United States Department of Labor
Employees' Compensation Appeals Board

N.G., Appellant	)	
and	)	**Docket No. 06-853**
	)	**Issued: October 26, 2006**
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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 27, 2006 appellant filed a timely appeal from a November 30, 2005 merit decision of the Office of Workers' Compensation Programs which granted a schedule award for her left upper extremity and a nonmerit decision dated February 14, 2006 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both schedule award and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has more than a five percent impairment of her left upper extremity; and (2) whether the Office properly denied her request for a further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

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 that her left arm

condition was due to her employment duties.[1] The Office accepted the claim for left wrist tendinitis.

In a report dated August 1, 1996, Dr. C. Rene Arredondo, a Board-certified orthopedic surgeon, noted that appellant had been treated for reflex sympathetic dystrophy, de Quervain's syndrome and carpal tunnel syndrome. He reported that a bone scan showed that appellant had increased activity in the left wrist. A physical examination of the left wrist revealed "tenderness over first extensor tendon compartment, some coldness of the fingertips of the left hand, positive Tinel's test" and pinch strength and grip weakness. Dr. Arredondo referred appellant to another physician. He diagnosed upper extremity chronic pain syndrome, bilateral reflex sympathetic dystrophy and de Quervain's stenosing tenosynovitis right and left upper extremities. On July 25, 1996 the Office granted appellant's request to change her treating physician to Dr. Arredondo.

On December 30, 1996 appellant filed a claim for a schedule award.

In a May 27, 1997 attending physician's report, Dr. Leah D. Eberley, a treating Board-certified internist, diagnosed reflex sympathetic dystrophy, left de Quervain's syndrome and bilateral carpal tunnel syndrome. She checked "yes" to the form question regarding whether the condition was caused or aggravated by appellant's employment.

In a March 26, 2001 report, Dr. Eberley stated that she has treated appellant since November 29, 1994 for a variety of illnesses including irritable bowl syndrome, depression, left hand reflex sympathetic dystrophy, migraines, headaches and "orthostatic hypotension, thought to be associated with reflex sympathetic dystrophy (RSD)."

On May 3, 2002 the Office granted appellant's request to change her treating physician to Dr. Eberley.

In a June 18, 2002 report, Dr. Eberley diagnosed reflex sympathetic dystrophy.

In a report dated June 19, 2002, Dr. Michael J. Mrochek, a Board-certified physiatrist, diagnosed de Quervain's syndrome and RSD.[2] A review of the medical records supported the diagnosis RSD and x-ray interpretations of the hands "showed no signs of arthritis or significant abnormalities in the bones." Dr. Mrochek reported essentially normal upper extremity shoulder motion with negative Tinel's at the elbow and wrist. He also reported a positive Finkelstein's test and some tenderness over the left wrist first extensor compartment. Dr. Morchek opined that appellant had reached maximum medical improvement and had a five percent impairment of the left upper extremity.

In a report dated October 15, 2003, Dr. Randy J. Pollet, a second opinion Board-certified orthopedic surgeon, noted that appellant's accepted left wrist tendinitis had resolved and that she had no permanent impairment. A physical examination revealed no evidence of carpal tunnel

[1] Appellant retired on disability effective August 5, 1995.

[2] Dr. Eberley referred appellant to Dr. Mrochek.

syndrome, de Quervain's disease or RSD. Dr. Pollet reported that appellant had full range of motion in both upper extremities and in her wrist areas. In concluding, he opined that she had no work-related conditions.

By decision dated January 13, 2005, the Office denied appellant's schedule award claim.[3]

Appellant requested a review of the written record which was postmarked January 20, 2005.

In a decision dated June 24, 2005, the Office hearing representative vacated the January 13, 2005 decision finding a conflict in the medical opinion evidence. He noted that the record contained evidence from various treating physicians who "have supplied objective test results supporting appellant having RSD causally related to factors of her federal employment." The hearing representative instructed the Office to refer appellant to an impartial medical specialist to determine whether she had an employment-related left upper extremity condition and the extent of any permanent impairment.

On September 8, 2005 the Office referred appellant to Dr. Arredondo to resolve the conflict in the medical opinion evidence between Dr. Pollet and Dr. Eberley.

In a report dated September 20, 2005, Dr. Arredondo diagnosed left wrist strain/sprain and history of RSD, which he noted was not an accepted condition. A physical examination revealed negative Phalen's and Tinel's test and "no swelling, no tenderness, no changes in temperature and no specific findings compatible with median nerve compression." Range of motion revealed 40 degrees flexion for a 3 percent impairment, 60 degrees extension for a 0 percent impairment and 10 degrees radial deviation for a 2 percent impairment. Dr. Arredondo concluded that appellant had a five percent impairment of the left upper extremity and referenced pages 467, 468 and 469 from the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

In a report dated October 28, 2005, the Office medical adviser reviewed Dr. Arredondo's report and agreed that appellant had a five percent impairment of her left upper extremity. He concurred with Dr. Arredondo that appellant had a three percent impairment for loss of left wrist flexion (Figure 16-28, page 467) and a two percent impairment for loss of left wrist radial deviation (Figure 16-31, page 469). Adding the range of motion impairments resulted in a five percent impairment to appellant's left upper extremity.

On November 30, 2005 the Office issued a schedule award for a five percent impairment of the left upper extremity. The award was for a total of 15.6 weeks, to run from September 20 to October 29, 2005.

[3] The Board notes that appellant filed an occupational disease claim on January 24, 2005 alleging that on February 7, 1995 she first realized her bilateral carpal tunnel syndrome, de Quervain's syndrome and RSD were employment related. The record does not contain a final decision regarding this claim. Therefore, the Board does not have jurisdiction over the merits of the claim. *See* 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

In a letter dated December 20, 2005, appellant requested reconsideration and submitted a December 8, 2005 report by Dr. Angelo Romagosa, a treating Board-certified physiatrist. She informed the Office that Dr. Arredondo had seen her in 1996.

By decision dated February 14, 2006, the Office denied appellant's request for reconsideration.[4]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] sets 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.[7]

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.[8] 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.[9] In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion.[10]

ANALYSIS

In the instant case the Office accepted the claim for left wrist tendinitis. Appellant filed a claim for a schedule award on December 30, 1996.

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[4] The Board notes the record contains evidence regarding other claimants.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

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

[8] 5 U.S.C. § 8123(a).

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

[10] *Nancy Keenan*, 56 ECAB ___ (Docket No. 05-949, issued August 18, 2005); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

The Office found a conflict between Dr. Pollet and appellant's attending physician, Dr. Eberley, regarding whether appellant had an employment-related left upper extremity condition and whether there was any permanent impairment. It referred the case to Dr. Arredondo

The Board finds that a conflict in the medical opinion existed between Dr. Mrochek, an examining physician, and Dr. Pollet, regarding whether appellant had an RSD to her left upper extremity condition and whether there was any permanent impairment. While Dr. Eberley diagnosed RSD, she provided no opinion as to whether appellant had an impairment of her left upper extremity or provided an impairment rating. Thus, her opinion was insufficient to create a conflict in medical opinion with Dr. Pollet. Dr. Mrocheck diagnosed de Quervain's syndrome and RSD and concluded that appellant had a five percent impairment of the left upper extremity. He reported essentially normal upper extremity shoulder motion with negative Tinel's at the elbow and wrist and a positive Finkelstein's test and some tenderness over the left wrist first extensor compartment. Dr. Pollet opined that appellant's accepted left wrist tendinitis had resolved and that she had no permanent impairment. He reported that a physical examination revealed no evidence of carpal tunnel syndrome, de Quervain's disease or RSD and full range of motion in both upper extremities and in her wrist areas. Thus, the conflict in the medical opinion evidence was between Dr. Mrcocheck and Dr. Pollet. With regard to the opinion of Dr. Arredondo, the Board notes ordinarily his opinion would be accorded special weight in resolving the outstanding conflict. However, the record contains evidence that Dr. Arredondo previously treated appellant in 1996. There is a July 25, 1996 letter from the Office approving appellant's request to change her treating physician to Dr. Arredondo.

It is well established that a physician previously connected with the claim or the claimant may not serve as a referee medical examiner.[11] In *Beverly Wetzel*,[12] the Board found that a physician who had made the original interpretation of the claimant's electrocardiogram following the claimant's collapse and hospitalization and whose associates had interpreted subsequent cardiograms, could not serve as a referee medical examiner within the meaning of 5 U.S.C. § 8123(a). The Office's procedure manual, citing Board precedent, states that physicians who may not be used as referees include "physicians previously connected with the claim or the claimant or physicians in partnership with those already so connected."[13] The Board finds that Dr. Arredondo may not serve as the referee medical specialist in this case and the Office must select an appropriate physician to fill the role.

The Board finds that the conflict in medical opinion remains unresolved as Dr. Arredondo was not properly selected as the impartial medical specialist due to his previous connections to the case. To resolve this conflict, the Office should refer appellant, a statement of accepted facts and the case record, to an appropriate medical specialist for a reasoned medical

[11] *Ronald Santos*, 53 ECAB 742 (2002) (The importance of safeguarding the independence of impartial medical specialists is recognized in Office procedures, which provide that, physicians previously connected with the claim or the claimant or physicians in partnership with those already so connected, may not be used as impartial medical specialists).

[12] 26 ECAB 181, 184 (1974).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(3) (May 2003).

opinion on the question of whether she has RSD of the left upper extremity causally related to her federal employment and whether the condition caused any permanent impairment. Following this and all other development deemed necessary, the Office shall issue a *de novo* decision in the case.[14]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 14, 2006 and November 30, 2005 are set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: October 26, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[14] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration is moot.