U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLIS RAGLAND and DEPARTMENT OF VETERANS AFFAIRS, LYONS VETERANS HOSPITAL, Lyons, NJ

Docket No. 01-1350; Submitted on the Record;
Issued May 2, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established that he has more than a 14 percent permanent impairment of the right arm, for which he received a schedule award.

On April 23, 1996 appellant, then a 51-year-old nursing assistant, filed a claim for traumatic injury alleging that on April 16, 1996 he injured his right wrist while in the performance of duty.

The Office of Workers' Compensation Programs accepted appellant's claim for right wrist sprain, subsequent exacerbation of right wrist neuropathy, authorized surgeries performed on August 8, 1996, August 19 and December 2, 1997. The Office paid appropriate wage-loss compensation.

Appellant then filed a claim for a schedule award based on loss of use of his right arm. In support of his claim, he submitted a report dated April 14, 1999, from Dr. Ronald J. Potash, a Board-certified surgeon, who stated that he reviewed appellant's medical records and concluded, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), that appellant had a 71 percent impairment of the right upper extremity based on loss of range of motion, 11 percent, moderate to severe right ulnar entrapment at the elbow, 40 percent, right brachial plexus, upper and lower, 36 percent and mild right ulnar and median nerve entrapment, 20 percent.[1]

In a report dated December 20, 1999, Dr. Scott Naftulin, an osteopath and Office consultant, stated that the results of an electrodiagnostic study taken that day revealed mildly abnormal findings including a focal ulnar mononeuropathy at the right elbow. However, there

[1] Dr. Potash noted that he had reviewed an electroneuromyographic evaluation performed on September 24, 1997 in his evaluation. Although this test was performed prior to appellant's final surgery on December 2, 1997, Dr. Potash noted that he had also reviewed Dr. Scott Fried's diagnostic test reports, one of which was a postsurgery report dated December 10, 1997 which revealed "some Grade 1 change at the facing surface of the lunate [bone]."

was no evidence of right carpal tunnel syndrome, cervical radiculopathy, brachial plexopathy, neuropathy or myopathy.[2]

In a report dated February 1, 2000, Dr. Daniel E. Muser, a Board-certified orthopedic surgeon and a second opinion physician, stated that he had examined appellant on January 28, 2000 and reported findings. He stated that he relied on the A.M.A., *Guides* (4th ed. 1993) to find that appellant had 4 percent impairment of the wrist due to loss of range of motion and 10 percent impairment based on mild ulnar neuropathy of the right elbow for a total impairment rating of 14 percent for the right arm.[3]

In a report dated April 12, 2000, the Office medical adviser reviewed Dr. Muser's report and Dr. Naftulin's test results and recommended a 14 percent right upper extremity impairment rating.

On April 19, 2000 the Office granted appellant a 14 percent impairment of the right arm from February 1 to December 3, 2000.[4]

By letter dated April 20, 2000, appellant's attorney requested a hearing, which was held on September 20, 2000. By decision dated December 7, 2000 and finalized on January 14, 2001, the Office hearing representative affirmed the Office's April 19, 2000 decision. The hearing representative stated that Dr. Muser's report was well reasoned, in part, because Dr. Muser relied on Dr. Naftulin's diagnostic test results which revealed a mild neuropathy. She then stated: "Therefore, Dr. Potash's assessment is of diminished probative value."

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

In this case, there was disagreement between appellant's treating physician, Dr. Potash and the Office's referral physician, Dr. Muser, regarding the percentage of impairment in appellant's right upper extremity caused by his work-related injury. When such conflicts in medical opinion arise, section 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[5]

Because the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

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[2] The Office referred to Dr. Naftulin as a second opinion physician. However, his medical function in this case was more appropriately that of a consultant inasmuch as his report was limited to a diagnostic test and its findings.

[3] The record does not include a copy of appellant's referral to Dr. Muser as a second opinion physician. However, the record does include an internal Office memorandum directing that appellant's claim should be referred to a Board-certified orthopedic surgeon as a second opinion physician. Dr. Muser is a Board-certified orthopedic surgeon.

[4] The hearing representative correctly noted that appellant's award was for 43.68 weeks.

[5] 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).

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical examiner selected in accordance with the Office's procedures, to resolve the outstanding conflict in medical evidence regarding the appropriate percentage of impairment in appellant's right arm. On remand, the Office should instruct the impartial medical examiner to provide a well-rationalized opinion, to refer specifically to the applicable tables and standards of the A.M.A., *Guides* in making his findings and rendering his impairment rating and to indicate the specific background upon which he based his opinion. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

The January 14, 2001 decision of the Office of Workers' Compensation Programs is therefore set aside and the case is remanded to the Office for further action consistent with this decision of the Board.[6]

Dated, Washington, DC
May 2, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] The Board notes that the record includes information that was associated incorrectly with the case record.