

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEO SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 99-1683; Submitted on the Record;
Issued September 27, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant is entitled to a schedule award for permanent partial impairment of the right upper extremity related to his accepted work injuries.

On September 14, 1965 appellant, then a 34-year-old letter carrier, was injured in the performance of duty when a porch step gave way and he fell down a flight of stairs. The Office of Workers' Compensation Programs accepted his claim for a bruise to the left arm and a lumbar strain. Appellant received compensation for medical benefits and intermittent periods of wage loss.

On May 4, 1970 appellant was involved in a car accident in the performance of his duties as a special delivery messenger. He was treated for a left frontal hematoma and complaints of a severe headache at St. Mary's Hospital. An x-ray of the skull performed on May 4, 1970 was interpreted as normal. In an attending physician's report dated May 25, 1970, Dr. Emil L. Barrows diagnosed that appellant sustained a contusion of the forehead as a result of the May 4, 1970 car accident with no other evidence of injury. He prescribed pain medication for appellant's headaches. The Office ultimately approved appellant's May 4, 1970 claim for transient cerebral ischemia and seizure state.¹

In a CA-20 attending physician's report dated February 15, 1974, Dr. J. Philip Fox, a general practitioner, diagnosed that appellant suffered from post-traumatic headaches related to

¹ Appellant had several subsequent work-related injuries. The Office accepted that appellant sustained a lumbosacral strain on February 18, 1979. An injury sustained on September 1, 1980 was accepted for cervical strain, right lower radiculopathy and aggravation of arthritis of the spine. Appellant sustained an injury on December 12, 1984, which was accepted for cervical strain and an injury on December 3, 1982, which was accepted for degenerative arthritis and synovitis of the right knee with precipitation of surgery for a torn meniscus. Appellant has received a schedule award for permanent impairment related to his right lower extremity.

the September 14, 1965 work injury. He approved appellant for regular work effective June 13, 1976.

On February 3, 1997 appellant requested a schedule award for permanent impairment he sustained as a result of his accepted work injuries.

In a May 20, 1997 letter, the Office noted that it had not received a medical report from Dr. Fox since 1974; therefore, appellant needed to submit a comprehensive medical report discussing what residual impairment, if any, he suffered as a result of the September 14, 1965 work injury.

In support of his claim, appellant submitted intermittent treatment notes from Dr. Fox dating from September 1974 to October 18, 1995.

Appellant submitted a February 2, 1981 report by Dr. Phillip Harber, a Board-certified internist, who noted that appellant slipped on ice while working in February 1979. He indicated that appellant injured his right and left shoulder, requiring traction until May 1979 when appellant returned to light duty. Dr. Harber noted physical findings and diagnosed that appellant had “contracture” and limitation of motion to the right elbow, possibly related to disuse after his work injury.

Dr. Fox prepared a series of impairment rating forms provided by the Office. In a September 18, 1997 report, he diagnosed that appellant had 75 percent of the left lower extremity and 75 percent impairment of the right upper extremity. He noted findings with respect to flexion, extension, rotation, elevation and adduction. Dr. Fox also reported that appellant had joint ankylosis at the right elbow.

The Office referred appellant for a second opinion evaluation with Dr. Arthur L. Hughes, a Board-certified neurologist. In a report dated November 5, 1997, Dr. Hughes reported normal physical findings. He discussed appellant’s history of injuries and stated:

“The lumbar strain has resolved. There are certainly at this time age-related changes ([appellant] is now 66 years old) but the original lumbar sprain, which was a soft tissue injury, has long since resolved and there are no residuals. [Appellant] never had ‘cerebral ischemia secondary to an old head injury.’ This is an incorrect diagnosis. In any event, he does not have residuals from this condition. [Appellant] has had occasional seizures over the years, the last occurring about a year ago, and it must be concluded that the potential for seizures still exists and, therefore, [appellant] does experience a residual partial complex seizure disorder secondary to the head injury of 1965.”

Dr. Hughes concluded that the 1970 car accident did not contribute to appellant’s seizures and that appellant had no permanent partial impairment of the upper and lower extremities related to the accepted conditions.

In a December 16, 1997 report, Dr. Fox voiced his disagreement with Dr. Hughes’ report and stated:

“Dr. Hughes has the wrong dates. [Appellant] was initially injured on September 14, 1965. The seizure state dates to September 14, 1965 and is unrelated to the injury in 1970.

“Further it is most difficult to see how Dr. Hughes can state the cerebral ischemia which occurred in 1965 ‘is the wrong diagnosis.’ He should be aware that this occurred 32+ years ago. Unless he was the examining physician at the time he has no basis on which to arrive at that decision.

“No mention is made in Dr. Hughes report of the contractive deformity of the right arm....”

Because the Office determined that a conflict existed in the record between the reports of Drs. Fox and Hughes, appellant was referred for an impartial medical evaluation with Dr. Colin Zadikoff, a Board-certified neurologist. The Office forwarded Dr. Zadikoff a copy of the record and a statement of accepted facts. In a report dated January 13, 1998, Dr. Zadikoff noted physical findings and discussed appellant’s symptoms and course of medical treatment. He diagnosed that appellant suffered from seizure disorder secondary to the 1965 work injury. He opined that appellant had no permanent partial impairment of his upper or lower extremities.

In a decision dated June 11, 1998, the Office credited the report of the impartial medical specialist and denied compensation on the grounds that the evidence failed to establish that appellant sustained any permanent partial impairment due to the accepted work injuries of September 14, 1965 and May 4, 1970.

On June 18, 1998 appellant requested a hearing, which was held on December 11, 1998.

In a decision dated January 22, 1999, an Office hearing representative modified the Office’s June 11, 1998 decision to reflect that there was never a conflict in the record between Drs. Fox and Hughes, and that the opinion of Dr. Zadikoff was equal to that of an Office referral physician. Because he determined that Dr. Fox’s opinion was not reasoned, the Office hearing representative, crediting the opinion of the Office referral physicians, concluded that appellant was not entitled to a schedule award for injuries sustained on September 14, 1965 and May 4, 1970.

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

Section 8107 of the Federal Employees’ Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.² Because the Act did not specify the manner in which the percentage of impairment for a schedule award shall be determined, for consistent results and to ensure equal justice for all claimants, the Board has authorized 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*

² 5 U.S.C. § 8107(a).

Evaluation of Permanent Impairment has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.³

Initially, the Board notes that the Office hearing representative erred in finding that a conflict did not exist in the record between the reports of Dr. Hughes, the Office referral physician and Dr. Fox, appellant's treating physician. Dr. Fox specifically opined that appellant had a 75 percent impairment of the right arm as a result of his September 14, 1965 work injury. Dr. Hughes, on the other hand, found no evidence of any upper extremity impairment. Because a conflict existed in the record, the Office correctly determined that an examination was required by an impartial medical specialist.⁴ The Office, however, did not properly send appellant to an impartial physician. As noted by the Office hearing representative, Dr. Zadikoff's stationary indicates that he and Dr. Hughes are members of the same health care facility. Because Dr. Zadikoff's status as an impartial medical specialist is compromised by his relationship to the Office referral physician, the Board finds that appellant must be sent to a new medical specialist for an impartial medical evaluation and that Dr. Zadikoff's opinion is not entitled to controlling weight as a medical specialist. Furthermore, the Board notes that Dr. Zadikoff did not provide a reasoned opinion as to whether appellant sustained any permanent impairment to his right arm due to his work-related injuries. Dr. Zadikoff merely answered "no" to the question of whether appellant had any permanent partial impairment of the upper or lower extremities without further explanation. He also did not render or mention any physical findings with respect to appellant's arm. Thus, the Board finds that appellant must be referred on remand to a new impartial medical specialist for an evaluation relevant to his request for a schedule award.

Additionally, on remand, the Office should combine any of appellant's prior claims relevant to the status of his right arm to the instant claim for proper consideration of appellant's claim for a schedule award. Since appellant is not entitled to a schedule award related to his seizure disorder⁵ and he has already received a schedule award for his left lower extremity, those issues need not be addressed on remand. After further medical development as deemed appropriate by the Office, the Office shall issue a *de novo* decision on appellant's entitlement to a schedule award for permanent impairment of his right upper extremity causally related to his accepted work injuries.

The decision of the Office of Workers' Compensation Programs dated January 22, 1999 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
September 27, 2000

³ 20 C.F.R. § 10.333 (1999); *see James Kennedy, Jr.*, 40 ECAB 620 (1989); *Quincy E. Malone*, 31 ECAB 846 (1980).

⁴ Where 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; *see* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321(b) (1999); *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

⁵ Compensation is only provided for specified periods of time for the permanent loss or loss of use of certain members, organs and functions of the body set forth at 5 U.S.C. § 8107 and 20 C.F.R. § 10.404(a) (1999). The brain is not a scheduled member as set forth in those sections.

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member