

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
K.S., Appellant)	
)	
and)	Docket No. 09-1260
)	Issued: January 28, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Bluebell, PA, Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2009 appellant filed a timely appeal from a February 13, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has more than one percent impairment of the right upper extremity, for which she received a schedule award; and (2) whether she sustained a ratable impairment of the right lower extremity.

On appeal, appellant's attorney, contends that the Office erred by relying on the opinion of the impartial medical examiner as it was conflicting and poorly rationalized. He requests that the Office appoint a second impartial medical examiner.

FACTUAL HISTORY

This is the second appeal before the Board. In a February 25, 2008 decision,¹ the Board set aside a February 23, 2007 Office decision, which found one percent impairment of the right arm. The Board found that the Office improperly relied on the opinion of Dr. Kevin Hanley, a Board-certified orthopedic surgeon and second opinion physician, instead of the opinion of Dr. Barry Snyder, a Board-certified orthopedic surgeon and impartial medical examiner. The Board remanded the case for the Office to obtain a supplemental report from Dr. Snyder addressing the extent of any permanent impairment of the right upper and lower extremities. The law and the facts of the case are incorporated by reference.

In a February 28, 2008 letter, the Office requested that Dr. Snyder submit a supplemental report on whether the right upper extremity impairments he noted on examination were related to an accepted right shoulder strain, basal fracture of the first metacarpal of the right thumb, right elbow contusion and right knee contusion. It also asked him to assess any impairment of the right lower extremity. Dr. Snyder was asked to refer to specific tables and grading schemes of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*").²

In an August 15, 2008 report, Dr. Snyder opined that the accepted March 25, 2003 injuries were all self-limiting and resolved by mid May 2003. He noted that appellant sustained a proximal phalanx fracture of the right thumb, not a first metacarpal fracture. The fracture resolved without "significant impairment of motion" or pain at the fracture site. Dr. Snyder diagnosed a resolved right shoulder sprain/sprain, with stiffness and acromioclavicular degeneration unrelated to the accepted injuries. He opined that the right knee and elbow contusions resolved without residuals. Dr. Snyder explained that the impairments noted in his previous reports related only to "preexisting degenerative disease and obesity. He stated that according to the A.M.A., *Guides*, appellant had no permanent impairment of the right upper or lower extremity.

By decision dated August 22, 2008, the Office found that appellant sustained no greater than a one percent impairment of the right upper extremity and no impairment to the right lower extremity. It found that Dr. Snyder's opinion was sufficiently rationalized to represent the weight of the medical evidence.

By letter dated August 26, 2008, appellant requested an oral hearing, held December 17, 2008 by video conference. Appellant, through her attorney, contended that Dr. Snyder's opinion was conflicting and poorly rationalized. Counsel requested that the Office appoint a new impartial medical specialist as Dr. Snyder did not clarify his opinion as requested.

By decision dated and finalized February 13, 2009, an Office hearing representative affirmed the Office's August 26, 2008 decision, finding that appellant did not have more than one percent impairment of the right upper extremity. The hearing representative found that

¹ Docket No. 07-2096 (issued February 25, 2008).

² The Office contacted Dr. Snyder several times from May 22 to July 29, 2008 requesting that he submit his report.

Dr. Snyder's opinion as impartial medical examiner was entitled to the weight of the medical evidence as he "clearly and with medical rationale has indicated [appellant] not to possess any permanent partial impairment of the right upper or lower extremities as a result of the employment injuries sustained on March 25, 2003."

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act³ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁴

The standards for evaluation 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 should be considered together in evaluating the degree of permanent impairment.⁵ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation, or loss of strength.⁶ Chapter 17 of the A.M.A., *Guides* sets forth the grading schemes and procedures for evaluating impairments of the lower extremities.⁷

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁸ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁹

When 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 the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from

³ 5 U.S.C. §§ 8101-8193.

⁴ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁵ *See Paul A. Toms*, 28 ECAB 403 (1987).

⁶ A.M.A., *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

⁷ *Id.* at Chapter 17, "The Lower Extremities," pp. 523-561 (5th ed. 2001).

⁸ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

⁹ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

the specialist for the purpose of correcting a defect in the original report.¹⁰ If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.¹¹ Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act¹² will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹³

ANALYSIS

Appellant claimed a schedule award for permanent impairment of the right upper and lower extremities caused by an accepted right shoulder strain, right thumb fracture, right elbow contusion and right knee contusion. Dr. David Weiss, an attending osteopath, found 27 percent impairment of the right arm and 11 percent impairment of the right leg due to the accepted injuries. Dr. Hanley, a Board-certified orthopedic surgeon and second opinion physician, found one percent impairment of the right upper extremity and no impairment of the right leg. The Office found that a conflict of medical opinion arose between Dr. Weiss and Dr. Hanley. It properly referred appellant to Dr. Snyder, a Board-certified orthopedic surgeon, to resolve the conflict.

Dr. Snyder originally submitted a December 23, 2005 report finding seven percent impairment of the right upper extremity due to restricted shoulder motion. He changed his opinion in an August 7, 2006 report, finding no impairment related to the accepted injuries. The Office requested that Dr. Snyder clarify his opinion regarding the nature and extent of any permanent impairment with specific references to the A.M.A., *Guides*.

Dr. Snyder submitted an August 15, 2008 supplemental report. He opined that any impairment he noted previously was due to obesity and preexisting degenerative disease. However, Dr. Snyder did not adequately explain the basis for this distinction in causing impairment. This lack of rationale diminishes the probative value of his opinion.¹⁴ Dr. Snyder stated that the right knee contusion had resolved, but did not provide a detailed assessment of the right lower extremity as the Office requested. He stated that appellant had no "significant impairment of motion" of the right thumb, indicating that there was some limitation present. However, Dr. Snyder did not provide range of motion measurements or refer to a specific grading element of the A.M.A., *Guides*. The Office instructed Dr. Snyder to utilize the A.M.A., *Guides* in assessing the percentages of any permanent impairment. Dr. Snyder did not do so. He failed to provide a rationalized clarification of his medical opinion. The reports of Dr. Snyder are insufficient to resolve the conflict in medical opinion.¹⁵

¹⁰ *Harry T. Mosier*, 49 ECAB 688 (1998).

¹¹ *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹² 5 U.S.C. § 8123(a).

¹³ *Harold Travis*, 30 ECAB 1071 (1979).

¹⁴ *Richard A. Neidert*, 57 ECAB 474 (2006).

¹⁵ *Guiseppe Aversa*, *supra* note 11.

If an impartial medical specialist is unable to clarify his opinion as requested, the case should be referred to another appropriate impartial medical specialist.¹⁶ Dr. Snyder was unable to clarify his report as requested. The case will be remanded to the Office for appointment of a new impartial medical examiner to resolve the conflict of medical opinion. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2009 is set aside and the case remanded to the Office for additional development consistent with this decision.

Issued: January 28, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ *Id.*