U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGINA TAPER and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

Docket No. 01-1620; Submitted on the Record;
Issued June 7, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than 20 percent permanent impairment of each of her upper extremities for which she received schedule awards; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on April 3, 2001.

Appellant, a 34-year-old automated markup clerk, filed a notice of occupational disease on November 26, 1996 alleging that she developed pain in her hands due to keying in the performance of duty. The Office accepted appellant's claim for bilateral wrist tendinitis, bilateral carpal tunnel syndrome and cumulative trauma disorder on July 17, 1997.

Appellant requested a schedule award on May 14, 1998. By decision dated May 20, 1999, the Office granted her a schedule award for 19 percent permanent impairment of each of her upper extremities. Appellant requested reconsideration of this decision on June 24, 1999. By decision dated October 15, 1999, the Office set aside the May 20, 1999 decision. On October 25, 1999 the Office granted appellant a schedule award for 10 percent permanent impairment of each of appellant's upper extremities. She requested an oral hearing on November 20, 1999. By decision dated July 19, 2000, the hearing representative set aside the Office's October 25, 1999 decision and remanded appellant's claim for further development of the medical evidence. By decision dated September 21, 2000, the Office granted appellant a schedule award for a total of 20 percent permanent impairment of each of her upper extremities.

The Board finds the case not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

sustaining permanent impairment from loss or loss of use, of scheduled 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In this case, the Office second opinion physician, Dr. H.S. Pabla, a Board-certified orthopedic surgeon, diagnosed cumulative trauma disorder on August 26, 1998. He opined that appellant had 10 percent impairment of her upper extremities due to pain, weakness, atrophy and loss of function.

Appellant's attending physician, Dr. Michael E. Batipps, a Board-certified neurologist, completed a detailed report on September 30, 1998. He diagnosed bilateral carpal tunnel syndrome, bilateral ulnar neuritis at the elbow, bilateral wrist flexor tendinitis and bilateral de Quervain's tendinitis. Dr. Batipps concluded that appellant had 31 percent impairment of the right and left median nerves due to sensory and motor loss. He found an additional impairment of 14 percent of the right and left ulnar nerves. Dr. Batipps found that appellant had 10 percent impairment of the right thumb due to de Quervain's tendinitis and 5 percent of the right hand due to wrist flexor tendinitis. He concluded that appellant had an equal impairment of her left upper extremity for a total of 40 percent permanent impairment of each of her upper extremities.

The Office properly found a conflict of medical opinion evidence between Dr. Batipps, who supported appellant's continued disability for work and found permanent impairment of 40 percent of the upper extremities and the second opinion physician, Dr. Pabla, who found that appellant could return to her date-of-injury position and that she had 10 percent impairment of her upper extremities. Section 8123(a) of the Act,[4] provides, "[i]f there is 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." The Office properly referred appellant to Dr. Richard W. Barth, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his report dated December 20, 1998, Dr. Barth noted appellant's history of injury and performed a physical examination. He diagnosed bilateral overuse syndrome with mild median nerve entrapment at the wrist and mild ulnar nerve entrapment at the elbow. Dr. Barth concluded that appellant had 10 percent impairment due to mild persistent median nerve entrapment, 10 percent due to mild persistent ulnar nerve entrapment at the elbow and 10 percent impairment due to loss of grip strength for a total of 27 percent permanent impairment of each of appellant's upper extremity.

[3] A.M.A., *Guides*, 4th ed. (1993).

[4] 5 U.S.C. §§ 8101-8193, 8123(a).

The district medical adviser reviewed the medical evidence and concluded that the A.M.A., *Guides* did not allow an additional impairment for grip strength.[5] The district medical adviser concluded that appellant had 10 percent impairment due to mild carpal tunnel syndrome.[6] He stated that the Office had not accepted an elbow condition and that, therefore, appellant was not entitled to additional 10 percent impairment due to ulnar nerve entrapment.

On August 5, 1999 Dr. Batipps reviewed Dr. Barth's report and concluded that appellant had no less than 26 percent impairment of the whole person. The Board notes that the Act does not provide for impairment to the whole person, but only to the listed scheduled members.

Dr. Batipps testified at the oral hearing on April 7, 2000 that in addition to bilateral carpal tunnel syndrome and wrist tendinitis, appellant developed bilateral ulnar nerve impingement at the elbows. He stated that this condition was related to the repetitive motion injuries and that it should be accepted by the Office. Dr. Batipps stated that due to appellant's history he believed that the ulnar nerve was impinged at the same time as the median nerve. He concluded that appellant had 10 percent permanent impairment due to this condition. Dr. Batipps also stated that Dr. Barth attempted to add 10 percent impairment due to loss of strength to the 10 percent for mild carpal tunnel syndrome. Dr. Batipps opined that appellant's degree of carpal tunnel syndrome should be rated as moderate which would encompass Dr. Barth's findings. He concluded that appellant had 28 percent permanent impairment of each of her upper extremities.

The hearing representative issued a decision on July 19, 2000 and stated, "I find that the testimony of [appellant's] physician is sufficient to require further development in the case. Upon return of the file to the district office, it should be referred to the Office medical consultant for review of Dr. Batipps' testimony and opinion on the extent of permanent impairment of [appellant's] upper extremities."

The Office requested that the district medical adviser provide the diagnosis related to the work injury of November 5, 1996 as well as the percentages of impairment to each upper extremity. The Office requested a detailed medical explanation. In a form report dated September 11, 2000, the district medical adviser found that appellant had 20 percent impairment of each of her upper extremities due to moderate impairment due to carpal tunnel syndrome.[7] As there is no evidence in the record that appellant has more than 20 percent impairment of her upper extremities due to impairment of the median nerve, the Board finds that appellant is not entitled to an additional schedule award for this condition. However, the district medical adviser did not address the issue of appellant's additional diagnosed condition of ulnar nerve impingement.

Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[8] In this case, the hearing

[5] A.M.A., *Guides*, 64.

[6] A.M.A., *Guides*, 57, Table 16.

[7] A.M.A., *Guides*, 57, Table 16.

[8] *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

representative remanded appellant's claim for consideration of Dr. Batipps' testimony regarding the percentage of impairment due to carpal tunnel syndrome as well as ulnar nerve impingement. Dr. Batipps diagnosed ulnar nerve impingement and opined that it was causally related to appellant's history of injury. The Office did not address this aspect of appellant's claim prior to issuing her amended schedule award. The Office should review Dr. Batipps' testimony and undertake any additional development necessary to determine whether appellant's diagnosed condition of ulnar nerve impingement is causally related to her accepted employment injury and whether she is entitled to an additional schedule award for this condition. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.[9]

The September 21, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion of the Board.

Dated, Washington, DC
June 7, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[9] Due the disposition of the issue, it is not necessary for the Board to address the April 3, 2001 decision of the Office denying appellant's request for reconsideration. The Board also notes that appellant did not disagree with the December 14, 2000 decision of the Office finding that her light-duty position represents her wage-earning capacity.