U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PORTIA E. COOPER and U.S. POSTAL SERVICE,
POST OFFICE, Pasadena, MD

Docket No. 98-1960; Submitted on the Record;
Issued July 26, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that she has greater than a 26 percent permanent impairment of the right and left upper extremities.

On July 25, 1984 appellant, a 37-year-old distribution clerk, filed a claim for benefits based on carpal tunnel syndrome, which the Office of Workers' Compensation Programs accepted for bilateral carpal tunnel syndrome and ganglion cyst of the right wrist. On October 2, 1984 Dr. Neil M. Keats, a Board-certified orthopedic surgeon, performed bilateral carpal tunnel release surgery. Dr. Keats stated in reports dated September 2 and November 12, 1987 that appellant had a 12 percent permanent impairment for her right and left hands, respectively.

On January 21, 1988 the Office granted appellant a schedule award for a 12 percent permanent impairment of the right and left upper extremities for the period August 14, 1987 to January 19, 1989, for a total of 74.88 weeks of compensation.

On June 22, 1989 appellant filed another claim for an award under the schedule for permanent partial disability based on bilateral carpal tunnel syndrome.

On June 28, 1994 the Office granted appellant an award under the schedule for a 12 percent permanent impairment of the upper right and left extremities for the period October 2, 1992 through June 5, 1994, for a total of 611.52 weeks of compensation.[1]

[1] In an apparent typographical error, the June 28, 1994 schedule award granted awards for impairments of the upper and lower extremities, instead of left and right upper extremity.

Appellant subsequently requested an additional schedule award for compensation greater than that which the Office had already awarded.[2]

On August 3, 1994 Dr. Keats submitted an impairment evaluation, in which he rated appellant at a 50 percent impairment for the upper extremities, plus a 30 percent impairment of the little finger.[3] In a report dated September 13, 1994, an Office medical adviser reviewed Dr. Keats' report and concluded that appellant had sustained no further percentage of impairment in addition to that which the Office had already awarded.[4]

In a report dated November 2, 1994, Dr. Keats stated that appellant had a 50 percent impairment of the right hand and 25 percent impairment of the left hand; he stated in a June 9, 1995 report that, pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition) (the A.M.A., *Guides*), appellant had a 50 percent permanent disability for the right hand based on loss of sensation, motor power and loss of range of motion of her little and ring finger and a 15 percent permanent impairment for her left hand based mainly on sensory loss.[5]

The Office found that there was a conflict in the medical evidence and referred appellant for an impairment evaluation with Dr. Louis S. Elias, a Board-certified orthopedic surgeon, who stated in a May 13, 1996 report that, pursuant to page 57, Table 16 of the A.M.A., *Guides*, appellant had a 20 percent permanent impairment of the right upper extremity and a 10 percent permanent impairment of the left upper extremity. In a June 30, 1996 report, he stated that this was an overall rating and was not in addition to the 26 percent permanent impairment already awarded by the Office.

In a report dated February 20, 1997, an Office medical adviser found that the impairment percentages found by Dr. Elias represented the total impairment rating to which appellant was entitled.[6]

[2] There is no Form CA-7 in the case file. A July 18, 1994 letter from the Office to Dr. Keats requesting that he administer an impairment evaluation of appellant indicates that appellant telephoned the Office and requested an additional award.

[3] Dr. Keats completed two forms following his evaluation, both of them dated August 2, 1994. Although he indicated that the findings and conclusions indicated on both forms resulted in a 50 percent impairment of the right upper extremity, the Office apparently construed this as a finding of a 50 percent impairment for both upper extremities.

[4] The February 20, 1997 statement of accepted facts states that appellant has received a schedule award of 26 percent for each upper extremity.

[5] Notwithstanding this report, the statement of accepted facts dated February 20, 1997 indicates that appellant's treating physician gave her a rating of a 15 percent impairment of the left hand.

[6] The Office had referred appellant's case to a previous independent medical examiner, but an Office medical adviser invalidated his opinion on February 3, 1996 after he failed to submit sufficient findings in both his initial and supplemental reports.

By decision dated March 26, 1997, the Office denied the claim for an additional award under the schedule.

By letter dated April 23, 1997, appellant requested an oral hearing, which was held on March 18, 1998.

By decision dated April 23, 1998, an Office hearing representative affirmed the Office's previous decision. The hearing representative found that Dr. Keats' opinion of a 50 percent impairment of the right upper extremities was not probative, indicating that he never provided a sufficient medical rationale as to how her impairment rating had increased from 12 percent to 50 percent. The hearing representative also indicated that Dr. Keats' rating, with regard to the left upper extremity, varied over time, in different reports. In addition, the hearing representative stated that Dr. Keats failed to cite the applicable tables and charts of the A.M.A., *Guides* on which his impairment rating was based. The hearing representative relied on the Office medical adviser's adoption of the opinion of Dr. Elias, stating that Dr. Elias' impairment evaluation was the only one in the record rendered in accordance with the applicable tables and charts of the A.M.A., *Guides* and, therefore, represented the weight of the medical evidence.

In addition, the Office hearing representative stated in a footnote that the Office had erred in its February 20, 1997 decision, by stating that Dr. Elias was a referee, independent medical examiner. The hearing representative found that because Dr. Elias had not been chosen on a rotation basis, he could not be designated as an independent medical examiner, therefore, the hearing representative designated Dr. Elias as a second opinion referral physician. Accordingly, the hearing representative concluded that appellant was not entitled to an award greater than the 26 percent permanent impairment of both upper extremities already awarded by the Office.

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

In the present case, there was disagreement between the Office referral physician and Dr. Keats, appellant's physician, as to the percentage of impairment in appellant's right upper extremities caused by his accepted carpal tunnel condition. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[7] The Office appointed Dr. Elias who examined appellant and submitted reports dated May 13 and June 30, 1996. He concluded that appellant did not have an impairment of both upper extremities greater than the 26 percent already awarded. However, the hearing representative subsequently found that Dr. Elias was not selected on a rotational basis; thus, his appointment did not resolve the conflict between medical opinions

[7] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "[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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

in this case.[8] Once the hearing representative disqualified the impartial specialist and declared his opinion to be that of a second opinion physician, that opinion can only align on one side or the other of the declared conflict. It was, therefore, incumbent upon the hearing representative to send the case back or refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. The hearing representative, therefore, erred in ignoring the conflict and finding that the converted second opinion of Dr. Elias represented the weight of the evidence to deny the claim. Accordingly, as the Office hearing representative did not refer the case back for a properly selected impartial medical examiner after finding he was not selected by the Office pursuant to its rotating selection procedures, there remains an unresolved conflict in medical opinion.[9]

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures, to resolve the outstanding conflict in medical evidence regarding the appropriate percentage of impairment in appellant's upper extremities. On remand, the Office should instruct the new impartial medical examiner to provide a well-rationalized opinion, to specifically refer to the applicable tables and standards of the A.M.A., *Guides* in making his findings and conclusions and in rendering his impairment rating and to clearly indicate the specific background upon which he based his opinion. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

[8] The Office Procedure Manual contemplates that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(a)(3) (March 1994).

[9] *See Shirley L. Steib*, 46 ECAB 309 (1994); *Vernon E. Gaskins*, 39 ECAB 746 (1988).

The Office's decision of April 23, 1998 is, therefore, set aside and the case is remanded to the Office of Workers' Compensation Programs for further action consistent with this decision of the Board.

Dated, Washington, D.C.
July 26, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member