United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 07-1880**
	)	**Issued: January 29, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2007 appellant, through her attorney, filed a timely appeal from a June 14, 2007 merit decision of the Office of Workers' Compensation Programs denying her claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 23 percent permanent impairment of the right upper extremity and a 6 percent permanent impairment of the left upper extremity.

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board set aside an August 22, 2001 decision denying appellant's request for reconsideration on the grounds that it was untimely and did not show clear evidence of error.[1] The Board determined that appellant

[1] Docket No. 02-273 (issued February 27, 2003).

filed a timely request for reconsideration and remanded the case for the Office to apply the appropriate legal standard to her request. The Board also affirmed a May 1, 2001 decision finding that appellant did not establish an employment-related recurrence of disability on December 8, 2000.[2] On the second appeal, the Board set aside a February 22, 2006 decision finding that she had no more than a 23 percent right upper extremity impairment and a 6 percent left upper extremity impairment.[3] The Board noted that the record did not contain a medical report with complete clinical findings and remanded the case for the Office to refer appellant for a second opinion examination. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

The Office referred appellant to Dr. Alexander L. Lambert, II, a Board-certified orthopedic surgeon, for an impairment evaluation. In a report dated February 13, 2007, he discussed appellant's medical history and listed findings on physical examination. On examination of the shoulders, Dr. Lambert found flexion to 170 degrees, abduction to 160 degrees, internal rotation to 70 degrees and full external rotation. He listed strength on abduction of the right shoulder as 4/5 and found a "positive 90-degrees flexion and internal rotation test" on the left shoulder with tenderness of the AC joint and subacomial bursa area to palpation. Dr. Lambert found that appellant had full flexion, extension and pronation of the elbows, full supination on the left and a loss of 10 degrees supination on the right. Appellant experienced pain with palpation of the lateral elbow area. Dr. Lambert found full range of motion of the wrists and digits. He diagnosed a history of bilateral carpal tunnel syndrome, bilateral elbow epicondylitis, currently mild and without impingement, a history of right shoulder impingement syndrome and status post right rotator cuff repair, bilateral AC degenerative joint disease and a history of fibromyalgia. Dr. Lambert stated:

> "I found [appellant's] cogwheel input for motor testing to be a very difficult manner of assessing her impairment, and chose to use the range of motion as provided in [C]hapter 16 to help develop a possible impairment rating. I felt that with the carpal tunnel syndrome, right more than left, but with normal two-point sensory exam[ination] and no atrophy, I felt that this was not as severe and could not rate at a maximum of five percent and felt that her carpal tunnel syndrome on the right was a four percent and the carpal tunnel syndrome on the left was a two percent. [She] had only a four percent upper extremity impairment due to loss of range of motion on the right, and a three percent impairment on the left. The AC joint DJD [degenerative joint disease] arthritis, which may require resection and arthroplasty, was felt to be a 10 percent for the right, also due to the rotator cuff surgery that [appellant] has had, and only 5 percent on the left. I felt this gave

[2] The Office accepted that appellant sustained bilateral epicondylitis, fibromyalgia, bilateral carpal tunnel syndrome, acromioclavicular (AC) joint arthritis, rotator cuff tendinosis and right shoulder impingement due to factors of her federal employment. By decision dated March 6, 1995, the Office granted her a schedule award for an 11 percent permanent impairment of the right arm and a 6 percent permanent impairment of the left arm. In a March 7, 2000 decision, the Office granted appellant a schedule award for a 12 percent right upper extremity impairment. She underwent a subacromial decompression of the right shoulder on June 30, 1998. The record indicates that in December 2004 appellant underwent an open rotator cuff repair of the right shoulder.

[3] Docket No. 06-879 (issued October 17, 2006).

[her] a 10 percent upper extremity impairment rating on the left and only an 18 percent upper extremity impairment rating on the right."

Dr. Lambert rated appellant's fibromyalgia according to Chapter 18 of the A.M.A., *Guides* and concluded that she had no ratable impairment due to pain from fibromyalgia.

On March 20, 2007 an Office medical adviser reviewed Dr. Lambert's impairment evaluation. He concurred with the physician's finding of a four percent impairment of the right upper extremity and two percent impairment of the left upper extremity "for residuals of carpal tunnel syndrome." The Office medical adviser further concurred with Dr. Lambert's finding of a five percent impairment of the left upper extremity for rotator cuff surgery but disagreed that appellant had a 10 percent impairment for degenerative arthritis of the acromioclavicular joint. He explained that he could not ascertain the basis for this rating under the A.M.A., *Guides*. The Office medical adviser found that the other impairment ratings by Dr. Lambert were consistent with the A.M.A., *Guides*.

By decision dated June 14, 2007, the Office denied appellant's claim for an additional schedule award. The Office noted that she previously received an award for a 6 percent left upper extremity impairment and a 23 percent right upper extremity impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[4] and its implementing federal regulations,[5] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[7]

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[8] While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] 20 C.F.R. § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] *Vanessa Young*, 55 ECAB 575 (2004).

justice is done.[9] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[10]

ANALYSIS

On prior appeal, the Board remanded the case for the Office to obtain another second opinion examination on the issue of the extent of appellant's upper extremity impairment. In a report dated February 13, 2007, Dr. Lambert found that appellant had a 10 percent impairment due to her rotator cuff repair on the right side.[11] He measured range of motion findings for the shoulders as 170 degrees flexion, 160 degrees abduction, full external rotation and 70 degrees internal rotation.[12] Dr. Lambert concluded that appellant had a three percent impairment due to loss of range of motion of the shoulders bilaterally. He further found that she had full range of motion of the elbows except for 10 degrees of supination on the right, for an additional one percent impairment.[13] The Office medical adviser concurred with Dr. Lambert's finding regarding the extent of appellant's impairment due to loss of range of motion. His report, however, does not contain range of motion findings for shoulder adduction and extension. Further, while Dr. Lambert found full range of motion for the elbows and on shoulder external rotation, he did not provide the actual measurements. Consequently, his report contains insufficient clinical findings regarding appellant's range of motion.[14]

Additionally, Dr. Lambert and the Office medical adviser appear to have applied the provisions on page 495 of the A.M.A., *Guides* relevant to carpal tunnel syndrome in finding that appellant had a four percent impairment due to carpal tunnel syndrome on the right and a two percent impairment due to carpal tunnel syndrome on the left. The three scenarios for rating an impairment due to carpal tunnel syndrome on page 495, however, apply only when a claimant has had surgical decompression. It does not appear from the record that appellant underwent carpal tunnel releases on either the right or left side. Consequently, Dr. Lambert's impairment finding for carpal tunnel syndrome is not in accordance with the A.M.A., *Guides*.

Dr. Lambert provided appellant with a 10 percent impairment due to arthritis of the AC joint; however, he did not reference the provisions of the A.M.A., *Guides* in reaching this determination. As noted by the Office medical adviser, the A.M.A., *Guides* make no provision for an impairment of the AC joint due to arthritis.

[9] *Richard E. Simpson*, 55 ECAB 490 (2004).

[10] *Melvin James*, 55 ECAB 406 (2004).

[11] A.M.A., *Guides* 506, Table 16-27.

[12] *Id.* at 476, 477, 479, Figures 16-40, 16-43, 16-46.

[13] *Id.* at 472, Figure 16-34. The Office medical adviser found that Dr. Lambert provided appellant a five percent impairment due to her rotator cuff surgery on the left side.

[14] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[15] While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[16] Dr. Lambert and the Office medical adviser did not provide an impairment rating that conforms to the provisions of the A.M.A., *Guides*. The case is not in posture for decision. Consequently, the case will be remanded to the Office for further development to determine the extent of appellant's permanent impairment of the upper extremities. Following such further development as deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 14, 2007 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 29, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[15] *See Vanessa Young*, *supra* note 8.

[16] *Melvin James*, *supra* note 10.