

development.¹ The Board found that the case was not in posture for decision regarding whether appellant had more than a four percent impairment of his right arm and a three percent impairment of his left arm.² The Board noted that the Office properly determined that there was a conflict in the medical evidence regarding appellant's upper extremity impairment between Dr. Vernon S. Esplin, an attending Board-certified orthopedic surgeon, and Dr. Hugh Macaulay, a Board-certified orthopedic surgeon, who served as an Office medical adviser. The Board noted that the Office properly referred appellant to Dr. Robert P. Hanson, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

The Board determined that Dr. Hanson properly analyzed appellant's limited wrist motion in his July 8, 2003 report to determine that he had a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm based on these particular limitations.³ The Board further found that Dr. Hanson and Dr. Macaulay applied an improper standard when they categorically stated that limitations of appellant's elbow motion could not be included in the calculations of his upper extremity impairment.⁴ The Board remanded the case to the Office for referral of appellant to another impartial medical specialist for a complete evaluation of his upper extremity impairment to be followed by an appropriate decision.⁵ The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

¹ Docket No. 03-1994 (issued December 15, 2003).

² In early 2001 the Office accepted that appellant, then a 34-year-old painter, sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand and wrist. In May and July 2001, appellant underwent surgical procedures, which included shortening of both ulna bones, debridement of his right wrist joint and debridement of partial scapholunate tears and triangular fibrocartilagenous cartilage complex tears in both wrists. In April 2002, he had surgical hardware removed from both wrists. By decision dated July 25, 2003, the Office granted appellant a schedule award for a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm.

³ The findings of Dr. Hanson's report showed that appellant had a 2 percent impairment due to right extension of 50 degrees, a 2 percent impairment due to right flexion of 52 (for a total of 4 percent on the right), a 2 percent impairment due to left extension of 48 and a 1 percent impairment due to left flexion of 55. See A.M.A., *Guides* 467, Figure 16-28. Dr. Macaulay reviewed the report of Dr. Hanson and also concluded that appellant had these impairment ratings.

⁴ The Board noted that 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. See *Dale B. Larson*, 41 ECAB 481, 490 (1990); *Pedro M. DeLeon, Jr.*, 35 ECAB 487, 492 (1983). The Board indicated that the evidence suggested that appellant had some impairment due to limited elbow motion.

⁵ The Board also found that Dr. Esplin's June 25, 2002 determination that appellant had a 30 percent impairment was improper because he included a rating for weakness upon grip strength testing, did not clearly indicate that the strength rating applied equally to both extremities, and made additional calculation errors when he added the rating figures for motion and strength limitations. The A.M.A., *Guides* specifically provides that strength deficits, as measured by grip testing, should only rarely be included in the calculation of an upper extremity impairment and the facts do not support the inclusion of a loss of strength impairment rating in the present case. A.M.A., *Guides* at 508, section 16.8a.

On remand the Office referred appellant to Dr. Anthony Fenison, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding the extent of the permanent impairment of his upper extremities.

In a report dated March 24, 2004, Dr. Fenison stated that appellant exhibited the following findings upon range of motion testing of his elbows: extension of 180 degrees, flexion of 135 degrees, supination of 85 degrees, and pronation of 75 degrees in each elbow.⁶ Dr. Fenison stated that appellant had right wrist extension of 60 degrees; flexion of 70 degrees; radial deviation of 10 degrees; and ulnar deviation of 20 degrees. He further reported that appellant had left wrist extension of 65 degrees; flexion of 70 degrees; radial deviation of 20 degrees; and ulnar deviation of 40 degrees. Dr. Fenison found that for the distal interphalangeal joints of the index, middle and little fingers of each hand appellant had 180 degrees of extension and 70 degrees of extension. He reported that for the proximal interphalangeal joints of the index, middle and little fingers of each hand appellant had 180 degrees of extension and 100 degrees of extension. Dr. Fenison further noted that for the metacarpophalangeal joints of the index fingers of each hand appellant had 180 degrees of extension and 85 degrees of extension; for the metacarpophalangeal joints of the middle and little fingers of each hand appellant had 180 degrees of extension and 90 degrees of extension. He also stated that appellant was entitled to a 25 percent impairment rating for grip strength deficits. Dr. Fenison concluded that appellant has more than a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm.

On April 14, 2004 Dr. Macaulay, the district medical adviser for the Office, reviewed the findings of Dr. Fenison and determined that appellant had a 4 percent impairment of his right arm based on a 2 percent impairment for 10 degrees of radial deviation of the right wrist and a 2 percent impairment for 20 degrees of ulnar deviation of the right wrist.⁷

By decision dated May 6, 2004, the Office determined that appellant did not establish that he had more than a four percent impairment of his right arm and a three percent impairment of his left arm, for which he received a schedule award. The Office based its determination on the March 24, 2004 report of Dr. Fenison and the April 14, 2004 report of Dr. Macaulay.

Appellant requested a hearing before an Office hearing representative which was held on November 16, 2004. He argued that the Office did not adequately consider his limited elbow motion or the 30 percent impairment rating of Dr. Esplin when it made its determination regarding his total upper extremity impairment.

By decision dated and finalized March 4, 2005, the Office hearing representative affirmed the Office's May 6, 2004 decision.

⁶ Dr. Fenison also indicated that appellant's elbow motions were "normal."

⁷ Dr. Macaulay's report outlined the findings for appellant's wrist motion.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁸ and its implementing regulation⁹ sets forth the number of weeks of compensation payable to employees 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.¹⁰

Section 8123(a) of the Act provides in pertinent part: "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."¹¹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

The Office accepted that appellant sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand and wrist and awarded him a schedule award for a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm. In a December 15, 2003 decision, the Board directed the Office to refer appellant to a new impartial medical specialist for a complete evaluation of his upper extremity impairment to be followed by an appropriate decision.¹³

Based on the March 24, 2004 report of Dr. Fenison and the April 14, 2004 report of Dr. Macaulay, the Office found that the medical evidence did not show that appellant has more than a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm.

The Board finds that the Office did not fully evaluate appellant's entitlement to schedule award compensation for his upper extremities and therefore the case is not in posture for decision

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a).

¹² *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹³ *See supra* note 11 and 12 and accompanying text regarding the nature of referrals to impartial medical specialists. The Board noted that appellant's limited elbow motion had not been properly evaluated.

regarding this matter. The Office properly found that Dr. Macaulay, who reviewed the findings of Dr. Fenison, correctly calculated that appellant had a 4 percent impairment of his right arm based on a 2 percent impairment for 10 degrees of radial deviation of the right wrist and a 2 percent impairment for 20 degrees of ulnar deviation of the right wrist.¹⁴

However, it does not appear that the Office adequately evaluated whether appellant had entitlement to schedule award compensation for limited elbow motion. As noted above, the Board remanded the case to the Office for this reason. Dr. Fenison provided examination findings for elbow motion; however, Dr. Macaulay did not provide any indication that he considered whether appellant was entitled to an impairment rating for limited elbow motion. The findings of Dr. Fenison suggest that appellant would be entitled to a 1 percent impairment rating for each of the following elbow motions: 135 degrees of right elbow flexion, 135 degrees of left elbow flexion, 75 degrees of right elbow pronation, and 135 degrees of left elbow pronation.¹⁵ Moreover, it does not appear that the Office adequately considered whether appellant is entitled to schedule award compensation for limited finger motion. Dr. Fenison's finding that appellant had 85 degrees of extension of the metacarpophalangeal joints of both index fingers suggests a 3 percent impairment rating for each index finger.¹⁶

It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹⁷ For the above-noted reasons, it is necessary to conduct additional evaluation of appellant's claim that he has more than a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm.¹⁸ After such development as it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm, for which he received

¹⁴ See A.M.A., *Guides* at 469, Figure 16-31. Applying the relevant standards to Dr. Fenison's findings, it does not appear that appellant would be entitled to any other impairment ratings for limited wrist motion upon flexion, extension, radial deviation or ulnar deviation. See A.M.A., *Guides* at 467, Figure 16-28.

¹⁵ See A.M.A., *Guides* at 472, 474, Figures 16-34 and 16-37. It does not appear that appellant would be entitled to any other impairment ratings for limited elbow motion. See *id.*

¹⁶ See A.M.A., *Guides* at 464, Figure 16-25. It does not appear that appellant would be entitled to any other impairment ratings for limited motion of the distal interphalangeal, proximal interphalangeal or metacarpophalangeal joints. See A.M.A., *Guides* at 461, 463, Figures 16-21 and 16-23.

¹⁷ *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁸ Dr. Fenison stated that appellant was entitled to a 25 percent impairment rating for grip strength deficits, but it would not be appropriate to include such deficits in the impairment rating of the present case. See *supra* note 5 regarding the limited inclusion of grip strength deficits. Appellant claimed that the June 25, 2002 report of Dr. Esplin, an attending Board-certified orthopedic surgeon, showed that he had a 30 percent impairment. The Board has previously explained the deficiencies of this report. See *id.*

a schedule award. The case will be remanded to the Office for further development and the issuance of an appropriate decision regarding this matter.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 4, 2005 and May 6, 2004 decisions are set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: September 7, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board