U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARC THYRRING and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION TECHNICAL CENTER, Atlantic City Airport, NJ

Docket No. 02-954; Submitted on the Record;
Issued October 9, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for his accepted condition.

On March 4, 1993 appellant, then a 39-year-old carpenter, filed a notice of occupational disease alleging that numbness in his hands and fingers was a result of his federal employment. The record also indicates that, on July 7, 1992, appellant was stepping from a raised forklift, lost his footing and slipped. The Office of Workers' Compensation Programs accepted appellant's claim for a partial tear of the long head of the left biceps as a consequence of his fall.[1]

Appellant filed a claim for a schedule award on October 19, 1998. In a report dated September 1, 1998, Dr. David Weiss found that appellant had a 20 percent permanent impairment of the left upper extremity according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition.

A second opinion physician, Dr. Marc L. Kahn, a Board-certified internist, examined appellant on July 8, 1999 and stated: "Regarding his left upper extremity, I find really no objective finding at this time. I am assigning it a zero percent permanent disability."

Appellant was referred to a referee medical examiner to resolve the conflict in medical opinion between Drs. Weiss and Kahn. In a report dated January 5, 2000, Dr. Glenn Zuck stated:

> "His [appellant's] left shoulder symptoms, in my opinion, are related to a chronic bursitis and deconditioning of the rotator cuff musculature. The possibility of rotator cuff pathology does exist in light of him sustaining a traumatic injury to his left shoulder, with a partial biceps tendon tear being diagnosed by Dr. Dalzell previously."

[1] The record indicates that appellant has four separate injuries and schedule award ratings, but the only issue in this case is the left upper extremity.

In an addendum report dated February 4, 2000, Dr. Zuck stated: "With regards to the left upper extremity, I am in agreement with Dr. Weiss with a 20 percent impairment." Dr. Zuck did not mention page numbers or tables and figures from the A.M.A., *Guides*, nor did he measure shoulder range of motion. In a third report dated May 2, 2000, he utilized the fourth edition of the A.M.A., *Guides* and opined: "Regarding the left shoulder, there was a full range of motion with flexion, extension, internal and external rotation, abduction and adduction. I am assigning a zero percent permanent disability to the left upper extremity."

On May 17, 2000 the district medical adviser found a zero percent permanent impairment for the left upper extremity.

By decision dated February 10, 2001, the Office found that appellant had no ratable permanent impairment to the left upper extremity as a result of his injury and denied his claim for a schedule award.

Appellant requested an oral hearing on February 14, 2001. By decision dated October 3, 2001, the hearing representative affirmed the Office's February 10, 2001 decision.

The Board finds that this case is not in posture for decision on the issue of whether appellant has established that he is entitled to a schedule award for his left upper extremity.

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] 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 for all claimants the Office adopted the A.M.A., *Guides*[4] as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

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

[5] *Leisa D. Vassar*, 40 ECAB 1287 (1989).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990).

is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[7] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act[8] will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[9]

In this case, the Office referred appellant to Dr. Zuck to resolve a conflict in medical opinion between Drs. Weiss and Kahn. In his first report dated January 5, 2000, Dr. Zuck discussed appellant's medical history, his physical examination and his left shoulder symptoms. He opined that appellant's left shoulder symptoms were related to chronic bursitis and noted a possibility of rotator cuff pathology. He did not provide any ratings for a schedule award nor did he mention the A.M.A., *Guides*. In his second report dated February 4, 2000, he stated that he was in agreement with Dr. Weiss of a 20 percent permanent impairment of the left upper extremity but did not indicate how he arrived at his conclusion. In his last report dated May 2, 2000, Dr. Zuck noted that he utilized the A.M.A., *Guides*, finding full range of motion in appellant's left shoulder and assigning an impairment rating of zero percent.

The Board finds that Dr. Zuck's opinions are contradictory and incomplete and should not be given special weight in resolving the medical conflict. In his first report, Dr. Zuck failed to provide a rating for appellant's left upper extremity. In his second report, he stated that he agreed with Dr. Weiss that appellant had a 20 percent permanent impairment, but did not show how he arrived at his conclusions or mention the A.M.A., *Guides*. In his final report, he contradicted his earlier findings and stated that appellant had full range of motion in his shoulder and had a zero percent permanent impairment. Dr. Zuck did not address the A.M.A., *Guides* or show how he calculated the ratings in his reports. He provided no medical rationale to support his ultimate conclusion that appellant has a zero percent permanent impairment of the left shoulder. Dr. Zuck submitted three reports and in each report failed to provide a sufficiently well-rationalized opinion with an impairment rating from the A.M.A., *Guides*. The Board finds that, since Dr. Zuck's reports were contradictory and incomplete, the Office must submit the case record together with a statement of accepted facts to another impartial specialist for a rationalized medical opinion on the issue of the degree of impairment of appellant's left upper extremity.[10]

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[7] *Nathan L. Harrell*, 41 ECAB 402 (1990).

[8] 5 U.S.C. § 8123(a) provides the following:

> "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If 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."

[9] *Harold Travis*, 30 ECAB 1071 (1979).

[10] *Supra* note 7.

The October 3, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further findings consistent with this opinion of the Board.

Dated, Washington, DC
October 9, 2002

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member