United States Department of Labor
Employees' Compensation Appeals Board

A.T., Appellant	)	
and	)	**Docket No. 09-518**
	)	**Issued: November 9, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Palantine, IL, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 15, 2008 appellant filed a timely appeal of merit decisions of the Office of Workers' Compensation Programs dated October 21 and December 4, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has established that he has impairment to his right upper extremity of greater than 44 percent, for which he already received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on appeal.[1] By decision dated June 24, 2008, the Board found a conflict in medical opinion between Dr. Jacob Salomon, appellant's Board-certified orthopedic surgeon, who opined that appellant had a 54 percent impairment of the right upper extremity, and Dr. Edward S. Forman, an osteopath and the second opinion

[1] Docket No. 07-885 (issued June 24, 2008).

physician, who found that appellant had a 33 percent impairment of the right upper extremity. Accordingly, the Board remanded the case for the Office to refer appellant to an impartial medical examiner for resolution of the conflict.[2] The facts and the history of the case are incorporated by reference.[3]

Pursuant to the Board's instructions, by letter dated September 25, 2008, the Office referred appellant to Dr. Charles Mercier, a Board-certified orthopedic surgeon, in order to resolve the conflict between Drs. Salomon and Forman regarding the percentage of impairment to appellant's right upper extremity.[4] In an opinion dated October 9, 2008, Dr. Mercier diagnosed appellant with status "post carpal tunnel release and right shoulder surgery with impingement -- healed." After discussing appellant's medical records and conducting a physical examination, Dr. Mercier noted that appellant "demonstrated subjective decreased range of motion of the right shoulder is nonanatomical and cannot be used to determine permanent partial impairment." He noted that appellant did not lose any range of motion of the right shoulder as a result of his right shoulder surgery or injury. Dr. Mercier noted that, based on the records of appellant's treating chiropractor, Dr. Morgenstern, there was no evidence of suprascapular nerve impingement, and that therefore appellant had no permanent partial impairment related to loss of range of motion, sensory loss or muscle atrophy in the right upper extremity. He also noted no evidence of peri-shoulder muscle atrophy, neurological changes, instability, impingement or rotator cuff disease. Although Dr. Mercier did note an area of anesthesia in the right thumb, he noted that appellant maintained good sweating. He noted that this would indicate that the subjective anesthesia in the right thumb is bogus as one cannot sweat without normal sensory function. Dr. Mercier stated that appellant's prior disability rating was based in large part on appellant's subjective responses to testing and noted that there was evidence from his examination that appellant "was willing to falsify his physical exam[ination] findings putting into serious doubt the reliability of his subjective complaints." He concluded, "Based on the factors of loss of range of motion, neurological loss or muscle atrophy, pain, or any [reflex sympathetic dystrophy]-like syndrome, [appellant] has no reliable objective evidence of partial permanent impairment of the right upper extremity."

[2] *Id.*

[3] On July 30, 2002 appellant, then a 42-year-old flat sorting machine clerk, filed an occupational disease claim alleging that he sustained an injury to his right shoulder due to loading mail and lifting and pulling all-purpose containers, hampers and Tub-packs as part of his federal employment. The Office accepted her claim for right shoulder tendinitis, joint impingement and carpal tunnel syndrome and paid appropriate compensation and medical benefits. On January 8, 2004 the Office issued a schedule award in this case for 41 percent impairment to appellant's right upper extremity. In a decision dated September 22, 2004, the Office issued a schedule award for an additional three percent impairment to appellant's right upper extremity in claim number xxxxxx919, for a total schedule award for 44 percent impairment of his right upper extremity.

[4] The Office made two previous referrals to impartial medical examiners. By letter dated August 7, 2008, the Office referred appellant to Dr. John Stamelos, a Board-certified orthopedic surgeon, for an impartial medical examination. However, Dr. Stamelos' office informed the Office that Dr. Stamelos does not do evaluations under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, for impairment ratings. Accordingly, by letter dated September 12, 2008, the Office referred appellant to Dr. Robert Goldberg, a Board-certified orthopedic surgeon, to resolve the conflict. However, Dr. Goldberg's office also indicated that it does not do impairment ratings.

By decision dated October 21, 2008, the Office found that appellant was not entitled to an additional increase in permanent impairment of the right upper extremity as a result of the June 17, 2002 work injury.

By letter received November 10, 2008, appellant requested reconsideration. He argued, *inter alia*, that a judge had ordered in a decision dated in June 2008 that the Office issue a schedule award in the percentage awarded by his doctor.

On November 14, 2008 the Office referred appellant's case to the Office medical adviser for review of Dr. Mercier's opinion with regard to impairment. In a reply dated November 18, 2008, the Office medical adviser noted that the permanent impairment for the right upper extremity is zero percent. He noted that, according to the notes and physical examination of Dr. Mercier,[5] appellant had no ratable objective physical findings for the above accepted claims. The medical adviser also noted that appellant did not have a postoperative electromyogram examination, which if abnormal would account for a five percent rating for the right upper extremity. However, he noted that this was not clinically indicated.

By decision dated December 4, 2008, the Office found that the new information was not sufficient to warrant modification of the October 21, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations,[7] set 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, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[8] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9] A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a latter date causally related to his employment injury.[10]

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors

[5] The Office medical adviser mistakenly referred to Dr. Mercier as the treating physician. Dr. Mercier is the impartial medical examiner.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] 20 C.F.R. § 10.404(a).

[9] *Id.*

[10] *Linda T. Brown*, 51 ECAB 115 (1999).

should be considered together in evaluating the degree of permanent impairment.[11] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.[12]

Section 8123 of the Act provides that, 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.[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14] However, in a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[15]

ANALYSIS

In this case, the Office accepted appellant's claim for right shoulder tendinitis, joint impingement and carpal tunnel syndrome. Appellant has previously received schedule awards in the total amount of 44 percent for right upper extremity impairment. On prior appeal the Board remanded the case for the Office to refer appellant to an impartial medical specialist in order to resolve the conflict between Dr. Salomon, who opined that appellant had a 54 percent impairment of the right upper extremity, and Dr. Forman, who found that appellant had a 33 percent impairment of the right upper extremity.[16] Both the opinion of Dr. Salomon and the opinion of Dr. Forman were based on their individual interpretations of appellant's impairment pursuant to the A.M.A., *Guides*. When the Office referred appellant to Dr. Mercier to resolve the conflict, the Office did not instruct Dr. Mercier to apply the A.M.A., *Guides* in determining appellant's impairment. Although Dr. Mercier conducted a thorough examination and review of the medical evidence, he never mentioned the A.M.A., *Guides*. He never referred to any charts, pages or tables that would provide insight as to how he reached his determination that appellant was not entitled to a further schedule award. The Board further notes that the Office medical adviser also did not reference the A.M.A., *Guides.* As the A.M.A., *Guides* have been adopted by

[11] *See Paul A. Toms*, 38 ECAB 403 (1987).

[12] A.M.A., *Guides*, Chapter 16, The Upper Extremities, pages 433-521 (5th ed. 2001).

[13] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[14] *Jacqueline Brasch (Ronald Brasch*), 52 ECAB 252 (2001).

[15] *Margaret M. Gilmore*, 47 ECAB 718 (1996).

[16] Contrary to appellant's allegations below, the Board did not order the Office to issue a schedule award pursuant to his doctor's opinion.

the implementing regulations as the appropriate standard for evaluating schedule losses,[17] the failure of Dr. Mercier to utilize the A.M.A., *Guides* in reaching his conclusion indicates that his opinion did not resolve the conflict in the medical evidence.

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 requires further 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 report and have a proper evaluation done.[18] Therefore, the Board will set aside the Office's December 4, 2008 decision and remand the case for a supplemental report from the impartial medical examiner. Following such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on the issue of consequential injury and additional impairment.

CONCLUSION

The Board finds that this case is not in posture for decision. The medical evidence requires further development as the conflict in medical evidence remains unresolved.

[17] 20 C.F.R. § 10.404(a).

[18] *Albert Vervalde*, 36 ECAB 233 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 4 and October 21, 2008 are set aside and the case is remanded for further consideration consistent with this opinion.

Issued: November 9, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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