

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER M. EVANS and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

*Docket No. 01-1629; Submitted on the Record;
Issued February 7, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that he has greater than a seven percent permanent impairment of his left arm, for which he received a schedule award.

This is the second appeal in this case before the Board. Appellant injured his left arm on October 30, 1991. The Office of Workers' Compensation Programs accepted his claim for left shoulder sprain and authorized arthroplasty surgery on April 3, 1992. He filed a claim for a schedule award based on loss of use of his left upper extremity on March 9, 1992. By decision dated January 4, 1996, the Office denied appellant's claim for a schedule award. By letter dated January 12, 1996, his attorney requested an oral hearing. By decision dated November 15, 1996, the Office hearing representative affirmed the January 4, 1996 Office decision, denying benefits based on a schedule award.

In a decision issued January 14, 1999,¹ the Board found that there was a conflict in the medical evidence on the issue of whether appellant sustained any permanent impairment due to his October 30, 1991 employment injury. The Board set aside the November 15, 1996 decision of the Office hearing representative and remanded the case for referral to an impartial medical specialist.

On February 17, 1999 the Office scheduled appellant for an impartial medical examination with Dr. Alexander Fasulo, a Board-certified orthopedic surgeon, which took place on March 8, 1999. In a report dated March 10, 1999, Dr. Fasulo stated findings on examination, reviewed the medical record and the statement of accepted facts and determined that appellant had a seven percent permanent impairment of the left upper extremity pursuant to the American Medical Association, (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (fourth edition). He calculated that appellant had 150 degrees flexion in his left shoulder, which equated

¹ Docket No. 97-1173 (issued January 14, 1999).

to a two percent impairment; 120 degrees abduction, which equated to a 3 percent impairment; and 60 degrees internal rotation, which equated to a 2 percent impairment.

In a report and impairment worksheet dated March 17, 1999, an Office medical adviser concluded that appellant had a seven percent permanent impairment based on loss of use of his left upper extremity. Relying on Dr. Fasulo's findings and conclusions, the Office medical adviser calculated that 150 degrees flexion in his left shoulder amounting to a two percent impairment pursuant to Table 38 at page 43; 120 degrees abduction amounting to a three percent impairment pursuant to Table 41 at page 44; and 60 degrees internal rotation amounting to a two percent impairment pursuant to Table 44 at page 45 which totaled a seven percent impairment of the left upper extremity.

By decision dated October 13, 1999, the Office granted appellant a schedule award for a 7 percent permanent impairment of the left arm for the period from March 8 to June 8, 1999 for a total of 21.84 weeks of compensation.

By letter dated October 19, 1999, appellant's attorney requested a hearing, which was held on May 25, 2000. He did not submit any additional medical evidence in support of his request.

By decision dated June 28, 2000, an Office hearing representative affirmed the October 13, 1999 Office decision.

By letter dated December 6, 2000, appellant's attorney requested reconsideration and submitted an October 31, 2000 report from Dr. David Weiss, an osteopath. After examining appellant and reviewing his medical records, Dr. Weiss rated appellant at a 48 percent impairment of the left upper extremity pursuant to the A.M.A., *Guides*. He arrived at this finding by combining a left shoulder range of motion deficit, flexion, of 3 percent; a left shoulder range of motion, abduction, 3 percent; left shoulder arthroplasty, 24 percent; motor strength deficit, left triceps, 10 percent; and left grip strength, 20 percent.

By decision dated March 9, 2001, the Office denied modification of the October 13, 1999 Office decision.

The Board finds that this case is not in posture for a decision.

In the instant case, the Office determined in its October 13, 1999 decision, that appellant had a seven percent permanent impairment of his left arm by adopting the findings of the Office medical adviser. The Office medical adviser determined the precise impairment rating by taking Dr. Fasulo's findings, which were contained in his March 10, 1999 report and then applying these findings to the applicable figures and tables of the A.M.A., *Guides* to arrive at the total percentage of impairment in appellant's left upper extremity. The Office medical adviser calculated that appellant had a seven percent impairment of the left upper extremity by taking Dr. Fasulo's findings of loss of flexion, abduction and internal rotation in his left shoulder and applying them to the applicable tables of the A.M.A., *Guides*. The Office then granted appellant a schedule award for a seven percent permanent impairment of his left arm. This award was proper, as it was based on the weight of the medical evidence in the record at the time of the decision. However, subsequent to the Office's decision, appellant submitted the October 31,

2000 report of Dr. Weiss, who calculated a 48 percent impairment rating of the left upper extremity based on a different set of factors. This created a conflict in the medical evidence regarding the precise impairment rating applicable to appellant's left upper extremity.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."² In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion to resolve the aforementioned conflict. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.³ After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Office's decision of March 9, 2001 is, therefore, set aside and the case is remanded to the Office for a *de novo* decision in accordance with this opinion.

Dated, Washington, DC
February 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

² Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(i)f 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

³ *Aubrey Belnavis*, 37 ECAB 206 (1985).