

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER M. EVANS and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, N.J.

*Docket No. 97-1173; Submitted on the Record;
Issued January 14, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he is entitled to a schedule award as a result of his October 30, 1991 employment injury.

On October 31, 1991 appellant, then a 43-year-old mechanic, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his left arm while removing a motor mount bolt wrench on October 30, 1991. The Office of Workers' Compensation Programs accepted the claim for left shoulder sprain on February 10, 1992. The Office authorized arthroscopy of the left shoulder and arthroscopic acromioplasty on April 3, 1992.

On March 9, 1992 appellant filed a claim (Form CA-7) for a schedule award.

In a report dated October 17, 1992, Dr. Ronald Goldberg, a Board-certified orthopedic surgeon, opined that appellant had a 13 percent impairment based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. revised). Dr. Goldberg stated that appellant had flexion to 145 degrees in the left shoulder, 40 degrees of extension to the left shoulder, abduction of the left shoulder was 130 degrees, adduction of the left shoulder was 10 degrees, internal rotation of the left shoulder was 70 degrees and external rotation was 30 degrees.

The Office referred appellant to Dr. William Johnson for an evaluation on October 1, 1993. In a report dated November 5, 1993, Dr. Johnson stated that appellant had forward elevation of 160 degrees, internal rotation of 70 degrees, external rotation of 80 degrees, adduction of 50 degrees, extension 50 degrees. Dr. Johnson opined that appellant had a 6 percent impairment due to joint crepitation and 4 percent impairment for abnormal motor for a total of 10 percent permanent partial impairment.

On March 16, 1994 the Office referred appellant to Dr. David M. Smith, a Board-certified orthopedic surgeon, together with a statement of accepted facts and medical records and questions to be answered.

In a report dated April 25, 1994, Dr. Smith opined that appellant “had a full painless active and passive range of motion of the left shoulder with no loss, whatsoever compared to the right side.” Dr. Smith stated that appellant had abduction of 150 degrees, forward elevation of 150 degrees, internal rotation of 40 degrees, external rotation of 90 degrees, adduction of 30 degrees and extension of 40 degrees. Dr. Smith indicated that a physical examination revealed no muscle atrophy and a normal neurological examination of the left upper extremity. Dr. Smith further opined that appellant had “no evidence, whatsoever, of any musculoskeletal impairment or disability in regard to the left shoulder.”

In a report dated December 14, 1994, the Office medical adviser, opined that appellant had a 10 percent permanent impairment of the left upper extremity based upon Dr. Johnson’s November 5, 1993 report.

In a report dated August 11, 1995, the Office medical adviser opined that appellant had zero percent permanent impairment of the left upper extremity based upon Dr. Smith’s April 25, 1994 report. In a report dated December 5, 1995, the Office medical adviser opined that the differences in impairment ratings by Drs. Goldberg, Johnson and Smith was due to appellant’s “physical improvement as time progressed.”

By decision dated January 4, 1996, the Office found the evidence insufficient to establish a schedule award.

Appellant, through his attorney requested a hearing before an Office representative in a letter dated January 12, 1996. A hearing was held on August 13, 1996 at which appellant was represented by counsel and allowed to testify.

By decision dated November 15, 1996, the hearing representative opined that appellant was not entitled to a schedule award as a result of his October 30, 1991 accepted employment injury. In so finding, the hearing representative relied upon the August 11 and December 14, 1995 reports by the Office medical adviser which opined that appellant had no impairment to his left upper extremity due to his accepted employment injury.

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

The schedule award provision of the Federal Employees’ Compensation Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act’s compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss

¹ 5 U.S.C. § 8107 *et seq.*

of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.² 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.³

In the present case, based on appellant's history of injury and a physical examination, Dr. Goldberg opined that appellant had a 13 percent permanent impairment of the left upper extremity. Dr. Johnson, who Office initially referred appellant for an evaluation, opined that appellant had a 10 percent permanent impairment of his left upper extremity. In a report dated December 14, 1994, the Office medical adviser, agreed with Dr. Johnson's opinion that appellant had a 10 percent permanent impairment of the left upper extremity.

Dr. Smith, the second opinion physician, opined that appellant had no impairment. Dr. Smith further opined that appellant had no evidence of any musculoskeletal impairment in his left shoulder or any disability due to his accepted employment injury. In a report dated August 11, 1995, the Office medical adviser opined that appellant had zero percent permanent impairment of the left upper extremity based upon Dr. Smith's April 25, 1994 report. In a supplemental report dated December 5, 1995, the Office medical adviser stated that the differences in impairment ratings by Drs. Goldberg, Johnson and Smith was due to appellant's "physical improvement as time progressed."

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between appellant's physician, Dr. Goldberg, and the Office second opinion physician, Dr. Smith, on the issue of whether appellant sustained permanent impairment due to his October 30, 1991 employment injury, such that he would be entitled to a schedule award. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized medical opinion on this matter. After such further development as the Office deems necessary, the Office should issue a *de novo* decision regarding appellant's claim.

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Daniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

The decision of the Office of Workers' Compensation Programs dated November 15, 1996 is set aside and the case remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
January 14, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member