U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA BRADSHAW and U.S. POSTAL SERVICE,
PALANTINE PROCESSING & DISTRIBUTION CENTER,
Palantine, IL

Docket No. 98-2023; Submitted on the Record;
Issued May 2, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has a permanent impairment of her right upper extremity entitling her to a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On January 15, 1994 appellant, then a 42-year-old clerk, filed a notice of occupational disease and claim for compensation alleging that she had pain in her shoulder.[1] In support of this claim, appellant submitted numerous medical notes from Dr. Morton Einhorn, a Board-certified internist, dated from March 8 through November 30, 1994, wherein Dr. Einhorn noted that due to the fact that appellant suffered from severe suprascapular bursitis/tendinitis, appellant was totally incapacitated from work from March 10 through 27, 1994, from August 14 to 21, 1994, and again from November 27 to December 4, 1994.

By letter dated July 17, 1995, appellant requested that the Office leave her "CA-7 claim alone at this time." By letter dated March 19, 1996, she requested that her claim proceed. In response to a March 21, 1996 letter from the Office on April 30, 1996, appellant filed a claim for compensation on account of traumatic injury or occupational disease (Form CA-7).

In a medical report dated July 19, 1996, Dr. Einhorn noted that appellant had been suffering from right shoulder pain since about January 1994. He relayed that appellant told him that the pain started and was aggravated by her job, and specifically, by moving heavy trays of mail containing many hundreds of pieces of mail. In response to questions from the Office, Dr. Einhorn noted that appellant's abduction was 30 degrees in her right shoulder as compared with 150 degrees in her left, forward elevation was 30 degrees in the right and 150 degrees in the

[1] Although the record contains a claim filed for back pain by appellant on February 24, 1994, the Board has no jurisdiction over this claim, as there is no final decision regarding a back injury in the record.

left, internal rotation was 20 degrees in the right shoulder as compared with 40 degrees in the left, external rotation was 30 degrees as compared with 90, backward elevation was 20 degrees as compared with 40 degrees, abduction was 15 degrees as compared with 30 degrees and extension was 20 degrees as compared to 40 degrees.

On August 1, 1996 the Office referred this case to the Office medical adviser. The Office noted that the claim had been accepted for "suprascapular bursitis tendinitis right shoulder" and requested that the Office medical adviser determine the extent of permanent partial impairment and set a date of maximum medical improvement. In a letter dated August 4, 1996, the Office medical adviser stated that the records were insufficient to properly determine the degree of permanent partial impairment. He recommended that the Office obtain a second opinion.

The Office referred appellant to Dr. Stuart M. Meyer, a Board-certified orthopedic surgeon, for a second opinion. In his medical report dated October 7, 1996, Dr. Meyer noted his impression that appellant had "chronic rotator cuff tendinitis, possible impingement syndrome or partial rotator cuff tear." He noted that appellant's range of motion in her right shoulder was 130 degrees on abduction, 170 degrees on forward flexion and 50 degrees on both internal and external rotation. Dr. Meyer recommended that appellant undergo a magnetic resonance imaging (MRI) scan of the right shoulder to further evaluate for a rotator cuff tear. In a report dated July 7, 1998, he stated that appellant's recent MRI revealed no evidence of rotator cuff tear. In response to questions from the Office, in a report dated July 25, 1997, Dr. Meyer noted that appellant's objective complaints were that of a positive impingement sign and subjective complaints were of pain with repetitive motions. He believed that maximum medical improvement had occurred and that there would not be any permanent disability. Dr. Meyer did advise that appellant should avoid any type of repetitive overhead activities.

On August 7, 1997 the Office again referred this case to the Office medical adviser. In a medical report dated August 9, 1997, the Office medical adviser noted that although Dr. Meyer noted objective findings of shoulder impingement, there was no evidence of upper extremity permanent partial impairment. He concluded that there was no medical evidence in the chart to support any permanent partial impairment of the upper extremity. Dr. Meyer determined that maximum medical improvement was reached on October 7, 1996.

On April 3, 1998 the Office accepted appellant's claim for right shoulder tendinitis due to a work-related injury of January 15, 1994. However, the Office found that appellant's right shoulder injury was not severe enough to be considered ratable based on the opinion of Dr. Meyer and therefore appellant was not entitled to a schedule award of compensation.

Thereafter, appellant submitted a medical report dated April 30, 1998, in which Dr. Einhorn estimated that appellant lost about 20 percent of her strength in the shoulder groups involved. He noted that he had not made any behavioral observations other than when he examined her and determined the muscle strength was diminished. The Office submitted this opinion to a second Office medical adviser who, by letter dated May 11, 1998, found that the prior holding of zero percent permanent disability should stand. The second Office medical adviser based this opinion on the fact that an MRI scan demonstrated that appellant did not have a rotator cuff tear and that her orthopedic surgeon, Dr. Meyer, had stated that she has no evidence for upper extremity permanent partial disability. He noted that although Dr. Einhorn

made a claim that appellant was weak in her shoulder, he neither quantified it in the usual fashion in grading muscle strength, nor has he stated which exact muscles are weak. He further noted that Dr. Einhorn was an internist and accordingly not particularly experienced in evaluating the musculoskeletal system.

In a decision dated June 3, 1998, the Office denied appellant's request for review on the merits, as it found that the evidence submitted in support of the request for review was repetitious in nature and not sufficient to warrant review of the prior decision. The Office further noted that Dr. Einhorn failed to provide a reasoned medical opinion based on objective findings upon which a rating could be made of the impairment to appellant's right shoulder under the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

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

Under section 8107 of the Federal Employees Compensation Act[2] and section 10.304 of the implementing federal regulations,[3] 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 shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides*[4] as the standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[6] All factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.

In obtaining medical evidence for a schedule award, the evaluation made by the physicians must include a detailed description of the impairment including, where applicable, the loss in degrees of motion of the affected member, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions 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

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.304.

[4] A.M.A., *Guides* (4th ed. 1993).

[5] *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis J. Kilcoyne*, 38 ECAB 168 (1986).

[6] *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

and limitations.[7] Additional reports should be required of the physician where the report does not meet this standard.[8]

In the instant case, the Office failed to properly develop the record for a determination regarding a possible schedule award for impairment to appellant's right upper extremity. We initially note that the Office misinterpreted the opinion of Dr. Meyer. In its April 3, 1998 decision, the Office found that appellant's right shoulder injury was not severe enough to be considered ratable based on the opinion of Dr. Meyer. The Office found that he stated that "there is no evidence for upper extremity permanent/partial impairment." However, what Dr. Meyer said was, "I do not believe that there is any permanent disability." Disability is not synonymous with physical impairment. As used in the Act,[9] the term disability means incapacity, because of employment injury, to earn the wages that that employee was receiving at the time of the injury.[10] Schedule awards are payable for permanent impairment of specified body members; it is not necessary that appellant be disabled.[11] Furthermore, Dr. Meyer found that appellant's range of motion in her right shoulder was limited to 130 degrees on abduction, 170 degrees on forward flexion and 50 degrees on both internal and external rotation. Contrary to the Office's decision, these readings would result in an impairment under the A.M.A., *Guides*.[12] In addition, Dr. Meyer conceded that appellant was in pain and that this pain was work related. He also told appellant that she should avoid any type of repetitive overhead activities. We further note that the Office erred when it referred to Dr. Meyer as appellant's physician, wherein he was chosen by the Office for a second opinion; Dr. Einhorn was appellant's physician.

Furthermore, we note that section 8123(a) of the Act provides in pertinent part: "If there is 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."[13] In the instant case, Dr. Einhorn found that appellant's abduction was limited to 30 degrees in her right shoulder whereas Dr. Meyer found that appellant's right shoulder had a range of motion of 130 degrees; Dr. Einhorn found that the forward elevation was 30 degrees whereas Dr. Meyer found forward flexion to be 170 degrees; Dr. Einhorn found that appellant's right shoulder had internal rotation of 20 degrees as compared with Dr. Meyer who found 50 degrees; and Dr. Einhorn found that appellant's external rotation was 30 degrees as compared with Dr. Meyer, who found 50 degrees. As these opinions would result in differing degrees of

[7] *Gary L. Loser*, 38 ECAB 673 (1987).

[8] *Henry G. Flores, Jr.*, 43 ECAB 901 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 1995).

[9] 5 U.S.C. §§ 8101-8193.

[10] *Richard T. DeVito*, 39 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

[11] *See* 5 U.S.C. § 8107.

[12] *See* A.M.A., *Guides* at 44-45.

[13] 5 U.S.C. § 8123(a); *see also Gertrude T. Zakrajesek,*, 47 ECAB 770, 773 (1996).

impairment under the A.M.A., *Guides*,[14] we remand this case in order for the Office to refer this case to an impartial medical examiner to resolve the conflict in the medical opinion evidence.

In view of the Board's disposition of the first issue, the second issue, *i.e.*, whether the Office abused its discretion in refusing to open appellant's case for review on the merits, is moot.

The decisions of the Office of Workers' Compensation Programs dated June 3 and April 3, 1998 are set aside and this case is remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
May 2, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *See* A.M.A., *Guides* at 44-45.