U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA WOOTEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Louisville, Ky.

Docket No. 95-2371; Submitted on the Record;
Issued April 22, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has greater than a nine percent permanent impairment of her right upper extremity for which she received a schedule award.

On August 29, 1988 appellant, then a 30-year-old nurse, sustained injuries to her right foot and to her right elbow when she was pushed by a patient who she had been assisting. Under claim number A6-44729, the Office of Workers' Compensation Programs accepted appellant's claim for a fractured toe and contusion of the right arm and paid her compensation for one week off from work. Appellant's right arm pain did not resolve and she was subsequently diagnosed with lateral epicondylitis, commonly referred to as tennis elbow.[1] Following diagnostic studies to rule out carpal tunnel syndrome, appellant was treated with an epidural block treatment on July 27, 1990, followed by surgery on August 10, 1990. After the surgery, appellant obtained physical therapy treatment and returned to work October 18, 1990, with restrictions against using her right arm. Physical therapy treatment notes indicate that appellant complained of increased pain upon her return to work. On her fourth day back at work, she experienced severe pain and spasms while handling a thick chart. Appellant was admitted to the employing establishment's emergency room facility on that date, October 24, 1990, and was diagnosed with cellulitis and a strep infection in the arm which required incision and drainage. At the same time, she underwent debridement of the elbow. Under claim number A6-501935, the Office accepted aggravation of the chronic epicondylitis of the right arm due to the August 29, 1988 employment injury. The Office combined claim number A6-44729 together with claim number A6-501935 into the latter claim.

[1] The records show that a bone scan was performed on October 19, 1988 which showed increased uptake of the right elbow area. X-rays on October 21, 1988 were negative however for a fracture. Appellant continued to obtain treatment every three months for her right arm symptoms, and in February 1990, she was examined by Dr. O. James Hurt, a Board-certified orthopedic surgeon and Office referral physician. Dr. Hurt diagnosed tennis elbow based on repeated negative x-rays and noted that activities such as dispensing medicines, aggravated her condition.

Appellant continued to obtain treatment for her right elbow condition, for which she was diagnosed with arthritis resulting from the surgery due to the infection, as well as possible reflex sympathetic dystrophy. She returned to light-duty work on February 5, 1991 under work restrictions provided by Dr. Greg Gleis, a Board-certified orthopedic surgeon at the employing establishment. Dr. Gleis obtained a consultation from Dr. James M. Kleinert, a Board-certified orthopedic surgeon, who examined appellant in March 1991 and recommended permanent work restrictions, as well as an elbow brace and further physical therapy treatment. Dr. Kleinert concurred with the diagnosis of post-traumatic arthritis of the right elbow secondary to the infection and he provided range of motion measurements and grip strength measurements for purposes of rating appellant's impairment.[2]

On September 16, 1991 appellant filed a request for a schedule award. On November 14, 1991 the Office awarded appellant a schedule award for 45 percent impairment to the right upper extremity, for the period March 7, 1991 to November 13, 1993.[3] Appellant requested an oral hearing based on the seven percent difference between the recommended impairment from her physician, Dr. Gleis, and the percentage of impairment awarded to her by the Office. Prior to scheduling a hearing, an Office hearing representative found in an April 7, 1992 decision, the need for further development on the extent of permanent impairment due to pain, sensory deficit, or loss of strength. Upon review of the medical record, a second Office medical adviser noted the lack of consistent medical findings to establish a diagnosis of reflex sympathetic dystrophy, and recommended further evaluation.[4]

The Office referred appellant, together with a list of questions to be addressed a statement of accepted facts, to Dr. Stanley W. Collis, a Board-certified orthopedic surgeon and Office consultant physician. The Office requested Dr. Collis to use specific charts when

[2] In June 1991 appellant filed a third claim for a left arm condition, due to overuse of her left arm to compensate for her injured right arm. She submitted an October 21, 1991 report from an employing establishment orthopedic surgeon to support her claim. Under claim number A6-525901 the Office accepted appellant's claim for left lateral epicondylitis.

[3] The schedule award was based on loss of range of motion of the right wrist, elbow and shoulder as reported by Dr. Gleis, together with his estimate of 34 percent for additional impairment due to sensory deficit, pain or loss of strength. An Office medical adviser Board-certified in orthopedic surgery correlated the range of motion measurements with the applicable tables of the third edition, revised, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He indicated that the loss of range of motion measurements equated to a 17 percent impairment under the applicable tables. *See* A.M.A., *Guides* 29, 32, 35, 36, figures 26, 32, 38, 41. The Office medical adviser combined 17 with 34 to equal 45 percent impairment under the Combined Values Chart as instructed in the A.M.A., *Guides; see* A.M.A., *Guides* 254-56. The Board notes that while Dr. Gleis had estimated a total percent of impairment of 52, the measurements for loss of range of motion correlated to a 17 percent loss only, and the A.M.A., *Guides*, provide for the combining of loss of range of motion with additional impairment for pain, sensory deficit or loss of strength. *See* A.M.A., *Guides* 31, 34, 38.

[4] The Office medical adviser noted that Dr. Andrievs J. Dzenitis, a Board-certified neurologist, who examined appellant on November 11, 1991, reported only loss of range of motion of the elbow with no loss of range of motion of the shoulder or the wrist. He noted Dr. Dzenitis' findings of no evidence of muscle atrophy and no loss of strength in the elbow or wrist. Following the Office medical adviser's review of the medical evidence, the Office obtained results from a cervical magnetic resonance imaging (MRI) performed on May 15, 1992, which was negative.

evaluating sensory loss, pain or loss of strength.[5] In a July 20, 1992 report, Dr. Collis indicated impairment for the loss of range of motion of the elbow only. While he noted that there may have been loss of range of motion of the right shoulder, he stated that he was unable to measure the range of motion because of her complaints of pain, and he stated that the range of motion of the right wrist, as well as the left side was normal. Dr. Collis did not address the rating scheme for pain, decreased sensation or loss of strength, nor did he indicate any impairment for the level of arthritis or support the extent of arthritis in the right side, as compared to the left side, based on x-ray findings.

The Office medical adviser, Dr. Harry Collins, Jr., Board-certified in orthopedic surgery, reviewed Dr. Collis' report and calculated a 17 percent impairment to the right upper extremity. Dr. Collis correlated the range of motion measurements of the elbow provided by Dr. Collis to the applicable chart of the A.M.A., *Guides*, to arrive at 11 percent impairment of the right arm.[6] The Office medical adviser rated the degree of pain or loss of sensation to equal three percent impairment of the right arm.[7] He combined 3 and 11 under the Combined Values Chart to equal 14 percent for the elbow. The Office medical adviser noted that since Dr. Collis was unable to perform the shoulder exam, he used the prior findings from Dr. Gleis on range of motion of the shoulder, which correlated to a three percent impairment of the right arm due to loss of range of motion. He attributed the decrease in the amount of percentage of impairment to an improved condition.

By an October 30, 1992 notice of proposed termination of the schedule award, appellant was advised that the medical evidence established a 14 percent impairment of the right arm.

By letter dated November 26, 1992, appellant requested an oral hearing. She provided a November 19, 1992 report by Dr. Kleinert, who noted measurements on range of motion of the elbow, and differences in grip strengths, as well as the x-rays' differences between the right and

[5] At the time of the Office referral to Dr. Collis, the Office combined the claim for a consequential left arm condition under A6-525901 with the current right arm injury claim under A6-501935.

[6] A.M.A., *Guides* 32, 33, figures 32 and 35. The Board notes that this measurement takes into loss of range of motion on supination, which Dr. Gleis previously did not provide in his September 1991 report.

[7] Under the rating scheme, a physician identifies the nerve innervating the area affected and finds the maximum value of impairment for that nerve, multiplying it by the degree of impairment under a separate table. The Office medical adviser identified the brachial cutaneous nerve as the affected nerve and multiplied the maximum amount of impairment of 5 percent by 60 percent (the maximum amount of impairment at level 3 which represents level 3 or decreased sensation with or without pain which interferes with activity). He arrived at a 3 percent impairment for pain or decreased sensation; *see* A.M.A., *Guides* 42-46, Tables 10, 14.

left elbows.[8] By letter dated May 24, 1993, appellant withdrew her request for an oral hearing as long as 28 percent impairment of the arm was an agreed upon amount, which she indicated was the most recent assessment by Dr. Kleinert. Appellant submitted a report by Dr. Kleinert who stated that since there was some disagreement on the amount of impairment, he referred appellant for a hand/work capacity evaluation in physical therapy on May 13, 1993. Appellant submitted a copy of the results of the test signed by both an occupational therapist who administered the test and Dr. Kleinert. The test results, which noted that appellant wore an elbow brace during the evaluation, reported impairment for loss of range of motion of the wrist at 6 percent, for the elbow at 10 percent and the shoulder at 15 percent.

By letter dated May 25, 1993, appellant was advised that as no final decision had been issued with respect to the decreased schedule award, the case was remanded to the Office for the issuance of a final decision.

By decision dated June 10, 1993, the Office terminated appellant's schedule award effective May 30, 1993, on the grounds that the weight of the medical evidence rested with the report of Dr. Collis. By separate notice of a preliminary determination of an overpayment dated June 10, 1993, the Office advised appellant of the determination that she was at fault in the creation of an overpayment in the amount of $33,231.21 due to her receipt of the schedule award for the period March 13, 1992 until May 29, 1993.

Appellant requested an oral hearing on the issues of the termination of her schedule award and the issues of fault and waiver of the overpayment.

At a hearing held on April 11, 1994, appellant testified that the infection she sustained ate away at the cartilage, and that she was advised by Dr. Kleinert against trying to have surgical fusion to alleviate her discomfort. She testified that she felt she had a pain level of 7 to 8 on a scale of 1 to 10, and that she continued to wear the brace outside of the home, and at times she would wear her arm in a sling at home. Appellant testified that Dr. Collis jerked her arm and caused her excruciating pain. She testified that she felt Dr. Kleinert's 28 percent impairment rating while wearing a brace should be accepted, and agreed to cooperate with any further evaluations.

By decision dated June 1, 1994, the Office hearing representative found that the report of Dr. Collis was insufficient in detail, since there were no range of motion measurements provided for the shoulder, and insufficient information was provided pertaining to pain, loss of sensation, or loss of strength. The Office hearing representative remanded the case to the Office for a further medical evaluation.

The Office referred appellant, together with a copy of the instructions from the Office hearing representative, to Dr. Martin Schiller, a Board-certified orthopedic surgeon. By report

[8] Dr. Kleinert reported for range of motion of the elbow, 50 degrees of flexion, which correlates to 23 percent impairment of the right arm, and 105 degrees of extension, which correlates to between 21 and 27 percent impairment of the right arm. *See* A.M.A., *Guides* 32, figure 32. He reported 60 degrees of supination of the elbow which correlated to a 1 percent impairment of the right arm. *See* A.M.A., *Guides* 33, figure 35. He reported some loss of range of motion of the right wrist, and indicated some loss of grip strength.

dated August 3, 1994, Dr. Schiller reviewed the history of injury and noted appellant's complaints of constant mild pain in the lateral aspect of the elbow and in the forearm slightly distal to the elbow on the right side. He noted that current x-rays of the right elbow indicated that the arthritis was progressing, and noted a narrowing at the ulnar and radial joint surfaces. Dr. Schiller reported range of motion measurements for the elbow only, noting a 45-degree loss in extension and indicating that supination was limited to 70 degrees. He noted no other impairment and no evidence of reflex dystrophy at that time. Dr. Schiller indicated that he calculated a five percent impairment due to loss of range of motion of the elbow, and indicated a three percent impairment for the arthritic pain.

In response to a request from the Office for range of motion measurements of the shoulder and an explanation for his pain rating, Dr. Schiller reevaluated appellant on October 5, 1994. He noted a 30-degree loss of range of motion on abduction as the only loss of range of motion of the shoulder, and indicated that the 3 percent impairment was assigned for the arthritic pain, not extrapolated from the tables of the A.M.A., *Guides*.

On November 29, 1994 an Office medical adviser correlated the range of motion measurements provided by Dr. Schiller to the applicable tables of the fourth edition of the A.M.A., *Guides*, to equal a five percent loss due to restriction of range of motion of the elbow on extension and one percent due to restriction of range of motion of the shoulder on abduction.[9] The Office medical adviser combined six percent impairment for loss of range of motion, with three percent for pain, which he rated on the applicable tables of the A.M.A., *Guides*.[10]

In February 1995 appellant submitted additional reports from Dr. Kleinert who diagnosed an additional condition of arthritis at the metacarpophalangeal joint of the right thumb and requested a brace for the right thumb. The Office advised appellant that a medical report addressing the relationship between the right thumb and the accepted employment-related condition was required prior to authorizing treatment for the right thumb.

By decision dated March 10, 1995, the Office found that appellant had no further entitlement to a schedule award beyond a nine percent impairment of the right arm, and found that a greater overpayment had occurred because of the incorrect amount.

The Board finds that appellant has not demonstrated entitlement to a schedule award for more than a nine percent permanent impairment of her right upper extremity.

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[9] *See* A.M.A., *Guides* 40, 41, 44, figures 32, 35, 41 (4th edition 1993). The Board notes that the equivalent values are found under the tables of the third edition, revised; *see* A.M.A., *Guides* 32, 33, 36 figures 32, 35, 41 (3d edition, revised 1991). The Board notes that 70 degrees of supination of the elbow equates to a 0 percent loss; *see* A.M.A., *Guides* 41, figure 35 (4th ed. 1993); 33, figure 35 (3d. ed., rev. 1991).

[10] The Board notes that while Dr. Schiller did not provide a basis for his estimate of three percent impairment due to arthritic pain, the Office medical adviser calculated under the applicable tables of the fourth edition, the impairment due to pain or loss of strength as previously calculated prior to the evaluation with Dr. Schiller; *see supra* note 7. The amounts of impairment under the rating scheme in the revised third edition remains the same under the fourth edition.

The schedule award provision of the Federal Employees' Compensation Act[11] and its implementing regulation[12] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified 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 Office has adopted the A.M.A., *Guides* and the Board has concurred in such adoption as an appropriate standard for evaluating schedule losses.[13] Office procedures directed the use of the revised third edition for all decisions made between September 1, 1991 and October 31, 1993, and the fourth edition for all decisions made after November 1, 1993.[14]

In the present case, the evidence indicates that at the time appellant was granted a schedule award on November 14, 1991, the award was inaccurate due to both the inflated measurements of loss of range of motion and to a high percentage estimated for pain, sensory deficit, or loss of strength. Based on a slight discrepancy between the estimate of impairment provided by Dr. Gleis, a Board-certified orthopedic surgeon, and the Office medical adviser who calculated the amount of percentage, appellant requested a hearing. The Office hearing representative who reviewed the case prior to conducting a hearing, found that the estimate of impairment due to pain, sensory deficit or loss of strength was not adequately explained by either Dr. Gleis or the Office medical adviser. The schedule award for 45 percent impairment of the right arm was set aside, and the case was remanded for further medical development. In developing the case, the Office obtained measurements of range of motion restrictions from Dr. Collis, whose findings correlated to a 14 percent impairment of the right arm. Appellant contested the new percentage of impairment, and provided a report from a physical therapist cosigned by Dr. Kleinert, which supported impairment of 28 percent. The Board notes, however, that because the evidence was not consistent and suggested possible exaggeration by appellant during her examinations, the Office hearing representative found that it was necessary for a further evaluation, and advised appellant of the consequences for failing to fully cooperate in an evaluation.

Under these circumstances, the Board finds that the weight of the medical evidence rests with the reports provided by Dr. Schiller, a Board-certified orthopedic surgeon, whose measurements correlated to a nine percent impairment of the right arm. As Dr. Kleinert did not provide a written report explaining how the measurements provided by the physical therapist were correct, appellant has not provided sufficient medical evidence to outweigh or to create a conflict with the report of Dr. Schiller. The Board finds therefore, that appellant has not

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.304.

[13] A.M.A., *Guides* (4th edition 1993). *See Danniel C. Goings*, 37 ECAB 781 (1986).

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (October 1995). *See also* FECA Bulletin No. 91-27 (1991) (with respect to the use of the revised third edition).

demonstrated entitlement to a schedule award for more than a nine percent permanent impairment of her right upper extremity.

The decision of the Office of Workers' Compensation Programs dated March 10, 1995 is hereby affirmed.

Dated, Washington, D.C.
April 22, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member