U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JILL A. BEMIS and U.S. POSTAL SERVICE, SOUTHEASTERN POSTAL & DISTRIBUTION FACILITY, Southeastern, PA

Docket No. 02-117; Submitted on the Record;
Issued January 2, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained greater than a 10 percent permanent impairment of the right upper extremity, for which she received a schedule award.

The Office of Workers' Compensation Programs accepted that on July 28, 1997 appellant, then a 34-year-old distribution clerk, sustained bicipital tendinitis of the right shoulder and a right rotator cuff tear requiring surgery on February 19, 1999, due to repetitive heavy lifting, pulling and pushing in the performance of duty. Appellant was off work from July 29 to August 3, 1997 and returned to full-time light-duty work August 4, 1997. She resumed full-time full duty on approximately June 16, 1998, but sustained a recurrence of disability commencing August 20, 1998 and was restricted to limited duty beginning in September 1998. Appellant was off work again beginning February 18, 1999, underwent surgery on February 19, 1999 and returned to full-time limited duty on July 20, 1999.

On October 13, 2000 appellant claimed a schedule award for permanent impairment of the right upper extremity. She submitted medical evidence in support of her claim.

In a January 15, 1999 report, Dr. Matthew B. Naegle, an attending Board-certified internist specializing in rheumatology who treated appellant beginning in 1997, noted that appellant's right bicipital tendinitis required surgical remediation to repair the tear in the right rotator cuff visible on September 1998 magnetic resonance imaging (MRI) scan.[1]

Appellant also submitted reports from Dr. John J. Pell, an attending Board-certified orthopedic surgeon, beginning in November 1998. Dr. Pell opined in a November 4, 1998 report that appellant's persistent right shoulder pain, unrelieved by corticosteroid injections, required surgical repair. In a February 19, 1999 surgical report, he noted performing "[a]rthroscopy,

[1] A September 8, 1998 MRI scan of the right shoulder showed a "[p]artial thickness tear of the supraspinatus tendon near its insertion."

acromioplasty, right shoulder" to repair "rotator cuff impingement syndrome, right shoulder," with bicipital tendinitis. Dr. Pell found that the "rotator cuff tendon" was "intact," as was the anterior glenoid labrum. He released appellant to limited duty as of June 23, 1999, with no reaching or reaching above the shoulder, lifting up to five pounds, no repetitive lifting and no lifting the right arm higher than chest level. Dr. Pell submitted reports through May 2000 noting continued right shoulder pain attributable to a bursa or tendon disorder, and renewing appellant's work restrictions.

In a July 26, 1999 report, Dr. Gerald R. Williams, an attending Board-certified orthopedic surgeon, provided a history of injury, treatment and surgery. On examination, Dr. Williams found objective signs of rotator cuff impingement. He noted that preoperative MRI scans showed "a partial thickness tear of the tendon but it is *intra* substance and therefore, probably not visualized from either the superficial or deep surface." Dr. Williams also found "some prominence of the anterior acromion," "significant degenerative signal" in the biceps anchor and the suggestion of a "SLAP" (superior glenoid labrum) lesion. Dr. Williams diagnosed rotator cuff tendinitis without labral pathology.

On December 17, 1999 the Office referred appellant, the medical record and statement of accepted facts to Dr. Steven J. Valentino, an osteopath and orthopedic surgeon, to obtain a second opinion regarding the precise diagnosis of appellant's condition and the extent of any work-related disability. In a January 11, 2000 report, Dr. Valentino found a 20-degree loss of right shoulder abduction "secondary to pain," and tenderness in the bicipital tendon on the right with a positive Speed's sign. Dr. Valentino diagnosed a "resolved right rotator cuff tear with bicipital tendinitis of the right shoulder." He opined that appellant had reached maximum medical improvement and prescribed permanent work restrictions of no lifting above the shoulder with the right arm and pulling, pushing and lifting limited to 20 pounds.[2]

In an August 1, 2000 report, Dr. David Weiss, an attending osteopath and Board-certified orthopedist, family practitioner and specialist in pain management, provided a history of injury and treatment, finding that appellant had reached maximum medical improvement as of July 22, 2000. Dr. Weiss related appellant's complaints of right shoulder pain and stiffness interfering with activities of daily living, including household chores and styling her hair. Using the Visual Analogue Scale, appellant classified her right shoulder pain as 7/10. On examination of the right shoulder, Dr. Weiss found a positive impingement sign, a 10-degree loss of abduction, a positive O'Brien's test. He found no evidence of neurologic injury or atrophy in the right upper extremity. Dr. Weiss diagnosed "[c]umulative and repetitive trauma disorder," "[i]mpingement syndrome to the right shoulder," and "[s]tatus post arthroscopic surgery with

[2] In a January 26, 2000 letter, appellant, through her authorized attorney representative, objected to the selection of Dr. Valentino as a second opinion examiner, as he performed fitness-for-duty examinations for the employing establishment. She submitted copies of correspondence from the employing establishment referring other employees to Dr. Valentino for fitness-for-duty examinations. In a June 15, 2000 report, Dr. John Nolan, a Board-certified orthopedic surgeon performing a fitness-for-duty examination for the employing establishment, noted a "slight decrease in internal rotation and abduction" of the right shoulder. Dr. Nolan opined that appellant had a four percent permanent impairment of the right upper extremity according to an unspecified table of the A.M.A., *Guides* and advised permanent work restrictions against continuous lifting or repetitive reaching with the right arm.

acromioplasty to the right shoulder." Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Weiss found Table 27, page 61, entitled "Impairment of the Upper Extremity After Arthroplasty of Specific Bones or Joints," a simple resection arthroplasty of the shoulder equaled a 24 percent permanent impairment of the right upper extremity.

In a November 14, 2000 report, an Office medical adviser noted reviewing Dr. Weiss' August 1, 2000 report and stated that he disagreed with Dr. Weiss' assessment. The Office medical adviser opined that, according to Table 27, page 61 of the A.M.A., *Guides*, "resection arthroplasty of the distal clavicle (the AC [acromioclavicular] joint)" equaled a 10 percent impairment of the right upper extremity, as the 24 percent impairment rating was "reserved for the total shoulder which includes [the] glenohumeral joint." The Office medical adviser concluded that appellant had a 10 percent impairment of the right upper extremity and not the 24 percent impairment found by Dr. Weiss. He agreed that appellant had reached maximum medical improvement as of July 22, 2000.

By decision dated November 21, 2000, the Office awarded appellant a schedule award for a 10 percent permanent impairment of the right upper extremity. The award, equal to 31.20 weeks of compensation, ran from July 22, 2000 to February 25, 2001.

Appellant disagreed with this decision and in a November 30, 2000 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held April 24, 2001. At the hearing, appellant's representative asserted that there was a conflict of opinion between the Office medical adviser and Dr. Weiss regarding the percentage of permanent impairment that required resolution by an impartial medical specialist.[3]

By decision dated July 13, 2001 and finalized July 17, 2001, an Office hearing representative affirmed the November 21, 2000 decision. The hearing representative found that the Office medical adviser properly appraised appellant's impairment using the A.M.A., *Guides*, whereas Dr. Weiss did not apply the appropriate criteria. The hearing representative therefore found that the Office medical adviser's opinion was entitled to the weight of the medical evidence.[4]

The Board finds that the case is not in posture for a decision due to an outstanding conflict of medical opinion evidence.

The schedule award provisions of the Federal Employees' Compensation Act and its implementing regulations[5] set forth the number of weeks of compensation to be paid for

[3] The record contains a January 17, 2001 decision approving the attorney's fee requested by appellant's authorized representative. Appellant does not appeal this decision.

[4] By decision dated August 16, 2001, the Office found that the limited-duty mail processor position fairly and reasonably represented appellant's wage-earning capacity. As appellant did not specifically appeal this decision to the Board, the August 16, 2001 decision is not before the Board on the present appeal.

[5] 20 C.F.R. § 10.404.

permanent loss or loss of use of the members of the body listed in the schedule.[6] As the Act does not specify how the percentage of loss shall be determined, the method used rests in the Office's discretion.[7] To ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, fourth edition, (1993), as a uniform, appropriate standard for evaluating schedule losses.[8] The Board has concurred with the adoption of the A.M.A., *Guides*.

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[9] Other factors, such as pain, atrophy and weakness, are also considered.

A critical issue in determining the percentage of permanent impairment in this case is the type of surgical procedure appellant underwent on February 19, 1999. In his surgical report, Dr. Pell, an attending Board-certified orthopedic surgeon, stated that he performed "[a]rthroscopy, acromioplasty, right shoulder," to repair "rotator cuff impingement syndrome" with bicipital tendinitis. Dr. Pell found that the rotator cuff tendon and anterior glenoid labrum were intact.

In support of her schedule award claim, appellant submitted an August 1, 2000 report from Dr. Weiss, an attending osteopath and Board-certified orthopedist, family practitioner and specialist in pain management. Dr. Weiss found that, according to the A.M.A., *Guides*, Table 27, page 61, the procedure Dr. Pell performed resulted in a 24 percent permanent impairment of the right upper extremity, as it constituted a simple resection arthroplasty of the right shoulder.

In determining that appellant had no greater than a 10 percent permanent impairment of the right upper extremity, the Office relied on the November 14, 2000 report of an Office medical adviser. The medical adviser reviewed Dr. Weiss' August 1, 2000 report, and contended that appellant had not undergone the type of resection arthroplasty contemplated by the A.M.A., *Guides* in assigning a 24 percent impairment to that procedure. The Office medical adviser found that appellant underwent a "resection arthroplasty of the distal clavicle" at the AC joint, equaling a 10 percent impairment of the upper extremity according to Table 27, page 61. The Office medical adviser explained that the simple resection arthroplasty procedure to which the A.M.A., *Guides* assigned a 24 percent impairment rating involved "the total shoulder," including the glenohumeral joint.

However, the Board finds that the Office medical adviser did not specify what criteria of the A.M.A., *Guides* defined "the total shoulder." The Office medical adviser did not explain

[6] 5 U.S.C. §§ 8107-8109.

[7] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[8] FECA Bulletin No. 89-30 (issued September 28, 1990).

[9] *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

why Dr. Weiss' interpretation of Dr. Pell's operative report was incorrect according to the A.M.A., *Guides* or why the procedure Dr. Pell performed was not a "total shoulder" procedure. Therefore, the Board finds that there is insufficient medical evidence to support that Dr. Weiss applied inappropriate criteria in assessing the percentage of appellant's permanent impairment. The Office medical adviser did not provide rationale referring to the criteria of the A.M.A., *Guides* explaining his opinion that appellant did not undergo the type of surgical resection necessary to qualify for the 24 percent impairment rating he assigned.

Thus, there is an outstanding conflict of medical opinion between Dr. Weiss, for appellant, and the Office medical adviser, for the government. 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."[10] 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.[11]

Therefore, the case must be remanded to the Office for further development to resolve the conflict of medical opinion. On remand of the case, the Office shall prepare a complete, detailed statement of accepted facts. The Office shall then refer this statement, appellant and the complete medical record to an appropriate Board-certified specialist or specialists, to obtain a rationalized medical opinion regarding the percentage of any work-related impairment of the right upper extremity according to the A.M.A., *Guides*. Following this and any other development the Office deems necessary, the Office shall issue an appropriate decision in the case.

[10] 5 U.S.C. § 8123.

[11] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

The decisions of the Office of Workers' Compensation Programs dated July 13, 2001 and finalized July 17, 2001 and dated November 21, 2000 are hereby set aside and the case remanded for further development consistent with this decision and order.

Dated, Washington, DC
January 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member