

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALKER L. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, LA

*Docket No. 99-1522; Submitted on the Record;
Issued August 18, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has any impairment of the right upper extremity for which he should receive a schedule award; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for a merit review in its March 12, 1999 decision under 5 U.S.C. § 8128 constituted an abuse of discretion.

On December 5, 1996 appellant, then a 49-year-old letter carrier, filed a notice of traumatic injury alleging that he injured his neck and right shoulder while carrying a satchel of mail on December 4, 1996 in the course of his federal employment. On January 23, 1997 appellant requested a schedule award. On February 6, 1997 the Office accepted the claim for a cervical spine strain and a right shoulder strain.

On February 18, 1997 Dr. John E. Clark, appellant's treating physician and a physician Board-certified in physical medicine and rehabilitation, stated that he was treating appellant for multi-level cervical spondylosis with degenerative disc disease that is causing a cervical stenosis at the C4-5 and C5-6 level. Dr. Clark stated that this caused an intermittent cervical radiculopathy into his right upper extremity. He stated that appellant was asymptomatic, but that he would award him a permanent impairment rating of five percent of the whole person based on his cervical pathology.

On March 17, 1997 the Office requested that Dr. Clark provide additional information regarding appellant's upper extremity impairments. In particular, the Office requested that Dr. Clark apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to render an impairment rating.

On March 31, 1997 Dr. Clark stated that he initially saw appellant on December 6, 1996 for acute onset of right cervical and right upper extremity pain due to carrying a mailbag on December 4, 1996. He stated that magnetic resonance imaging of the cervical spine showed severe cervical spondylosis from C3 through C7 with cervical stenosis at multiple levels.

Consequently, Dr. Clark concluded that appellant had degenerative disc disease that was exacerbated from carrying a mailbag and resulted in a right cervical radiculopathy syndrome causing pain, numbness and weakness in the right upper extremity. He stated that appellant reached maximum medical improvement on February 6, 1997. Dr. Clark stated that the only residual of the injury was that a Jamar grip test showed that right hand grip strength was reduced by 30 percent when compared to left hand grip strength. He noted that appellant was right hand dominant. Dr. Clark concluded that appellant had a permanent impairment rating of five percent of the whole person based on his cervical radiculopathy from his degenerative disc disease of the cervical spine. He stated that his finding was based on appellant having a category III radiculopathy of the cervicothoracic category pursuant to page 104 of the A.M.A., *Guides*.

On May 8, 1997 an Office medical adviser reviewed Dr. Clark's report and found that it failed to meet the Office's requirement because it did not separately address the impairment to the extremities. The Office medical adviser indicated that the Office should request an impairment evaluation of the upper extremities caused by or resulting from of the accepted job-related injury. On May 13, 1997 the Office requested another opinion from Dr. Clark pursuant to the Office medical adviser's instructions.

On May 20, 1997 Dr. Clark stated that appellant had a preexisting degenerative disc disease that caused him to have radiculopathy. He stated that there was an acceleration of the symptomology following carrying a mailbag. Dr. Clark stated that, consequently, he only awarded appellant a five percent whole person impairment rating based on his smoldering right cervical radiculopathy. He indicated that this was one third the value of the 15 percent whole person impairment rating that can be awarded to a person with a cervical/thoracic category III radiculopathy. Dr. Clark stated that he was basing most of appellant's impairment on his underlying disc disease, as opposed to the actual injury from carrying the mailbag. He noted, however, that the fact that appellant had residual weakness in his right grip strength indicated that there was some permanent neurological sequelae from the injury. Dr. Clark stated that there was no specific impairment evaluation of the upper extremity as appellant's impairment was of a neurologic nature coming from his cervical radiculopathy. He indicated that the impairment rating of the upper extremity was incorporated into the impairment rating for the radiculopathy, category III, page 104, of the A.M.A., *Guides*.

On June 11, 1997 the Office medical adviser noted that Dr. Clark still failed to provide an impairment rating for the upper extremity. The medical adviser noted that Dr. Clark only provided an impairment rating for the neck for which appellant could not receive a schedule award. Consequently, the medical adviser requested that the case be referred to another physician to render an evaluation of appellant's right upper extremity impairment pursuant to the A.M.A., *Guides*.

On June 25, 1997 the Office referred appellant to Dr. Lawrence Messina, a Board-certified orthopedic surgeon, for a second opinion examination.

On August 7, 1997 Dr. Messina reviewed appellant's symptoms and noted the history of the injury. His clinical examination revealed a limitation of range of motion of about 50 percent of the cervical spine, but that rotation was within normal limits. Dr. Messina noted some tenderness about the neck, but no paraspinous spasm. He found no tenderness localized directly

to the brachial plexus. Dr. Messina found a full range of motion in appellant's shoulders, elbows and hands, and found no atrophy in the right upper extremity. He noted symmetrical and physiologic deep tendon reflexes at the biceps, triceps and brachioradialis. Dr. Messina found no muscle weakness in either upper extremity. He stated that appellant's history was consistent with a cervical strain aggravated by carrying the mailbag with associated radiculopathy. Dr. Messina stated that this was a temporary problem as the numbness radiating into appellant's right hand gradually resolved. He opined that, with normoactive deep tendon reflexes and no evidence of muscle atrophy, appellant had no residual radiculopathy in his upper extremity. Dr. Messina stated that appellant's only real permanent restrictions stemmed from the limitation of range of motion in his cervical spine and that this appeared to be a preexisting condition rather than related to the December 1996 injury. He indicated that the limitation of range of motion of the cervical spine would give appellant a four percent whole body permanent impairment.

On December 1, 1997 the Office medical adviser noted that, in regards to the right upper extremity, Dr. Messina found no abnormal range of motion, no muscle atrophy and no muscle weakness. He, therefore, determined that there was no medical evidence from Dr. Messina supporting a permanent partial impairment of the right upper extremity. The Office medical adviser further noted that Dr. Messina's four percent impairment rating based on the restricted motion of the cervical spine was not probative as the spine is not a scheduled member.

By decision dated December 4, 1997, the Office found that the weight of the medical opinion evidence rested with the opinion of Dr. Messina who correctly applied the A.M.A., *Guides* and explained his computations prior to determining that appellant demonstrated no impairment of the right upper extremity. The Office indicated that Dr. Clark failed to provide an impairment rating for the right upper extremity, but only provided an impairment rating for the cervical spine, which is noncompensable. It further indicated that the Office medical adviser reviewed Dr. Messina's report, finding no abnormal range of motion, atrophy or muscle weakness of the right upper extremity, and also concluded that there was no impairment of the right upper extremity. It, therefore, found that appellant was not entitled to a schedule award.

On March 4, 1998 Dr. Clark reviewed the results of an Acron grip strength test. He stated that the bilateral grip strength test of the upper extremities showed a 46 percent deficit on the right. Dr. Clark further noted that pinch grip strength test was low on the right side. He also indicated that static strength testing of the right upper extremity showed weakness in the grip, dorsiflexion, palmar flexion, biceps, triceps, shoulder flexion and extension, shoulder abduction, shoulder adduction and shoulder internal and external rotation.

On March 26, 1998 appellant requested reconsideration.

By decision dated June 16, 1998, the Office reviewed the merits of the claim and found that the additional evidence submitted was insufficient to warrant modification of the prior decision. In this regard, the Office found that Dr. Clark's report March 4, 1998 lacked probative value because he failed to explain how he applied the A.M.A., *Guides* to reach his impairment finding. It further stated that Dr. Clark never provided a rationalized medical opinion explaining how the alleged permanent impairment was related to the December 4, 1996 work injury and that the claim was only accepted for cervical strain and right shoulder strain.

On August 25, 1998 Dr. Clark stated that appellant suffered an exacerbation of his underlying cervical degenerative disc disease when he was injured on December 4, 1996. He stated that this resulted in a cervical radiculopathy down his right arm causing a permanent residual weakness down his right arm. Dr. Clark indicated that he already provided an impairment rating in conformance with the A.M.A., *Guides*.

On September 25, 1998 Dr. Clark stated that appellant had a right C6 radiculopathy causing hand weakness. He stated that pursuant to Chapter 3.3 of the A.M.A., *Guides* that appellant had a permanent partial impairment rating of 15 percent based on his right C6 radiculopathy. Dr. Clark also stated that appellant was given a right upper extremity impairment rating of 35 percent due to the motor deficit caused by the right C6 radiculopathy pursuant to Table 13, page 51 of the A.M.A., *Guides*. He indicated that appellant had preexisting degenerative cervical disc disease prior to the accident on December 4, 1996. Dr. Clark further stated that prior to that accident appellant had no residual motor weakness in the right upper extremity. He opined that this represented a progression of his cervical degenerative disc disease stemming from the work-related incident.

On October 21, 1998 appellant requested reconsideration.

On January 11, 1999 the Office medical adviser reviewed the reports of Drs. Messina and Clark. He noted that there was a wide disagreement between Dr. Messina's August 7, 1997 report finding a 0 percent permanent impairment of the right upper extremity and Dr. Clark's September 25, 1998 report finding a 35 percent permanent impairment of the right upper extremity. The Office medical adviser indicated that Dr. Clark's opinion was confused, unexplained and unsupported by clinical data. Nevertheless, he concluded that another examination was required by a third party to determine the extent of any impairment of the right upper extremity and to determine if the impairment is work related.

By decision dated January 19, 1999, the Office reviewed the merits of the case and denied modification. The Office found that Dr. Messina properly evaluated appellant's condition while Dr. Clark failed to cure the deficiencies in his impairment assessment, namely he failed to appropriately address the percentage of impairment according to the A.M.A., *Guides*.

On February 4, 1999 Dr. Clark stated that he initially diagnosed cervical facet irritation with superimposed myalgias in the right shoulder girdle with the possibility of an underlying sensory radiculopathy at the C5-6 level. He stated that as time passed it became apparent that appellant had an underlying cervical radiculopathy producing low grade symptoms in the right upper extremity. Dr. Clark stated that cervical pathology produced the shoulder pain. He opined that the carrying of the mail sack directly caused the condition. Dr. Clark further explained that appellant's preexisting cervical pathology was exacerbated by the December 4, 1996 injury and left him with residual right upper extremity weakness. He concluded that the shoulder strain was not the primary injury and that the primary injury was to the right cervical C5-6 nerve root.

On February 10, 1999 appellant requested reconsideration.

By decision dated March 12, 1999, the Office declined to review its prior schedule award decision because appellant neither raised substantive legal questions nor included new and relevant evidence in his request for reconsideration.

The Board finds that this case is not in posture for a decision.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations,² set forth that schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment is to be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment.³

In obtaining medical evidence for schedule award purposes, the Office must obtain an evaluation by an attending physician which includes a detailed description of the impairment including, where applicable, the loss in degrees of motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment. The description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁴ If the attending physician has provided a detailed description of the impairment, but has not properly evaluated the impairment pursuant to the A.M.A., *Guides*, the Office may request that the Office medical adviser review the case record and determine the degree of appellant's impairment utilizing the description provided by the attending physician and the A.M.A., *Guides*.⁵

In the instant case, Dr. Clark, appellant's treating physician and a physician Board-certified in physical medicine and rehabilitation, and Dr. Messina, the Office referral physician and a Board-certified orthopedic surgeon, rendered conflicting opinions concerning whether appellant demonstrated weakness in his right upper extremity, whether his present condition was related to his December 4, 1996 injury, and the extent of the impairment to his right upper extremity. In his reports, Dr. Clark indicated that his clinical findings demonstrated weakness in appellant's right upper extremity. In particular, his March 31, 1997 report noted that grip strength was reduced on the right by 30 percent and his March 4, 1998 report indicated grip strength was reduced by 46 percent. Moreover, Dr. Clark indicated in his March 4, 1998 report that that pinch grip strength test was low on the right side and that static strength testing of the right upper extremity showed weakness in the grip, dorsiflexion, palmar flexion, biceps, triceps, shoulder flexion and extension, shoulder abduction, shoulder adduction and shoulder

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304, recodified at 20 C.F.R. § 10.404.

³ *Leisa D. Vassar*, 40 ECAB 1287 (1989).

⁴ *Joseph D. Lee*, 42 ECAB 172 (1990).

⁵ *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

internal and external rotation. In contrast, Dr. Messina, in his August 7, 1997 report, provided clinical findings which showed no evidence of weakness in the right upper extremity.

The physicians also offered conflicting views on whether appellant's present condition stemmed from the December 4, 1996 employment injury. In this regard, Dr. Clark opined in his reports that appellant's impairment resulted from an exacerbation of his preexisting cervical condition. Dr. Messina, however, found that appellant's present condition was unrelated to his December 1996 injury and attributed it solely to his preexisting condition.

Finally, Dr. Clark concluded in his September 25, 1998 report that appellant had a 35 percent impairment of his right upper extremity due to motor deficit caused by the right C6 radiculopathy pursuant to Table 13, page 51, of the A.M.A., *Guides*. In contrast, Dr. Messina's examination rendered no positive clinical findings regarding appellant's right upper extremity and he determined that appellant had a zero percent impairment of the right upper extremity.

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act,⁶ to resolve the conflict in the medical opinion.⁷ As an unresolved conflict exists in the medical opinion evidence, this case must be remanded to the Office for referral to an impartial medical specialist. The Office medical adviser urged this in his report dated January 11, 1999. Accordingly, after such further development as necessary, the Office shall issue a *de novo* decision.⁸

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

⁷ Although it is not clear how Dr. Clark applied the A.M.A., *Guides* to his clinical findings to reach his impairment rating, Drs. Clark and Messina also differ on whether appellant demonstrated right upper extremity weakness on examination and on whether his condition stems from the accepted employment injury. Consequently, their reports are equally probative on issues which need to be resolved in this case.

⁸ Because this case must be remanded for further development of the medical evidence and the issuance of a *de novo* decision, the Board need not address the Office's March 12, 1999 decision denying reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 19, 1999 and June 16, 1998 are hereby set aside and the case is remanded to the Office for further development consistent with this opinion.

Dated, Washington, D.C.
August 18, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member