

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAHZARIN R. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 00-8; Submitted on the Record;
Issued May 9, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 14, 1998; and (2) whether appellant is entitled to a schedule award for his right upper extremity.

The Office accepted appellant's claim for lateral and medial epicondylitis and paid appellant compensation benefits. His right arm condition resulted from repetitive keying of mail on the letter sorter machine over a period of time, culminating in her filing a notice of occupational disease on November 9, 1992.

The results of an electromyogram (EMG) dated June 16, 1994 from the Philadelphia Hand Center showed mild to moderate right brachial plexus neuropathy affecting the lower plexus more than the upper plexus cord components, mild or "very borderline" early developing median nerve neuropathy at the right wrist, no evidence of right ulnar neuropathy at the elbow or radial neuropathy at the radial tunnel level and no electromyographic evidence of cervical nerve root radicular component involvement.

On June 16, 1995 appellant filed a claim, Form CA-7, for a schedule award.

In a report dated April 22, 1995, appellant's treating physician, Dr. David Weiss, an osteopath, considered appellant's history of injury, performed a physical examination and reviewed two sets of EMGs and nerve conduction studies, one set which was normal and the other which revealed brachial plexus injury/right ulnar nerve at the cubital tunnel and median nerve neuropathy. He diagnosed right brachial plexus injury, right median nerve neuropathy and ulnar neuropathy of the cubital tunnel. Dr. Weiss opined that appellant still suffered residuals of her traumatically-induced injuries including daily right upper extremity pain, pins and needles in the right hand, exacerbation of her pain due to changes in weather and weakness in the right upper extremity. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th edition 1994), with references to specific page numbers and tables,

he opined that appellant was 100 percent disabled due to her right upper extremity. Dr. Weiss explained that, using Table 16, page, 57, appellant had a 10 percent mild entrapment of the right median nerve at the wrist and a 10 percent ulnar entrapment of the right elbow. Using Table 11, page 48 and Table 14, page 52, he opined that appellant had an 80 percent sensory deficit brachial plexus and using Table 12, page 49 and Table 14, page 52, appellant had a 25 percent motor deficit of the brachial plexus. Combining the sensory deficit to the motor deficit by implicitly using the Combined Values Chart, page 322, Dr. Weiss obtained 85 percent which he added to the 20 percent mild and ulnar entrapment to obtain a 100 percent impairment to the right upper extremity.

In a report dated May 13, 1996, a referral physician, Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon, considered appellant's history of injury, noting that she was injured on the job on August 22, 1992, that her job as a letter sorting machine clerk required repetitive action using her right arm to punch in numbers on a keypad as well as lifting trays and that she felt "a sharp shooting pain that went from her right fingertips up to the elbow and then up into her shoulder. He performed a physical examination and reviewed the EMGs and nerve conduction studies performed in 1994. Dr. O'Dowd stated:

"The review of [appellant] studies and the review of [her] history, it appears that [appellant] may have had a medial and lateral epicondylitis, but the onset of the symptoms is rather unusual, especially the sharp onset as the patient describes. It is by no means a typical presentation of tennis elbow or medial epicondylitis. Her diffuse discomfort on today's examination has a strong nonphysiologic exaggerated response to the superficial palpation, indicating enhancement of her symptoms. The presence of brachial plexus abnormalities is interesting, but not related to [appellant] sudden onset of symptoms in August of 1992. We find no clinical evidence of a persistent neurologic entrapment. We find no dependable evidence to verify any significant abnormality in her right upper extremity, other than [appellant's] exaggerated response to subjective discomfort.

"[Appellant's] abnormalities noted in the brachial plexus may or may not be causing symptoms in the right upper extremity, but certainly not to the degree that the examination of May 13, 1996 indicates. We therefore find no clear cut objective abnormality related to the injury of August 22, 1996."

He concluded that appellant did not have any disability related to the August 1992 onset of lateral and medial epicondylitis and had no disability rating.

By letter dated May 23, 1996, Dr. O'Dowd stated that he had completed his report based on his May 13, 1996 examination but he did not have copies of the EMGs or nerve conduction studies "that apparently were done on two different occasions."

In a report dated March 3, 1997, based on Dr. O'Dowd's May 13, 1996 report, the district medical adviser opined that appellant had no disability related to the August 1992 onset of lateral and medial epicondylitis and therefore had no disability rating.

By decision dated March 27, 1997, the Office denied appellant's claim for a schedule award. She requested a hearing before an Office hearing representative which was held on October 27, 1997.

By decision dated December 19, 1997, the Office hearing representative remanded the case, stating that Dr. O'Dowd's May 13, 1996 opinion was not sufficient to resolve the issue of whether appellant had a schedule injury because he indicated that appellant's injury occurred at one specific time and stated so several times in his evaluation. Further, in his May 23, 1996 letter, he stated that he had not reviewed the EMG studies and therefore his opinion was incomplete. The Office hearing representative stated that on remand the Office should ensure that Dr. O'Dowd reviewed the EMG studies in questions and provide a reasoned opinion on whether appellant exhibited any symptomatology related to the August 1992 employment injury and whether that symptomatology constituted an impairment under the A.M.A., *Guides* (4th edition 1994).

Subsequently, by letter dated January 12, 1998, the Office submitted the June 16, 1994 EMG/nerve conduction studies to Dr. O'Dowd and requested that he issue a supplemental report to respond to the questions posed by the Office hearing representative.

By letter dated April 28, 1998, Dr. O'Dowd stated that he had responded to the Office's January 12, 1998 letter in his May 13, 1996 report which he issued in its final form and notes that on page three, he evaluated the 1994 EMG and nerve conduction studies. His May 13, 1996 report is identical to the other May 13, 1996 report that is in the record.

By decision dated May 14, 1998, the Office terminated appellant's compensation benefits, stating that the weight of the medical evidence demonstrates that appellant had no continuing disability as a result of the accepted injury and that appellant was not entitled to a schedule award.

By letter dated May 18, 1998, appellant requested another oral hearing before an Office hearing representative which was held on March 23, 1999. She did not attend the hearing but her attorney addressed why Dr. O'Dowd's May 13, 1996 report was inadequate, stating that, in his initial May 13, 1996 report, [which is not in the record], he found some objective evidence of continuing disability including shooting pains in the fingertips of her right hand up to her right elbow, tenderness in the volar arm muscles and a positive Tinel's sign on the right wrist and elbow. Appellant's attorney also stated that Dr. O'Dowd did not add any information pursuant to the Office hearing representative's remand. Appellant's attorney contended that a conflict exists between Drs. Weiss' and O'Dowd's reports.

By decision dated July 8, 1999, the Office hearing representative affirmed the Office's May 14, 1998 decision.

The Board finds that the Office has not met its burden of proof to terminate benefits.

Once the office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

without establishing that the disabling condition has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

In the present case, in his April 22, 1995 report, appellant's treating physician, Dr. Weiss, concluded that appellant had a 100 percent impairment to the right upper extremity, which limited his ability to perform work activities. Dr. Weiss explained that appellant still had residuals of his injury which caused right upper extremity sensory changes and weakness. In his May 13, 1996 report, Dr. O'Dowd, based on his physical examination and a review of the 1994 EMG/nerve conduction studies, he emphasized that appellant had a sudden onset of symptoms which was unusual and that they were not typical of tennis elbow or medial epicondylitis. Dr. O'Dowd found no clinical evidence of a persistent neurologic entrapment and no "dependable evidence" of any significant abnormality in appellant's right upper extremity other than appellant's exaggerated response to subjective discomfort. He concluded that appellant did not have any disability related to the August 1992 employment injury.

In his May 23, 1996 letter, Dr. O'Dowd stated that he did not have copies of the EMG or nerve conduction studies that were apparently done on two different occasions. In response to the Office submitting to him the June 16, 1994 EMG/nerve conduction studies for review, in his April 28, 1998 letter, Dr. O'Dowd stated that his May 13, 1996 report had been issued in its final form and on page three he noted that he evaluated the 1994 EMG and nerve conduction studies. However, the May 13, 1996 report in its final form is identical to the other May 13, 1996 report in the record.

Dr. O'Dowd's May 13, 1996 report is not clear, complete or accurate. Since both May 13, 1996 reports are the same, it is unclear how, if at all, his review of the 1994 EMG and nerve conduction studies affected his review of the evidence. His repeated emphasis in his report on appellant's "sudden onset" of symptoms is inconsistent with the statement of accepted facts which indicated that appellant's condition had arisen over a period of time from repetitive use of her arm. Dr. O'Dowd's conclusion therefore that appellant is not disabled is not based on an accurate and complete factual history. His opinion is not well rationalized therefore does not justify the Office's termination of benefits.³

The Board finds that the case is not in posture for decision regarding appellant's claim for a schedule award.

The schedule award provision of the Federal Employees' Compensation Act⁴ 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

¹ *Patricia M. Mitchell*, 48 ECAB 371 (1997); *Patricia A. Keller*, 45 ECAB 278 (1993).

² *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *See Roger Dingess*, 47 ECAB 123, 127 (1995); *Clara T. Norga*, 46 ECAB 473, 484-85 (1995).

⁴ 5 U.S.C. § 8107 *et seq.*

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 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.⁵ 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.⁶

In the present case, in his April 22, 1995 report, Dr. Weiss concluded, using the A.M.A., *Guides* (4th edition 1994), with specific references to page numbers and tables, that appellant had a 100 percent impairment to the right upper extremity. As stated above, in his May 13, 1996 report, Dr. O'Dowd opined that appellant did not have any impairment. In his March 3, 1997 letter, based on his review of Dr. O'Dowd's May 13, 1996 report, the district medical adviser opined that appellant did not have any disability related to the August 1992 employment injury and therefore appellant did not have any "disability rating." Since, as previously stated, Dr. O'Dowd's opinion was not well rationalized and therefore is not probative, the case must be remanded for the Office to further develop the evidence as necessary to comply with the Act's procedural requirements that the district medical adviser review the relevant and probative evidence in order to provide an opinion on the nature and the percentage of appellant's impairment.⁷ Upon further development, the Office should issue a *de novo* decision on the issue of appellant's entitlement to a schedule award.

⁵ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

⁶ *Arthur E. Anderson*, *supra* note 5 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims Management, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(2)(d)(1) and (2) (April 1993).

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 8, 1999 is hereby reversed in part, vacated in part and remanded for further action consistent with this opinion.

Dated, Washington, D.C.
May 9, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member