United States Department of Labor
Employees' Compensation Appeals Board

N.G., Appellant	)	
and	)	**Docket No. 07-1251**
	)	**Issued: December 17, 2007**
DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, Fort Bliss, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2007 appellant filed a timely appeal from a March 29, 2007 merit decision of the Office of Workers' Compensation Programs denying her request for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the schedule award issue.

ISSUE

The issue is whether appellant sustained more than a five percent permanent impairment to her left upper extremity for which she previously received a schedule award.

FACTUAL HISTORY

The case has previously been on appeal to the Board.[1] In the prior appeal, the Board set aside the Office's November 30, 2005 and February 14, 2006 decisions and remanded the case to the Office. By decision dated November 30, 2005, the Office issued appellant a schedule award

[1] Docket No. 06-853 (issued October 26, 2006).

for a five percent impairment of the left upper extremity. Additionally, by February 14, 2006 decision, the Office issued a decision denying appellant's request for reconsideration. The Board found a conflict in the medical opinion evidence between Dr. Michael J. Mrochek, an examining Board-certified physiatrist and Dr. Randy J. Pollet, a second opinion Board-certified orthopedic surgeon, as to whether appellant had reflex sympathetic dystrophy to her upper left extremity condition and whether there was any permanent impairment due to this condition. On remand, the Board instructed the Office to refer appellant to an impartial medical specialist to resolve the conflict. The facts and the history contained in the prior decision are incorporated by reference.[2]

On remand, following the Board's October 26, 2006 decision the Office, by letter dated January 31, 2007, referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. William Nemeth, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Nemeth submitted a February 20, 2007 medical report, in which he provided a history of appellant's problems with her left wrist, hand and upper extremity, medical treatment and complaints. He reviewed appellant's medical records and reported his findings on physical examination. A physical examination revealed no left upper extremity swelling and good upper extremity motor strength bilaterally. Dr. Nemeth noted that a neurological examination revealed "reflexes in the biceps, brachioradialis and triceps are hypoactive, but equal on both sides." He concluded that appellant had no active left upper extremity reflex sympathetic dystrophy. With respect to appellant's upper extremity range of motion, Dr. Nemeth reported 91 degrees of wrist dorsal flexion, 68 degrees wrist palmar flexion, 18 degrees wrist radial deviation and 24 degrees wrist ulnar deviation. Based upon an extrapolation using Figure 15-31[3] he concluded that appellant had a five percent impairment of the left upper extremity. Dr. Nemeth stated that an extrapolation was used "because appellant's range of motion in all of her joints is significantly greater than normal as she shows hyperelasticity or hypermobility of joints." In reaching his impairment determination, Dr. Nemeth concluded that appellant had two percent impairment for 18 degrees of radial deviation and three percent impairment for 24 degrees of ulnar deviation which resulted in a total of a five percent impairment for the left upper extremity.

On March 26, 2007 an Office medical adviser reviewed Dr. Nemeth's February 20, 2007 report. She stated that the range of motion findings reported by Dr. Nemeth were based upon "extrapolating loss of motion figures as compared to the opposite side" which explained "the difference between Dr. Nemeth's figure ([five][percent]) and mine." Using Figures 16-28 at page 467 and Figure 16-31 at page 469, the Office medical adviser concluded that appellant had a 0 percent impairment for 91 degrees wrist extension, 0 percent impairment for 68 degrees wrist flexion, 0 degrees impairment for 18 degrees radial deviation and a one percent impairment for

[2] On February 9, 1995 appellant, a 41-year-old office automation secretary, filed an occupational disease claim alleging that on February 7, 1995 she first realized her left arm condition was due to her employment duties. The Office accepted the claim for left wrist tendinitis.

[3] This appears to be a typographical error as there is no Figure 15-31in Chapter 15 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A, *Guides*). The Board notes Figure 16-31, page 469 appears to be what Dr. Nemeth used. Figure 16-31 is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Abnormal Radial and Ulnar Deviations of Wrist Joint."

24 degrees radial deviation, resulting in a total one percent impairment of the left upper extremity.

By decision dated March 29, 2007, the Office denied an additional schedule award. It found that appellant had already received a schedule award totaling five percent for the left upper extremity. As Dr. Nemeth's February 20, 2007 report supported no more than a one percent impairment in the left upper extremity, there was no basis for the payment of additional compensation for more than a five percent impairment, for which she already received a schedule award. The Office accorded special weight to Dr. Nemeth's February 20, 2007 medical report.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his claim, including that she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[5]

The schedule award provision of the Act[6] and its implementing regulations[7] set 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[8]

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.[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[10]

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[4] 5 U.S.C. §§ 8101-8193.

[5] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.*; *see Billy B. Scoles*, 57 ECAB ___ (Docket No. 05-1696, issued December 7, 2005).

[9] 5 U.S.C. § 8123(a).

[10] *Darlene R. Kennedy*, 57 ECAB ___ (Docket No. 05-1284, issued February 10, 2006).

ANALYSIS

To resolve the conflict in the medical opinion evidence found by the Board, in the October 26, 2006 decision regarding whether appellant had reflex sympathetic dystrophy to her upper left extremity condition and whether there was any permanent impairment due to this condition, the Office referred appellant to Dr. Nemeth, selected as the impartial medical specialist. Dr. Nemeth concluded that appellant had no active left upper extremity reflex sympathetic dystrophy. However, he provided no analysis to show how he reached such a determination. While his statement regarding appellant's nonactive reflex sympathy dystrophy was clear and unequivocal, Dr. Nemeth failed to offer any medical reasoning in support of his conclusion.[11] The certainty with which Dr. Nemeth expressed his opinion cannot overcome the lack of medical rationale.[12] As he did not sufficiently explain his finding that appellant did not have active reflex sympathy dystrophy, Dr. Nemeth's opinion is insufficient to constitute the weight of the evidence on this issue and the record contains an unresolved conflict in medical opinion of whether appellant has reflex sympathy dystrophy.

The Board finds that Dr. Nemeth's brief conclusory statement is insufficient to resolve the conflict in medical opinion. The case will be remanded to the Office to obtain a further explanation from the impartial medical examiner. If Dr. Nemeth is unable to provide a rationalized explanation as to why appellant does not have left upper extremity reflex sympathetic dystrophy and any resulting impairment to her left upper extremity, the Office should refer appellant to a new impartial medical examiner.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is required.

[11] *Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005).

[12] *See Willa M. Frazier*, 55 ECAB 379 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2007 is set aside and the case remanded for further development consistent with the above decision.

Issued December 17, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board