U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLETON E. RAINEY and DEPARTMENT OF LABOR,
PENSION & WELFARE BENEFITS ADMINISTRATION,
Washington, DC

Docket No. 03-1692; Submitted on the Record;
Issued December 24, 2003

DECISION and ORDER

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

The issue is whether appellant is entitled to a schedule award for permanent impairment of his upper extremities.

This case has been before the Board previously. In a decision dated July 19, 2000, the Board reversed the Office of Workers' Compensation Programs' July 28, 1997 decision regarding termination of appellant's medical benefits.[1] The Board found that a conflict in medical opinion existed regarding whether he continued to be disabled from his employment-related conditions and whether he was entitled to a schedule award.[2] The law and facts as set forth in this decision are incorporated herein by reference.

Subsequent to the Board's July 19, 2000 decision, the Office initially referred appellant to Dr. Aleem A. Iqbal, Board-certified in psychiatry and neurology, regarding any continued

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[1] In the instant claim, adjudicated by the Office under file number 110104429, on March 2, 1992 the Office accepted that appellant sustained an employment-related cervical strain, left shoulder strain and aggravation of cervical disc disease at C6-7 with disc herniation. The Office also accepted that he sustained employment-related aggravation of psychosis and depression, adjudicated under file number 110114755, for which he has been receiving wage-loss compensation since December 13, 1991. Appellant received additional wage-loss compensation for intermittent absences subsequent to September 9, 1990. *See infra* note 6.

[2] Docket No. 98-301

disability and entitlement to a schedule award. Finding his report insufficient,[3] the Office then referred appellant to Dr. Fredric K. Cantor, Board-certified in psychiatry and neurology. He submitted a report dated April 18, 2001.

On October 31, 2002 the Office informed appellant that the conditions of cervical strain, aggravation of cervical disc disease and strain of the left shoulder had been accepted as employment related. In a decision that same date, the Office found that he was entitled to wage-loss compensation for the period March 4, 1991 to February 5, 1993. The Office further found that appellant was not entitled to a schedule award because Dr. Cantor, the impartial medical examiner, had advised that an accurate percentage of impairment could not be determined. The Office stated:

> "Determination of this type of impairment utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] (hereinafter A.M.A., *Guides*) requires an ability to objectively and accurately measure range of motion of the spine and extremities and to accurately and objectively quantify strength. In view of the fact that you are unable to cooperate with a thorough evaluation of range of motion testing of your neck and your complaint of pain inhibits motor testing and your sensory exam[ination] appears to demonstrate nonphysiologic subjective complaints, Dr. Cantor does not feel that an accurate determination can be made."

The Office, however, found that appellant continued to be entitled to medical benefits for the accepted conditions. On November 15, 2002 he requested reconsideration, arguing that he was entitled to a schedule award under the A.M.A., *Guides.* In a decision dated November 20, 2002, the Office denied modification of the prior decision. Appellant then filed an appeal with the Board.

By decision dated April 23, 2003, the Board remanded the case to the Office because the record before the Board did not contain the October 31, 2002 Office decision and thus, the case was not in posture for a decision. The case was remanded to the Office for reconstruction and proper assemblage of the record to be followed by a *de novo* decision on the merits of the claim.[5]

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[3] 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 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. Unless this procedure is carried out by the Office, the intent of section 8123(a) will be circumvented, when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence. *Roger W. Grjffith,* 51 ECAB 491 (2000).

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); *Joseph Lawrence, Jr.,* 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[5] Docket No. 03-777.

Subsequent to the Board's decision,[6] on June 19, 2003 the Office reassembled the record and reissued the October 31, 2002 decision, which found that appellant was not entitled to a schedule award. He again filed an appeal with the Board.

The Board finds that this case is not in posture for a decision regarding appellant's entitlement to a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[7] and section 10.404 of the implementing federal regulations, schedule awards are payable for permanent impairment of specified body members, functions or organs.[8] The Act, however, does not 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 A.M.A., *Guides* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[9]

The schedule award provision under the Act are limited to specific members or functions of the body enumerated under section 8107 and its implementing regulations. A schedule award is not payable for loss or loss of use, of any member of the body not specifically enumerated and is not payable for the body as a whole.[10] Neither the Act nor the implementing federal regulations provide for the payment of a schedule award for loss of use of the back or spine.[11] The 1960 amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[12]

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[6] The record also indicates that, in a decision dated February 14, 2003, the Office found that appellant was not entitled to wage-loss compensation for the period August 12 to September 8, 1990 because, as the date of injury was September 4, 1990, he was not entitled to compensation prior to that date and, further, that the record indicated that he had worked for the period September 3 through 8, 1990. On February 20, 2003 appellant requested reconsideration with the Office of the February 14, 2003 decision. The record before the Board does not contain a final decision issued by the Office regarding appellant's February 20, 2003 reconsideration request and he did not file an appeal with the Board regarding this decision.

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8107; 20 C.F.R. § 10.404 (1999).

[9] *Joseph Lawence, Jr., supra* note 4; *James J. Hjort,* 45 ECAB 595 (1994); *Leisa D. Vassar,* 40 ECAB 1287 (1989); *Francis John Kilcoyne,* 38 ECAB 168 (1986).

[10] *See Ann L. Tague,* 49 ECAB 453 (1998).

[11] *See Pamela J. Darling,* 49 ECAB 286 (1998).

[12] *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

In the instant case, finding that a conflict in the medical opinion evidence existed regarding whether appellant continued to be disabled from his employment-related conditions and whether he was entitled to a schedule award on March 19, 2001, the Office referred appellant, along with a job description, a statement of accepted facts, a set of questions and the medical record to Dr. Cantor, who is Board-certified in psychiatry and neurology, for an impartial evaluation on those issues. He was also to provide an impairment rating under the standards provided in the A.M.A., *Guides.* Based on Dr. Cantor's opinion, the Office accepted that appellant continued to have residuals of the accepted cervical strain, aggravation of cervical disc disease and left shoulder strain, but found he was not entitled to a schedule award.

Regarding entitlement to a schedule award, in his report dated April 18, 2001, Dr. Cantor acknowledged review of the medical record and appellant's complaints of neck pain, worse posteriorly, that the neck pain caused him to have a Lhermitte's sign[13] with pain and sudden weakness in his legs and that pain in his right arm was constant. Regarding his physical examination, Dr. Cantor noted that appellant wore a cervical collar, which he removed and that he had no ability to tilt, flex or extend his neck and had very limited rotation of the neck. Appellant asked that his neck range of motion not be tested and this was not done. Dr. Cantor provided range of motion findings for the right shoulder and further indicated that quantitative motor testing could not be done accurately due to appellant's complaint of pain and his inability to sustain contractions sufficiently to accurately quantify motor strength. Sensory examination demonstrated decreased sensation in all nerves of the cervical and brachial plexus on the right side affecting C8 and T1 least. Dr. Cantor provided additional findings on examination and advised that somatosensory evoked potential studies were performed on appellant's arms and legs and did not show any abnormalities to suggest either peripheral or spinal cord pathology and noted that appellant had a history of both normal and abnormal electromyography (EMG) examinations.

He concluded:

> "I believe that an accurate percentage of permanent impairment cannot be determined for [appellant]. Determination of this type of impairment utilizing the [A.M.A., *Guides*] requires the ability to objectively and accurately measure range of motion of the spine and extremities and to accurately and objectively quantify strength. In view of the fact that [appellant] is unable to cooperate with a thorough evaluation of range of motion testing of his neck; and in view of the fact that his complaint of pain inhibits motor testing; and in view of the fact that his sensory exam[ination] appears to demonstrate nonphysiologic subjective complaints, I do not feel that an accurate determination can be made."

Dr. Michael E. Batipps, appellant's attending Board-certified neurologist, who had treated him since 1990 and who, along with a second opinion examiner, Dr. James C. Cobey, a Board-certified orthopedic surgeon, created the conflict in medical opinion, provided a report dated January 17, 2003. In that report, he noted the history of injury and appellant's symptoms

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[13] Lhermitte's sign is defined as the development of sudden, transient, electric-like shocks spreading down the body when the patient flexes the head forward; seen mainly in multiple sclerosis, but also in compression and other disorders of the cervical cord. *DORLAND'S Illustrated Medical Dictionary,* (29th ed. 2000).

of neck pain radiating to the shoulders and down the right upper extremity, with decreased range of motion, increased pain, weakness and sensory symptoms including numbness, tingling and paresthesias of the right upper extremity, especially the right hand. Dr. Batipps further advised that manipulation of the neck produced a Lhermitte sign and flexion of the neck occasionally caused urinary incontinence and electrical shock sensations down the lower extremities with "sensory symptoms in the lower extremities usually time link to manipulation of the neck." He noted that appellant was extremely sedentary because of severe pain. Dr. Batipps provided findings on examination, including diffusely decreased pin prick sensation of the right upper extremity compared to the left. He stated that appellant declined neck manipulation testing because it elicited Lhermitte symptoms and less than full effort was noted in motor testing of the right upper extremity due to pain and decreased range of motion of the right shoulder. Dr. Batipps diagnosed: (1) chronic cervical strain with right cervical radiculopathy; (2) cervical disc disease, aggravated by #1; (3) right shoulder strain; (4) chronic stable cervical myelopathy due to #1 and #2; (5) Lhermitte sign/symptom due to #1, #2 and #4; and (5) neurogenic bladder due to #1, #2 and #4. He recommended physical therapy, repeat EMG studies and magnetic resonance imaging of the cervical spine.

In the instant case, the Office found that appellant was not entitled to a schedule award because, based on Dr. Cantor's opinion, an accurate percentage of permanent impairment could not be determined because he did not cooperate with the physical examination. The Board, however, finds that referral to a second impartial examiner is mandated.

It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[14] While both Dr. Cantor and Dr. Batipps advised that appellant refused to move his neck and that other testing such as motor strength determination that could provide an impairment rating were difficult or impossible to ascertain, section 16.5 of the A.M.A., *Guides* provides an analysis for impairment of the upper extremities due to peripheral nerve disorders and states that "[a]ccurate diagnosis of peripheral nerve disorders is based on a detailed history, a thorough physical examination with special emphasis on the nervous and vascular systems and appropriate diagnostic tests, including a variety of electrical and imaging studies."[15] Dr. Cantor specifically noted that the examination demonstrated decreased sensation in all nerves of the cervical and brachial plexus on the right, affecting C8 and T1 least. Even though he concluded that there were no findings that definitely indicated radicular pathology, he also stated that this could not be ruled out. Furthermore, appellant's treating neurologist, Dr. Batipps, provided a January 17, 2003 report, in which he advised that sensory examination demonstrated diffusely decreased pin prick sensation of the right upper extremity compared to the left.

Section 16.5a further provides that the evaluation of permanent impairment resulting from peripheral nerve disorders is based on the anatomic distribution and severity of loss of function resulting from sensory deficits or pain and motor deficits and loss of power.[16] Section

[14] *Walter K Malena,* 46 ECAB 983 (1995).

[15] A.M.A., *Guides, supra* note *4 at* 480.

[16] *Id*.

16.5b advises that upper extremity impairment is to be calculated using Tables 16-10 and/or l6-11.[17] As neither Dr. Cantor nor Dr. Batipps provided specific analysis under this section of the A.M.A., *Guides,* there are no findings to provide the basis for a schedule award. The Board, however, finds that there are sufficient examination findings to require further development in this regard.[18]

The Board further notes that, while Dr. Batipps advised that appellant's neurogenic bladder was caused by his accepted conditions, the bladder is not a specified member of the body, in either the Act or the regulations and the Board has no power to change or add to the plain meaning of the terms used in the statute.[19] Appellant, therefore, would not be entitled to a schedule award for this condition.

In conclusion, since Dr. Cantor advised that he was unable to perform an impairment rating, a conflict remains regarding whether appellant is entitled to a schedule award. The case must, therefore, be remanded to the Office for referral to another impartial examiner. On remand the Office should further develop the medical evidence as to appellant's accepted conditions and obtain an impairment rating based on his accepted injuries and any preexisting medical conditions. The Office shall then issue a *de novo* decision, consistent with this decision of the Board.

The decision of the Office of Workers' Compensation Programs dated June 19, 2003 is hereby vacated and the case is remanded to the Office for proceedings consistent with this decision.

Dated, Washington, DC
December 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] A.M.A., *Guides, supra* note 4 at 481.

[18] *Roger W. Griffith, supra* note 3.

[19] *Thomas J. Engelhart*, *supra* note 12.