United States Department of Labor
Employees' Compensation Appeals Board

THEODORE L. SPIRO, Appellant	)	
and	)	**Docket No. 04-1083**
	)	**Issued: September 1, 2004**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Theodore L. Spiro, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 15, 2004 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated March 18, 2003 which issued appellant an additional schedule award for one percent permanent impairment of the right upper extremity. Appellant also filed a timely appeal of the nonmerit decision dated December 22, 2003, which denied his request for reconsideration of the March 18, 2003 schedule award. Pursuant to 20 C.F.R. §§ 501.2 (c) and 501.3, the Board has jurisdiction over these schedule award decisions.

ISSUES

The issues on appeal are: (1) whether appellant is entitled to more than one additional percent permanent impairment of the right upper extremity for which he has received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration on December 22, 2003.

FACTUAL HISTORY

This is the second appeal in this case.[1] In a decision dated June 26, 2002, the Board set aside Office decisions dated July 18, 2000 and April 30, 2001, regarding a schedule award.[2] The Board found that a conflict was created by the opinion of Dr. Martin Wice, a Board-certified internist, who found that appellant has an 8 percent permanent impairment of the right upper extremity and a 13 percent permanent impairment of the left upper extremity and Dr. Bruce Schlafly, a Board-certified orthopedic surgeon, who found that appellant has a 35 percent permanent impairment of the right upper extremity and a 43 percent permanent impairment of the left upper extremity. The Board remanded the case and referred appellant, the case record and the statement of accepted facts to a medical specialist for an impartial medical evaluation to determine the percentages of impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) fifth edition, pursuant to section 8123(a) of the Federal Employees' Compensation Act.[3] The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

On November 5, 2002 the Office referred appellant to Dr. Daniel Sohn, Board-certified in physical medicine and rehabilitation, in order to resolve the outstanding conflict outlined by the Board.[4]

In his independent medical examination report dated November 14, 2002, Dr. Sohn indicated that he was asked to address appellant's entitlement to an additional schedule award based on a permanent partial impairment rating for appellant's upper extremities. Dr. Sohn reported that the statement of accepted facts and extensive medical record was reviewed including electromyography and nerve conduction study results and reports from appellant's physicians. He noted that he had been asked to resolve the conflict of medical opinion regarding appellant's permanent impairment due to "bilateral carpal tunnel syndrome status post release, bilateral cubital tunnel syndrome status post left release and right lateral epicondylitis." Dr. Sohn reviewed appellant's physical examination and also stated:

> "A goniometer was used to check range of motion at the wrists and elbows. On the right, wrist flexion was 48 degrees, extension 45 degrees, radial deviation 27 degrees [and] ulnar deviation 27 degrees. Right elbow flexion was 132 degrees, extension 0, pronation 67 degrees [and] supination 58 degrees. On the left, wrist flexion was 58 degrees, extension 43 degrees radial deviation

[1] Docket No. 01-1793 (issued June 26, 2002).

[2] Appellant's claim was accepted for bilateral carpal tunnel syndrome and release, bilateral cubital tunnel syndrome, left ulnar nerve transposition, bilateral radial nerve entrapment and aggravation of right epicondylosis. By decision dated July 18, 2000, appellant was awarded an 8 percent permanent impairment for the right upper extremity and a 13 percent permanent impairment for the left upper extremity.

[3] 5 U.S.C. § 8107 *et. seq*.

[4] The Office also referred appellant to Dr. Sohn to resolve an outstanding issue regarding continuing disability. The Board notes that the issue of continuing disability is not on appeal and will not be addressed here.

17 degrees [and] ulnar deviation 32 degrees. Left elbow flexion was 135 degrees, extension to 0 degrees, pronation 67 degrees [and] supination 64 degrees."

The impartial medical specialist related his impressions regarding the conditions he had previously noted as at issue, but also noted that appellant had "multiple entrapment neuropathies related to the patient's connective tissue tendency toward fibroma formation. The patient has not been identified to have a peripheral neuropathy nor hereditary neuropathy."

Dr. Sohn then outlined his impairment rating. He stated:

> "Impairment rating due to carpal tunnel syndrome surgically treated was performed with the examination of the wrists and hands. Wrist range of motion measured with the goniometer yield on the right was 2 percent disability due to flexion, 3 percent due to extension and 1 percent due to ulnar deviation limitations. On the left, disability is found to be 3 percent due to extension limitation and 1 percent due to radial deviation limitation. These values were obtained from Figure 16-28 and 16-31, pages 467 and 469. The total disability related to range of motion deficit is 10 percent.
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> "Disability for weakness in the left upper extremity due to ulnar neuropathy was ascertained using Table 16-11, page 484 and 16-15, page 492. The severity of motor deficit is 15 percent. The maximum percent of upper extremity impairment due to motor deficit of the ulnar nerve above the midforearm is 46 percent. 15 percent times the 46 percent equals 6.9 percent. The patient's complaints of discomfort are felt to be adequately addressed in the range of motion and strength evaluation.
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> "Upper extremity disability due to dysfunction at the level of the elbow was ascertained using range of motion limitations as measured with the goniometer. Figure 16-34 and 16-37 on pages 472 and 474 were used. These yield a 1 percent disability due to right elbow flexion limitation, 1 percent for pronation limitation and 1 percent for supination limitation. On the left, disability rating is 1 percent for pronation limitation and 1 percent for supination limitation. The patient complaints of discomfort at the level of the elbow are felt to be addressed in the range of motion limitation. The total disability for the elbows is 5 percent.
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> "These calculations yield a total disability for bilateral upper extremity of 22 percent. That is, a 9 [percent] disability for the right upper extremity deficits (wrist 6 percent, elbow 3 percent) and a 13 percent disability for the left upper extremity deficit (wrist 4 percent, elbow 2 percent, ulnar nerve 7 percent."

In a decision dated March 18, 2003, the Office issued a schedule award for an additional one percent permanent impairment of the right upper extremity based on Dr. Sohn's findings. The period of the award ran for 3.12 weeks for the period of February 10 to March 3, 2001.

In a letter dated December 7, 2003, appellant requested reconsideration of his claim. Appellant argued that Dr. John Gragnani incorrectly calculated the percentage of impairment in his May 10 and 11, 1999 reports and that Dr. Wice's June 7, 2000 report, along with Dr. Sohn's

referee examination were biased by his findings. He argued that Dr. Gragnani's entire opinion was based upon a May 6, 1999 nerve test, which showed a neuropathy above the mid-forearm and a neuropathy in the right foot. He argued that, as a result of the nerve test only, the physician concluded that there was multiple neuropathic disease or familial due to fibroma formation. Appellant argued that Dr. David C. Haueisen's November 9, 1998 and February 1, 1999 reports did not reveal any fibroma formation or any other type of manifestation on any nerve and Dr. Hayat's reports of file did not find that he was prone to a hereditary neuropathy. He stated that Dr. Sohn ignored the positive postsurgical nerve test and his decreased sensation to light touch and did not perform a two point discrepancy but agreed with Dr. Gragnani that appellant had a tendency of fibroma formation. Appellant concluded that Dr. Schlafly's September 11, 2000 report was not biased and argued that he correctly determined impairment.

The Office subsequently received an electromyogram and nerve conduction studies dated May 6, 1999 and June 12, 2002 and an operative report from Dr. Haueisen dated November 9, 1998.

In a decision dated December 22, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant to the issue of the schedule award and thus insufficient to warrant review of the prior merit decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] set forth the number of weeks of compensation payable to employees who sustain 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

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.[7] As noted by Larson, this is sometimes expressed by saying that the "employer takes the employee as he finds him."[8]

[5] 5 U.S.C. § 8107, *supra* note 3.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Dale B. Larson,* 41 ECAB 481 (1990).

[8] Larson, *The Law of Workers' Compensation,* §§ 12.30 and 58.21.

ANALYSIS

On July 18, 2000 the Office issued appellant a schedule award for 8 percent of the right upper extremity and 13 percent of the left upper extremity for his carpal tunnel and cubital tunnel impairments. On March 18, 2003 the Office issued appellant an additional schedule award for one percent permanent impairment of the right upper extremity following further development of the case on a remand order from the Board. Prior to issuing appellant the additional schedule award, the Office provided the referee specialist, Dr. Sohn, Board-certified in physical medicine and rehabilitation, the medical record and a statement of accepted facts to give him a proper medical and factual background. While in the statement of accepted facts the Office properly noted that appellant's claim was accepted for a number of conditions including bilateral radial nerve entrapment, in his November 14, 2002 report, Dr. Sohn did not note that this condition was an accepted condition. Thereafter in stating his own impressions of appellant's condition Dr. Sohn noted that appellant had "multiple entrapment neuropathies related to the patient's connective tissue tendency toward fibroma formation. The patient has not been identified to have a peripheral neuropathy nor hereditary neuropathy." Dr. Sohn did not thereafter evaluate whether appellant's nerve entrapment caused additional permanent impairment. Dr. Sohn apparently did not evaluate appellant's bilateral nerve entrapment syndrome because he felt it was caused by a connective tissue disease. However, the Board notes that bilateral radial nerve entrapment was a condition which was accepted by the Office as causally related to appellant's employment injuries. Furthermore, even if the nerve entrapment syndrome which Dr. Sohn diagnosed was a congenital condition caused by connective tissue disease, preexisting impairments of the upper extremities are to be included in the evaluation of the upper extremity impairment. This case must therefore be remanded to the Office for further clarification from Dr. Sohn. Dr. Sohn should address whether appellant's accepted bilateral radial nerve entrapment or his other diagnosed neuropathies caused any further permanent impairment. After such further development as necessary, the Office shall issue an appropriate decision.[9]

CONCLUSION

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

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[9] Due to the resolution of the first issue, it is unnecessary to address the second issue. The Board also notes that the Office has not issued a new decision regarding appellant's entitlement to an additional schedule award for the upper left extremity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 22 and March 18, 2003 are set aside and this case is remanded to the Office for further development pursuant to this decision.

Issued: September 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member