

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA A. COLLINS and U.S. POSTAL SERVICE, SOUTHERN
MARYLAND GENERAL MAIL FACILITY, Capitol Heights, Md.

*Docket No. 96-1016; Submitted on the Record;
Issued March 10, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that she has more than a seven percent permanent impairment of the right upper extremity, for which she has received a schedule award.

On October 29, 1991 appellant, then a 33-year-old "MPLSM" clerk, filed a traumatic injury claim (Form CA-1) assigned number A25-393107 alleging that on that date a shelf on an "APC" fell hitting her right hand.¹ The Office of Workers' Compensation Programs accepted appellant's claim for a contusion of the right hand and wrist, and right ulnar neuropathy.

On March 8, 1994 appellant filed a claim for a schedule award (Form CA-7).

By letter dated April 4, 1994, the Office advised Dr. Robert A. Smith, a Board-certified orthopedic surgeon and appellant's treating physician, to determine the extent of permanent partial impairment of the right ulnar neuropathy due to the October 29, 1991 employment injury, based on the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Office's letter was accompanied by a form for calculation of schedule awards. Dr. Smith did not respond. On June 20, 1994 the Office again mailed its April 4, 1994 letter to Dr. Smith.

Dr. Smith submitted the form for calculation of schedule awards dated July 5, 1994, indicating that appellant had reached maximum medical improvement on May 17, 1994. Dr. Smith further indicated that the degree of retained flexion was 145, that the degree of retained active extension was 120 degrees, that the degree of retained pronation from neutral was 80 degrees and that the degree of retained supination from neutral was 80 degrees. Dr. Smith also indicated that the question regarding an ankylosed joint was inapplicable. Additionally, Dr. Smith indicated that there was additional impairment of function of the arm due to sensory

¹ Previously, appellant filed a claim assigned number A25-320416 for a left hand and arm condition for which she was receiving compensation benefits.

deficit, pain or loss of strength estimated at 20 percent. Dr. Smith concluded that appellant had a 20 percent impairment of the upper extremity.

An Office medical adviser reviewed the medical records and statement of accepted facts, and stated that he agreed with Dr. Smith's finding that appellant had reached maximum medical improvement on May 17, 1994. The Office medical adviser opined that appellant had a seven percent impairment of the upper extremity based on Table 15 on page 54 of the 4th edition of the A.M.A., *Guides*. The Office medical adviser stated that maximum upper extremity impairment for pain due to an ulnar nerve impairment was seven percent.

On July 28, 1994 the Office granted appellant a schedule award for a seven percent permanent loss of use of the right upper extremity for the period May 17 to October 16, 1994 for a total of 21.84 weeks of compensation. The Office based its decision on the Office medical adviser's determination.

In an August 26, 1994 letter, appellant requested an oral hearing before an Office representative. At the hearing, appellant submitted the June 8, 1995 medical report of Dr. Marino R. Facelo, appellant's treating physician, revealing:

"Flexion is 120 degrees equivalent to 2 degrees of the upper extremity. Extension is -10 degrees equivalent to 1 percent. Supination is 40 degrees equivalent to 2 percent of the upper extremity. Pronation is 50 degrees equivalent to 2 percent of the upper extremity.

"The total impairment is 7 percent of the right upper extremity due to the loss of motion. In addition, due to ulnar neuropathy with the loss of strength and sensory dysfunction, I believe [appellant] has a 10 percent impairment. For suffering and pain, she has an additional 10 percent impairment.

"[Appellant] therefore has a total of 27 percent impairment of the right upper extremity directly related to the right elbow injury."

Subsequent to the hearing, appellant submitted the July 25, 1995 medical report of Dr. Daniel R. Ignacio, a Board-certified psychiatrist and appellant's treating physician, indicating that appellant experienced pain in her right elbow. Dr. Ignacio opined:

"Right elbow flexion is to 110 degrees, extension to 15 degrees, pronation, supination to 15 degrees and 10 degrees. [Appellant] is also tender along the right wrist with some hypoesthesia along the right hand. Movements along the right wrist is restricted with dorsiflexion, palmarflexion of 40 and 50 degrees, radial abduction to 15 degrees and ulnar abduction to 15 degrees."

Dr. Ignacio concluded that because of appellant's injury to the right wrist with chronic ulnar neuropathy, she had a moderate degree of impairment of the right upper extremities and that she had a 35 percent impairment of the right upper extremities due to the injury to the right elbow with the ulnar neuropathy as well as the associated sympathetically maintained pain syndrome. Dr. Ignacio stated that his conclusion was based on the A.M.A., *Guides*.

By decision dated October 10, 1995, the hearing representative remanded the case for further development of the medical evidence because Drs. Facelo and Ignacio determined that appellant had a loss of range of motion in the right arm which was not reported previously by Dr. Smith.

By letter dated November 8, 1995, the Office advised Dr. Chester D. DiLallo, a Board-certified orthopedic surgeon, that it was referring appellant along with a statement of accepted facts, medical records and instructions for submitting a report as an impartial medical specialist and for determining the extent of appellant's impairment based on the standards of the 4th edition of the A.M.A., *Guides* for an impartial medical examination.

Dr. DiLallo submitted a November 29, 1995 medical report revealing a history of the October 29, 1991 employment injury and appellant's employment and a review of appellant's medical records. Dr. DiLallo noted his findings on physical and objective examination. Dr. DiLallo opined that grip strength on the left was measured sequentially at 29, 29 and 32 pounds, and that grip strength on the right, which was the affected side, was 32, 29 and 37 pounds. Dr. DiLallo further opined that there was no abnormal sweating pattern, that there was a well-healed scar on the ulnar aspect of the right elbow and that range of motion of the right elbow, shoulder, hands and wrists was within normal limits. Dr. DiLallo diagnosed residual ulnar neuritis secondary to tardy ulnar palsy, treated by anterior transposition of the ulnar nerve. Dr. DiLallo concluded:

“I feel [appellant] at maximum has a five (5) percent impairment of the right upper extremity as a consequence of the residual pain that she has in this originally afflicted extremity. This is based on the parameters of taking into consideration the A.M.A., *Guides* Fourth Edition, for range of motion, for reflex sympathetic dystrophy and atrophy.”

Dr. DiLallo further concluded that appellant was restricted from repetitive motions of the right wrist and elbow, that appellant could work eight hours per day with her restrictions which were permanent, and that appellant's physical limitations were not related to the employment injury, but rather were due to nonwork-related conditions.

By decision dated December 15, 1995, the Office found the evidence of record insufficient to grant an additional award for a permanent partial impairment of appellant's right upper extremity. In an accompanying memorandum, the Office found that Dr. DiLallo's impairment rating did not support a schedule award for an additional impairment.

The Board finds that Dr. DiLallo is not an impartial medical examiner under section 8123(a) of the Federal Employees' Compensation Act.

Section 8123(a) of the Act provides that “[i]f there is a 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.”²

² 5 U.S.C. § 8123(a).

The Office found that appellant was not entitled to no more than a seven percent schedule award for an impairment of her right upper extremity based on Dr. DiLallo's determination that appellant had a five percent impairment of the right upper extremity. The Office referred appellant to Dr. DiLallo, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict of medical opinion between Dr. Facelo, appellant's treating physician, and Dr. Ignacio, a Board-certified physiatrist and appellant's treating physician. There was, however, no conflict of medical opinion between these physicians inasmuch as Drs. Facelo and Ignacio are both appellant's treating physicians.³ Therefore, Dr. DiLallo cannot be considered an impartial medical examiner pursuant to section 8123(a). Thus, Dr. DiLallo is considered a referral physician.

The Board further finds that this case is not in posture for a decision because an unresolved conflict in the medical opinion evidence exists between the opinions of Drs. Facelo, Ignacio and DiLallo.

Section 8123(a) of the Act provides that if there is a 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.⁴

In this case, it appears that Dr. Facelo used the A.M.A., *Guides* to determine that appellant had a 27 percent impairment of the upper right extremity. Dr. Ignacio determined that appellant had a 35 percent impairment of the upper right extremity based on the A.M.A., *Guides*. Further, Dr. DiLallo determined that appellant had a five percent impairment of the upper right extremity based on the A.M.A., *Guides*. The Board notes that Drs. Facelo, Ignacio and DiLallo used the A.M.A., *Guides* and that there is an extreme difference in the impairment ratings rendered by these physicians. In view of the discrepancies between the opinions of Drs. Facelo and Ignacio, appellant's treating physicians, and Dr. DiLallo, the second opinion physician, the Board finds that there is a conflict in the medical opinion evidence as to whether appellant has more than seven percent permanent impairment of the right upper extremity.

On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial Board-certified specialist in the appropriate field of medicine, to resolve the conflict as to whether appellant has more than a seven percent permanent impairment of the right upper extremity pursuant to section 8123(a). The impartial medical specialist should determine the extent of appellant's upper right extremity in accordance with the appropriate section of the 4th edition of the A.M.A., *Guides*. Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on appellant's claim for a schedule award.

The December 15 and October 10, 1995 decisions of the Office of Workers' Compensation Programs are hereby set aside; the case is remanded to the Office for further development consistent with this decision of the Board.

³ The Board notes that appellant was referred to Dr. Ignacio by Dr. Smith.

⁴ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

Dated, Washington, D.C.
March 10, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member