U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. BERNHARDT and U.S. POSTAL SERVICE,
POST OFFICE, Southeastern, PA

Docket No. 00-2183; Submitted on the Record;
Issued May 23, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has more than a 10 percent impairment of his left upper extremity for which he received a schedule award.

On July 26, 1996 appellant, then a 45-year-old machine operator clerk, filed a traumatic injury claim alleging that on that date he injured his left shoulder, while throwing bundles of magazines in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for left shoulder strain and left shoulder impingement syndrome and authorized left shoulder arthroscopy. On January 19, 1998 appellant underwent a left shoulder arthroplasty with subacromial decompression.

On January 4, 1999 appellant filed a Form CA-7 requesting a schedule award based on the November 10, 1998 finding of Dr. Nicholas P. Diamond, appellant's treating physician, that he had a 24 percent permanent impairment of the left upper extremity.

On January 8, 1999 an Office medical adviser reviewed appellant's medical records and determined that appellant was entitled to a 10 percent schedule award for the left upper extremity.

By decision dated February 9, 1999, the Office granted appellant a schedule award for a 10 percent permanent impairment of the left upper extremity. The period of the award ran for 31.20 weeks from November 10, 1998 to June 16, 1999.

By letter dated February 17, 1999, appellant, through his representative, requested a hearing before an Office hearing representative, which was held on July 28, 1999. At the request of the hearing representative, a second Office medical adviser reviewed appellant's claim and concluded that appellant was not entitled to greater than a 10 percent schedule award. In a decision October 8, 1999, the hearing representative affirmed the Office's February 9, 1999 decision.

By letter dated January 6, 2000, appellant, through his representative, requested reconsideration of the prior decision and submitted a September 29, 1999 medical report from Dr. David Weiss in support of his request.

On January 21, 2000 the Office determined that the newly submitted medical evidence was sufficient to create a conflict in medical opinion between appellant's physicians, Drs. Diamond and Weiss and the Office medical advisers.

By letter dated February 3, 2000, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Martin A. Cohen, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Cohen submitted a February 24, 2000 medical report concluding that appellant had no more than a 10 percent permanent impairment of the left upper extremity.

In a decision dated March 8, 2000, the Office found that the weight of the medical evidence rested with the opinion of Dr. Cohen, as the independent medical examiner. Accordingly, the Office declined to modify the prior decision, finding that appellant was not entitled to a schedule award for more than a 10 percent permanent impairment of the left upper extremity.

The Board finds that appellant has no more than a 10 percent permanent impairment of the left upper extremity for which he received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.404 of the implementing federal regulations,[2] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (fourth edition 1993) have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

Section 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[4]

In the present case, appellant's physicians, Drs. Diamond and Weiss, both determined that appellant had a 24 percent permanent impairment of the left upper extremity while two Office medical advisers determined that appellant had only a 10 percent permanent impairment

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *James J. Hjort*, 45 ECAB 595 (1994).

[4] 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

of the left upper extremity. As a conflict existed in the medical opinion evidence between Drs. Diamond and Weiss and the Office medical advisers, the Office properly referred appellant to Dr. Cohen, a Board-certified orthopedic surgeon, for an impartial medical examination.

When 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.[5]

In his February 24, 2000 medical report, Dr. Cohen provided a history of appellant's left shoulder injury and medical treatment. He also provided his findings on physical examination, which included no restriction of motion, no evidence of instability, a positive supraspinatus sign, no muscle atrophy, normal strength in all muscle groups tested, normal sensation to light touch and normal deep tendon reflexes. Dr. Cohen indicated that magnetic resonance images (MRI) provided by appellant and reviewed by him revealed increased signal in the T2 images near the greater tuberosity and a spur on the inferior surface of the acromion. He further indicated that he fully reviewed the relevant medical records, including the January 19, 1998 operative report. Applying the provisions of the A.M.A., *Guides* to his findings, Dr. Cohen noted that Table 27 on page 61 provided a 24 percent impairment rating for total shoulder arthroplasty and a 10 percent impairment rating for a distal clavicle resection. Dr. Cohen further noted, however, that appellant had undergone neither of these procedures, but rather had undergone a procedure for his impingement syndrome involving resection of a small amount of bone from the underside of the acromion. Dr. Cohen explained that, while appellant's specific surgery is not listed in the table, resection of the distal clavicle is frequently performed for some types of impingement syndrome and was the procedure listed in Table 27 that was most closely related to the type of surgery appellant underwent. Dr. Cohen concluded that, taking into account Table 27, together with appellant's unrestricted range of motion and positive supraspinatous sign, appellant had a 10 percent permanent impairment of his left upper extremity.

Inasmuch as Dr. Cohen's medical report is rationalized and based on an accurate factual and medical background, the Board finds that his opinion constitutes the weight of the medical opinion evidence in this case. Therefore, the Office properly determined that appellant was not entitled to more than a 10 percent permanent impairment of the left upper extremity, for which he has already received a schedule award.

[5] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

The decisions of the Office of Workers' Compensation Programs dated March 8, 2000 and October 8, 1999 are hereby affirmed.

Dated, Washington, DC
May 23, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member