U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES MCLEOD and DEPARTMENT OF THE NAVY, NAVAL UNDERSEA WARFARE CENTER DIVISION Keyport, WA

Docket No. 03-1904; Submitted on the Record;
Issued December 30, 2003

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant has more than a six percent permanent impairment of his left upper extremity, for which he received a schedule award.

On May 5, 1999 appellant then a 55-year-old pipe fitter, filed an occupational disease claim alleging that on August 15, 1998 he realized that his left elbow lateral epicondylitis and left cubital tunnel syndrome were caused by factors of his employment.[1] By letter dated June 3, 1999, the Office accepted his claim for lateral epicondylitis, distal tendinitis and cubital tunnel syndrome.

On February 2, 2000 appellant filed a claim for a schedule award. He submitted a February 22, 2000 report from Dr. Michael S. McManus, his treating physician and Board-certified in preventive medicine. Dr. McManus indicated that appellant had a six percent permanent impairment of the left upper extremity. On March 24, 2000 an Office medical adviser reviewed Dr. McManus' report and agreed with his finding that appellant had a six percent permanent impairment of the left upper extremity.

By decision dated May 4, 2000, the Office granted appellant a schedule award for a six percent permanent impairment of the left upper extremity.

On May 25, 2001 appellant filed a claim for an additional schedule award accompanied by a May 19, 2000 report of Dr. McManus who stated that appellant had a 24 percent permanent impairment of the left upper extremity. On June 8, 2001 an Office medical consultant,

[1] Prior to the instant claim, appellant filed an occupational disease claim on September 29, 1998 alleging that on April 15, 1995 he realized that his carpal tunnel syndrome was caused by factors of his employment. By letter dated March 2, 1999, the Office of Workers' Compensation Programs accepted his claim for left carpal tunnel syndrome. On July 21, 1999 appellant filed a traumatic injury claim alleging that on June 22, 1999 he twisted his left thumb while lifting and relocating pallets. The Office accepted his claim for left trigger thumb by letter dated October 15, 1999.

Dr. Richard G. McCollum, reviewed Dr. McManus' report. Dr. McCollum noted discrepancies in sensory impairment ratings between the reports and recommended that appellant undergo an independent medical examination.

Upon reviewing the Office medical adviser's report, the Office found a conflict in the medical opinion evidence and referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Alfred Blue, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Blue submitted a January 2, 2002 report finding that the previous rating of six percent was appropriate.

By decision dated February 12, 2002, the Office found the evidence of record insufficient to establish that appellant had more than six percent permanent impairment of his left upper extremity, for which he received a schedule award. In a February 27, 2002 letter, appellant, through his attorney, requested an oral hearing before an Office hearing representative.

In a February 10, 2003 decision, the hearing representative noted that there was no conflict of medical opinion created in the case, and determined that Dr. Blue was a second opinion physician. The hearing representative further found that a conflict existed between Dr. Blue, who determined that appellant had a 6 percent permanent impairment of the left upper extremity, and Dr. McManus, who determined that appellant had a 24 percent permanent impairment. The hearing representative set aside the Office's February 12, 2002 decision and remanded the case to refer appellant for an impartial medical examination.

On remand, the Office referred appellant, together with a statement of accepted facts, a list of specific questions and medical records, to Dr. William T. Thieme, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated April 8, 2003. Dr. Thieme submitted an April 24, 2003 report finding that appellant did not have any ratable impairment of the left upper extremity.

In a June 26, 2003 decision, the Office found that appellant had no more than a six percent permanent impairment for his left upper extremity, for which he received a schedule award.

The Board finds that appellant has no more than a six percent permanent impairment of his left upper extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to insure

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

equal justice under the law to 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 seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[5]

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."[6]

In this case, Dr. McManus, appellant's treating physician, determined that appellant had a 24 percent permanent impairment of the left upper extremity while Dr. Blue, an Office referral physician, determined that appellant had a 6 percent impairment of the left upper extremity. As a conflict existed in the medical opinion evidence between Dr. McManus and Dr. Blue, the Office properly referred appellant to Dr. Thieme for an impartial medical examination.[7]

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[8]

Dr. Thieme submitted an April 24, 2003 report providing a history of appellant's accepted employment injuries and the course of medical treatment. Dr. Thieme noted his findings on physical examination and diagnosed status post left carpal tunnel release for work-related carpal tunnel syndrome, status post release for work-related left trigger thumb, status post lateral epicondylitis of the left elbow, a history of work-related distal biceps tendinitis without current signs of that condition, mild work-related cubital tunnel syndrome with positive Tinel's at the left elbow without evidence of ulnar nerve neuropathy or intrinsic muscle dysfunction and nonanatomic numbness of the left hand. Dr. Thieme found no loss of range of motion of the left elbow and wrist. He opined that appellant had no ratable impairment for residuals of the left trigger thumb and no ratable residuals of his work-related left carpal tunnel syndrome, left elbow distal bicipital tendinitis, lateral epicondylitis or medial cubital tunnel syndrome. Dr. Thieme concluded that there was no ratable impairment of the left upper extremity as the joints had normal ranges of motion, normal strength and bulk and that there was no objective evidence of any sensory neuropathy.

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[5] *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

[6] 5 U.S.C. § 8123(a).

[7] The Board notes that the Office hearing representative, in his February 10, 2003 decision, properly determined that Dr. Blue was not an impartial medical examiner, but rather a second opinion physician because there was no conflict in the medical opinion evidence between Dr. McManus, appellant's treating physician, and Dr. McCollum, the Office medical consultant. Dr. McCollum merely noted the discrepancies with Dr. McManus' prior and recent impairment ratings and recommended an independent medical examination. *See* 5 U.S.C. § 8123; *Harold Burkes*, 42 ECAB 199, 201-04 (1990).

[8] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

The Board finds that Dr. Thieme's opinion is based on a proper factual and medical background and is sufficiently well reasoned to be accorded special weight in resolving the conflict on the extent of appellant's permanent impairment. The Office properly determined that appellant has no more than a six percent permanent impairment of the left upper extremity, for which he has already received a schedule award.

The June 26 and February 10, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
December 30, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member