the left upper extremity.

In a letter received by the Office on August 18, 1999, appellant requested a review of the written record.

By decision dated September 30, 1999, the Office denied appellant's request for a review of the written record on the grounds that it was not timely filed. The Office noted further consideration of the matter and found that the matter could be equally well addressed by a request for reconsideration, along with the submission of new evidence establishing that his current impairment was related to his accepted conditions. The instant appeal follows.

The Board has duly reviewed the case record and finds that appellant has not established that he has more than a three percent permanent impairment of his right upper extremity and more than a one percent permanent impairment of his left upper extremity for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act[4] and its implementing regulation[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.[6]

Dr. Bierner, the independent medical examiner, reviewed appellant's history, the medical record and his objective findings in an April 20, 1999 report. He concluded that, based on his calculations pursuant to the applicable figures of the A.M.A., *Guides*, appellant had a three percent impairment of the right upper extremity and a two percent impairment of the left upper extremity. Dr. Bierner found that appellant had a one percent impairment of the left upper extremity due to loss in range of motion and a one percent impairment due to median nerve dysfunction assessed at the wrist, manifested by a positive Phalen's test.

The Office medical adviser calculated appellant's permanent impairment rating based upon Dr. Bierner's April 20, 1999 report and concluded that appellant had a three percent

[4] 5 U.S.C. § 8107(c).

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides*.

impairment of the right upper extremity and a one percent impairment of the left upper extremity.[7]

The Board has reviewed the calculations of the Office medical adviser and finds that he properly calculated both of appellant's impairments pursuant to Figures 38, 41 and 44, on pages 43, 44 and 45 of the A.M.A., *Guides*. Although Dr. Bierner assessed an additional one percent impairment of appellant's left extremity based on a positive Phalen's test for left wrist pain, the Board finds that such an impairment rating cannot be considered, as the Office has not accepted a work-related wrist condition in this case. The Office medical adviser properly concluded, therefore, that appellant had a three percent impairment in his right shoulder and a one percent impairment in his left shoulder.

The Board further finds that the Office, in its September 30, 1999 decision, properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[8] Office regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[9]

The Office properly found that appellant's request for a review of the written record was untimely. His August 18, 1999 request for review of the written record was made more than 30 days after the Office's May 25, 1999 decision.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its

[7] The Board notes that, although the medical record contains a report from Dr. Shade, a Board-certified orthopedic surgeon, dated July 25, 1998, which indicated that appellant had a 14 percent permanent impairment of both upper extremities, the Office medical adviser properly relied on Dr. Bierner's April 20, 1999 report as the weight of the medical evidence. There existed a conflict in the medical opinion evidence when Dr. Shade's report was submitted, as Dr. Alexander, appellant's treating physician, had previously reported that appellant had full range of motion of his left and right shoulder. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *See Bertha J. Soule*, 48 ECAB 314 (1997).

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.616(b).

discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[10]

The Board finds that the Office properly exercised its discretion by further denying appellant's request upon finding that he could have the matter further addressed by the Office through a reconsideration request along with the submission of new evidence establishing that his claimed impairment was related to his accepted conditions.

For these reasons, the Office properly denied appellant's request for a review of the written record.

The decisions of the Office of Workers' Compensation Programs dated September 30 and May 25, 1999 are affirmed.

Dated, Washington, DC
November 22, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

[10] *Michael J. Welsh*, 40 ECAB 994 (1989).