

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE WOWK and U.S. POSTAL SERVICE,  
POST OFFICE, Trenton, N.J.

*Docket No. 96-754; Submitted on the Record;  
Issued November 2, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained greater than a 12 percent permanent impairment of the left and right upper extremities, for which he received a November 15, 1994 schedule award; and (2) whether the Office of Workers' Compensation Programs' September 27, 1995 refusal to reopen appellant's case for a merit review constituted an abuse of discretion.

On June 1, 1992 appellant, then a 50-year-old tractor-trailer driver, filed a claim for tendinitis of both upper extremities caused by loading and unloading trucks and pulling and pushing up to 500 pounds in the performance of duty.<sup>1</sup> The Office initially denied the claim by December 29, 1992 decision vacated by September 1, 1993 decision accepting bilateral epicondylitis.

In a December 1, 1993 report, Dr. Nicholas Diamond, an attending Board-certified pain management specialist, related appellant's symptoms of pain in both arms and elbows and paresthesias in both hands. On examination, Dr. Diamond found a full range of motion of both upper extremities, an intact motor and sensory examinations. Grip strength was 20 kilograms (kg) in the dominant right hand and 12 kg on the left. Dr. Diamond diagnosed bilateral medial epicondylitis, bilateral ulnar neuropathy "due to recurrent mechanical subluxations," left shoulder girdle strain and sprain, exacerbation of a preexisting left shoulder instability and chronic pain disorder with depression. Dr. Diamond explained that appellant still had "residuals of his traumatically-induced injuries including pain into the bilateral elbows, forearms, hands and fingers and into the left shoulder. He opined that appellant had a 20 percent permanent impairment of the right upper extremity due to loss of strength, with an additional 10 percent permanent impairment of the right upper extremity due to right ulnar neuropathy, for a total 30 percent permanent impairment of the right upper extremity. Dr. Diamond also opined that

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<sup>1</sup> The record indicates that appellant was working limited duty due to tendinitis at the time he filed his claim.

appellant had a 30 percent permanent impairment of the left upper extremity for loss of strength, with an additional 10 percent impairment due to left ulnar neuropathy, for a total of a 40 percent permanent impairment of the left upper extremity.<sup>2</sup>

On January 20, 1994 appellant filed a claim for a schedule award. The Office requested, by a May 20, 1994 letter, that appellant arrange for his physician to submit a detailed report regarding the percentages of permanent impairment of the upper extremities, referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.) (hereinafter, the A.M.A., *Guides*).

In a June 15, 1994 report, Dr. David Weiss, an attending Board-certified orthopedist, found a normal range of motion of both elbows and wrists, a grip strength of 20 kg on right and 12 kg on the left, with some atrophy of the left forearm and above the elbow. He related appellant's symptoms of persistent pain in both elbows causing difficulties in activities of daily living. Dr. Weiss did not provide a percentage of permanent impairment, but checked a box "yes" indicating that he relied upon the A.M.A., *Guides* in performing his evaluation.

In an August 5, 1994 report, an Office medical adviser found that according to Table 15, page 54, epicondylitis with loss of power, motor deficits and peripheral ulnar neuropathy could cause a maximum of 46 percent impairment of an upper extremity. The Office medical adviser used Table 12, page 49 to characterize appellant's pain level as grade 4, indicating a multiplication factor of 25 percent. The Office medical adviser then multiplied 46 percent by 25 percent, resulting in a 12 percent permanent impairment of each upper extremity based on loss of power, motor deficits and a peripheral nerve disorder of the ulnar nerve above the mid forearm. The Office medical adviser noted relying on Dr. Diamond's December 1, 1993 report in calculating the percentage of impairment.

By decision dated November 15, 1994, the Office issued appellant a schedule award for a 12 percent impairment of the left and right upper extremities.<sup>3</sup>

Appellant disagreed with this decision and by a November 30, 1994 letter requested a hearing before a representative of the Office's Branch of Hearings and Review, held May 4, 1995. At the hearing, appellant contended that the element of pain was not taken into account in calculating the schedule award and that he was entitled to a greater percentage of impairment due to pain. Appellant also argued that there was a conflict of medical opinion between Dr. Diamond and the Office medical adviser regarding the percentage of permanent impairment and requested that an impartial medical examination be ordered to resolve the conflict. Appellant submitted an October 29, 1993 electromyography report showing "findings suggestive of cervical radicular disease on the left as there is a difference in the F-wave percent response."

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<sup>2</sup> Dr. Diamond generally referred to the A.M.A., *Guides* when providing percentages of impairment, but did not indicate which tables or figures he relied on in determining the stated percentages of impairment.

<sup>3</sup> The award was equivalent to 74.88 weeks of compensation, covering the period November 18, 1993 to April 26, 1995. Appellant was issued a check for \$21,333.46 for the period November 18, 1993 to November 12, 1994, with continuing compensation checks every 4 weeks in the amount of \$1,671.00.

The study also showed an abnormal distal amplitude response of the ulnar sensory nerves bilaterally and of the right median sensory nerve and left median motor nerve.

Following the May 4, 1995 hearing, on June 19, 1995, the Office hearing representative referred the original schedule award calculation to a second Office medical adviser to ascertain whether the first Office medical adviser considered appellant's complaints of pain and other sensory impairment.

On June 21, 1995 the second Office medical adviser reviewed the schedule award calculations and explained that the first Office medical adviser had taken pain into account, as Table 15, page 54 included sensory deficit.

By decision dated and finalized July 5, 1995, the hearing representative affirmed the November 15, 1994 schedule award.

Appellant disagreed with the decision and requested reconsideration by August 17, 1995 letter, enclosing a July 28, 1995 report from Dr. Diamond. Dr. Diamond opined that appellant had a 20 percent impairment of the right upper extremity and 30 percent impairment of the left upper extremity due to loss of strength, based on Tables 31 and 34, page 65 of the A.M.A., *Guides*.

On September 27, 1995 an Office medical adviser reviewed Dr. Diamond's report, noting that it did not add anything to change the schedule award as Dr. Diamond relied on "Tables 32 and 24, page 65 ... [although] FECA Bulletin No. 95-17 specifically preclude[d] the use of these tables in conjunction with Table 12 page 49."

By decision dated September 27, 1995, the Office denied appellant's request for reconsideration on the grounds that Dr. Diamond's report was based on an erroneous interpretation of the A.M.A., *Guides* was, therefore, of no probative value and thus an insufficient basis on which to conduct a merit review.

Regarding the first issue, the Board finds that the case is not in posture for a decision due to a conflict of medical opinion as to whether appellant sustained greater than a 12 percent permanent impairment of each upper extremity.

Section 8107 of the Federal Employees' Compensation Act<sup>4</sup> and section 10.304 of the implementing regulations<sup>5</sup> provide that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the percentage of impairment. Therefore, the Office has adopted the fourth edition of the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.304.

in such adoptions.<sup>6</sup> Proper use of the A.M.A., *Guides* ensures consistent results and equal justice for all claimants.

In this case, Dr. Diamond, an attending Board-certified pain specialist, opined in a December 1, 1993 report that appellant had a 30 percent permanent impairment of the right upper extremity and a 40 percent permanent impairment of the left upper extremity due to loss of strength and bilateral ulnar neuropathy. In an August 5, 1994 report, an Office medical adviser, using Dr. Diamond's December 1, 1993 report, found a 12 percent permanent impairment of each upper extremity based on loss of power, motor deficits and a peripheral nerve disorder of the ulnar nerve above the mid forearm. Thus, the two physicians reached very different conclusions based on the same findings.

This conflict of opinion continued when Dr. Diamond submitted a July 28, 1995 report indicating a 20 percent impairment of the right upper extremity and 30 percent impairment of the left upper extremity due to loss of strength, based on Tables 32 and 34, page 65 of the A.M.A., *Guides*. A second Office medical adviser opined on September 27, 1995 that Dr. Diamond's report was of no probative value, but did not provide medical rationale explaining how and why Dr. Diamond's report was medically deficient.

The Act, at 5 U.S.C. § 8128(a), in pertinent part, provides: "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."

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist or specialists for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether appellant sustained greater than a 12 percent permanent impairment of the left and right upper extremities. Following this and other such development the Office deems necessary, the Office shall issue an appropriate decision in the case.<sup>7</sup>

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<sup>6</sup> *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

<sup>7</sup> As the case must be remanded for further development, the second issue is moot.

The decision of the Office of Workers' Compensation Programs dated September 27, 1995 and dated and finalized July 5, 1995, are hereby set aside and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, D.C.  
November 2, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member