United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, East Boston, MA, Employer	)	**Docket No. 10-2117** **Issued: July 14, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

Appellant, a 45-year-old transportation security screener, has an accepted traumatic injury claim for left shoulder, cervical and thoracic strains, which arose on July 5, 2005.[1] By decision dated August 3, 2010, the Office of Workers' Compensation Programs (OWCP) denied appellant's claim for a schedule award. The decision was based on the April 6, 2010 report of Dr. George P. Whitelaw, a Board-certified orthopedic surgeon and OWCP referral physician,[2]

[1] Appellant injured herself pushing a wheelchair-bound individual who weighed approximately 300 pounds. There is also a subsidiary claim (xxxxxx591) for a June 23, 2005 employment injury involving appellant's upper back and left upper extremity. The June 23 and July 5, 2005 traumatic injury claims have been combined with the latter claim designated as master file (xxxxxx798). Appellant also has an accepted claim for left shoulder capsulitis, which arose on June 8, 2004 (xxxxxx621).

[2] OWCP selected Dr. Whitelaw to resolve a purported conflict in medical opinion between appellant's physician, Dr. Richard S. Fraser, and the district medical adviser, Dr. Barry W. Levine, who believed appellant's left shoulder abnormalities were not the result of her July 5, 2005 employment injury, but instead due to a preexisting left shoulder injury. However, there was no true conflict in medical opinion because any previous impairment of the member under consideration is generally included in calculating the percentage of loss. *R.D.*, 59 ECAB 127, 130 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(2) (January 2010). Thus, Dr. Levine's stated concern was immaterial. Notwithstanding Dr. Whitelaw's initial designation as an impartial medical examiner (IME), the August 3, 2010 decision did not accord special weight to his findings as an IME, but merely identified him as a second opinion medical examiner.

who found "no evidence of any permanent disability." In a report dated August 1, 2010, Dr. David I. Krohn, the district medical adviser, found that there had been no demonstrated impairment of any of appellant's extremities resulting from her July 5, 2005 injury.[3]

Appellant's physician, Dr. Fraser, provided a November 30, 2009 impairment rating of 20 percent of the left upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). His rating was based on loss of motion in appellant's left shoulder, and he identified the specific tables and examples he utilized from the latest edition of the A.M.A., *Guides*. Dr. Fraser provided an identical rating on May 3, 2010. Neither Dr. Whitelaw nor Dr. Krohn specifically commented on Dr. Fraser's 20 percent left upper extremity impairment rating. Similarly, the August 3, 2010 decision made no mention of Dr. Fraser's latest left upper extremity impairment rating.

FECA provides that if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[4] Because of an unresolved conflict in medical opinion between appellant's physician, Dr. Fraser, and Drs. Whitelaw and Krohn on behalf of OWCP, the case shall be remanded to OWCP for referral to an impartial medical examiner. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued regarding appellant's claim for a schedule award.

[3] Dr. Krohn only referenced Dr. Whitelaw's April 6, 2010 report and an October 9, 2009 report from Dr. Fraser in which he found 21 percent impairment of both the cervical and lumbar spine. He correctly noted that the Federal Employees' Compensation Act (FECA) did not authorize a schedule award for impairment of the spine except to the extent it affected the function of an extremity. Dr. Krohn further stated that in his opinion, Dr. Fraser had not described impairment of any of appellant's extremities, either secondary to the claimed injury or otherwise.

[4] 5 U.S.C. § 8123(a) (2006); 20 C.F.R. § 10.321(b); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale." *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

IT IS HEREBY ORDERED THAT the August 3, 2010 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this order of the Board.

Issued: July 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board