U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALVIE R. DOWNS and DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINSTRATION, Columbia, Tenn.

Docket No. 96-1395; Submitted on the Record;
Issued February 20, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant is entitled to a greater than two percent permanent impairment for loss of use of the left arm for which he has received a schedule award.

The Board has duly reviewed the case record in the present case and finds that the case is not in posture for decision, as a conflict exists in the medical opinion evidence.

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative, and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3] Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[4] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office of Workers' Compensation Programs has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*, 4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.[5]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107(a).

[5] *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

In the present case, the Office accepted that appellant sustained a left shoulder strain and cervical strain due to his employment injury of July 12, 1993. By award of compensation dated October 6, 1995, the Office granted appellant a schedule award for a two percent loss of use of his left arm and, by decision dated February 6, 1996, the Office denied modification of its October 6, 1995 decision.

In support of his claim that he has a 10 percent loss of use of his left arm, appellant submitted an August 21, 1995 report from Dr. William M. Gavigan, a Board-certified orthopedic surgeon. In his report, Dr. Gavigan noted that appellant had a 90 degree abduction and forward flexion in his left shoulder. Dr. Gavigan then opined that appellant had a 10 percent permanent impairment to his left upper extremity. In a prior report dated June 15, 1994, Dr. Gavigan opined that appellant had a 160 degree abduction and forward flexion in his left shoulder and opined that he had a 2 percent impairment. In a report dated January 4, 1994 prior to appellant's arthroscopic surgery, Dr. Gavigan noted appellant had a 90 degree abduction and a 120 degree forward flexion.

The Office referred Dr. Gavigan's report to the Office medical adviser for his opinion on Dr. Gavigan's evaluation. In a report dated January 18, 1996, the Office medical adviser noted that Dr. Gavigan gave no medical explanation as to why appellant's motion was 90 degrees after his surgery when appellant had a forward flexion and abduction of 160 degrees. The Office medical adviser opined that the rating should remain at two percent permanent impairment of the left upper extremity.

When there are opposing medical reports of virtual equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act,[6] to resolve the conflict in the medical opinion evidence.

The Office denied appellant's request for modification of his schedule award on February 6, 1996 without resolution of the conflict in the medical opinion evidence. On remand, the Office shall refer appellant, along with a statement of accepted facts and medical record, to an appropriate specialist for an impartial evaluation to determine whether appellant has a greater than two percent permanent impairment of his left upper extremity. After such further development as necessary, the Office shall issue a *de novo* decision.

[6] 5 U.S.C. § 8123(a); *see Martha A. Whitson (Joe D. Whitson),* 36 ECAB 370 (1984).

The decision of the Office of Workers' Compensation Programs dated February 6, 1996 is hereby set aside and the case is remanded to the Office for further proceeding consistent with this opinion.

Dated, Washington, D.C.
February 20, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member