

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA J. MONROE and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

*Docket No. 98-2139; Submitted on the Record;
Issued March 24, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has greater than a three percent permanent loss of use of her left arm.

This case has previously been on appeal before the Board. In an order remanding case dated October 20, 1995, the Board found that a conflict existed in the medical opinion evidence between Dr. Ronald Goldberg, a physician for appellant who, concluded that she had a 46 percent permanent loss of use of the left arm, and Dr. Norman H. Eckbold, who examined appellant upon referral by the Office of Workers' Compensation Programs and concluded she had a two percent permanent loss of use of her left arm.¹ The Board remanded the case to the Office for referral of the case record and a statement of accepted facts to an appropriate medical specialist for an impartial evaluation and opinion, to be followed by a *de novo* decision.

On remand, appellant's attorney, by letter dated November 3, 1995, requested that appellant be allowed to participate in the selection of an impartial specialist; the reason given was "to help assure that the claimant undergoes a truly impartial examination." On December 28, 1995 the Office referred appellant, the case record and a statement of accepted facts to Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. Based on Dr. O'Dowd's February 2, 1996 report, the Office found, by decision dated March 11, 1996, that appellant had no greater than the two percent permanent loss of use of her left arm for which a schedule award was issued on December 3, 1992.

Appellant requested a hearing, which was held on October 22, 1996. By decision dated December 13, 1996, an Office hearing representative found that further development of the medical evidence was necessary. The Office hearing representative noted that Dr. O'Dowd indicated that appellant had full range of motion of her left shoulder, but did not provide measurements of such motion. The Office hearing representative also found that he incorrectly

¹ Docket No. 94-923.

used the third rather than the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and that Dr. O'Dowd did not include appellant's preexisting left shoulder condition in rating her permanent loss of use of the left arm. The case was remanded for a supplemental opinion from Dr. O'Dowd.

By letter dated April 4, 1997, the Office requested that Dr. O'Dowd provide measurements of appellant's left shoulder motion, that he use the fourth edition of the A.M.A., *Guides*, and that he include any preexisting impairment. In a report dated May 6, 1997, Dr. O'Dowd stated:

"Active range of motion is recorded as follows; Abduction to 170 left, 180 right, Extension to 170 left, 180 right, Abduction internal rotation and abduction external rotation are both 90 degrees, with the arm at the side she has full internal rotation to 85 degrees and external rotation approximately 60 degrees on either side. She can extend 50 to 60 degrees, on both sides with both shoulders. On palpation she is tender diffusely about the left shoulder, anteriorly posteriorly, again in a nonphysiologic fashion.

"Neurologic exam[ination] reveals some difference right versus left in terms of overall muscle mass. However, strength is equal to normal exam[ination].

"She has no functional defects in the upper extremity. There are no reflex defects, and she has normal sensation at all levels. There is negative Tinel's sign over the ulnar, radial and median nerve bilaterally at both wrist and elbow.

"She has negative Adson's maneuver for both thoracic outlet areas. There is superficial tenderness throughout the entire left shoulder, both anteriorly and posteriorly around the left trapezius, none on the right.

"Using the A.M.A., *Guides* ..., employing the range of motion as recorded above for her left shoulder, she has no deficit of the left upper extremity and no deficits of the entire person.

"Using Table Eleven-A on Page 48 in Chapter Three, because of the patient's subjective discomfort, paresthesia and diffuse discomfort about the left shoulder which may be secondary to the thoracic outlet syndrome surgery and which was performed in 1990, this patient qualifies as a Grade II classification with a percent sensory deficit involving the brachial plexus through the thoracic outlet syndrome as two to three percent. This qualifies the patient as a three percent impairment of the left upper extremity, secondary to persistent discomfort and paresthesia."

On May 16, 1997 an Office medical adviser reviewed Dr. O'Dowd's May 6, 1997 report and stated:

"Dr. O'Dowd states that claimant's ROM [range of motion] of the left shoulder indicates that 'she has no deficit of the left upper extremity and no deficit of the entire person.'

"He then refers to Table 11, page 48, of the A.M.A., *Guides*, 4th ed., and opines that claimant is entitled to a 3 percent impairment using said Table 11, but fails to indicate how he arrived at 3 percent. No explanation is given as to how he went from Grade II to 3 percent."

On July 11, 1997 the Office issued appellant a schedule award for an additional one percent permanent loss of use of the left arm, for a total of three percent.

Appellant requested a hearing, which was held on January 28, 1998. By decision dated April 1, 1998, an Office hearing representative found that Dr. O'Dowd's assessment of appellant's permanent impairment was reasonable and in accordance with the A.M.A., *Guides*, that Dr. O'Dowd properly used the fourth edition of the A.M.A., *Guides*, and that appellant had not provided a valid reason for requesting participation in the selection of the impartial specialist. By decision dated April 13, 1998, the Office terminated appellant's compensation effective that date on the basis that the weight of the medical evidence established that her injury-related disability had ceased.

On appeal, the Director of the Office filed a motion to dismiss in part and affirm in part, pointing out that appellant's attorney had timely requested an oral hearing before an Office hearing representative regarding the Office's April 13, 1998 decision terminating her compensation. By order dated March 31, 1999, the Board granted the motion to dismiss the portion of appellant's appeal that relates to the April 13, 1998 termination of her compensation benefits. The Board denied the motion to affirm the April 1, 1998 schedule award.

The Board finds that Dr. O'Dowd was properly selected as the impartial medical specialist resolving the conflict of medical evidence in this case. Although appellant's attorney requested, prior to the selection that he be allowed to participate in the selection of the impartial medical specialist, allowance of such participation is required only where a valid reason is provided.² The reason provided by appellant's attorney for requesting participation -- "to help assure that the claimant undergoes a truly impartial exam[ination]" -- is not a valid reason.³ The Office's use of a rotational system among all qualified and willing medical specialists is designed to assure a truly impartial evaluation.

² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994).

³ See *Larry B. Guillory*, 45 ECAB 522 (1994) (the Board found not valid the offered reason that the Office often uses defense medical experts).

It was proper for Dr. O'Dowd to use the fourth edition of the A.M.A., *Guides* to rate appellant's permanent impairment. The Office's procedure manual provides that when a claimant requests reconsideration of a schedule award: "If new evidence is received and a *de novo* decision is to be issued, the award should be calculated on the basis of the edition currently being used."⁴ In the present case, appellant requested reconsideration of the Office's December 3, 1992 schedule award. A conflict of medical evidence was found, and as a result, an impartial medical evaluation was obtained from Dr. O'Dowd. Under these circumstances, it was proper for Dr. O'Dowd to use, in his May 6, 1997 evaluation, the fourth edition of the A.M.A., *Guides*.

The Board finds that further development of the evidence is needed on the question of the extent of appellant's permanent loss of use of her left arm.

Dr. O'Dowd's second report, which is dated May 6, 1997, contains measurements of the motion of appellant's left shoulder, which, when compared to the tables of Chapter 3 of the fourth edition of the A.M.A., *Guides*, result in a zero percent permanent impairment, as found by Dr. O'Dowd. He also stated that appellant had no loss of strength of the left arm. With regard to appellant's permanent impairment due to sensory deficit, Dr. O'Dowd stated that appellant qualified as a Grade II classification using Table 11 of Chapter 3 of the A.M.A., *Guides*.⁵ His report, however, does not show that he followed the remainder of the procedure of Table 11, which is to identify the affected nerve or nerves, find the maximum impairment of the upper extremity due to sensory deficit or pain for each nerve or for the brachial plexus, and multiply the severity of the sensory deficit by the maximum impairment value. As pointed out by an Office medical adviser in a May 16, 1997 review of Dr. O'Dowd's report: "No explanation is given as to how he went from Grade II to [three] [percent]." In the absence of identification by the physician as to the specific nerve or group of nerves affected, the Board cannot ascertain whether the extent of permanent impairment was properly calculated. The case will be remanded to the Office for it to obtain a supplemental report from Dr. O'Dowd detailing which nerve or nerves were affected, or whether the entire brachial plexus was affected. After such further development as it deems necessary, the Office should issue an appropriate decision on the extent of permanent loss of use of appellant's left arm.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(b) (May 1996). This section also notes that the Office adopted the fourth edition effective November 1, 1993.

⁵ This table describes a Grade 2 classification as "Decreased sensibility with or without abnormal sensation or pain, which is forgotten during activity."

The decision of the Office of Workers' Compensation Programs dated April 1, 1998 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
March 24, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member