

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH B. WRIGHT and DEPARTMENT OF THE NAVY,  
MARINE CORPS COMBAT DEVELOPMENT COMMAND, Quantico, VA

*Docket No. 00-192; Submitted on the Record;  
Issued November 20, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
VALERIE D. EVANS-HARRELL

The issue is whether appellant has more than a three percent impairment of his right upper extremity, for which he received a schedule award.

On July 16, 1996 appellant, a 48-year-old plasterer, sustained an injury to his right arm while in the performance of duty. The Office of Workers' Compensation Programs accepted his claim for right wrist laceration and authorized exploratory surgery. Appellant underwent surgery on June 30, 1997 and he returned to light duty on July 22, 1997. He subsequently resumed his regular duties on September 8, 1997. Appellant received appropriate wage-loss compensation for periods of temporary total disability. Additionally, the Office granted appellant a schedule award on June 23, 1999 for a three percent impairment of the right upper extremity. On August 23, 1999 appellant filed a request for reconsideration of the Office's June 23, 1999 schedule award. Appellant also filed an appeal with the Board, which was docketed on August 30, 1999. While the instant appeal was pending, the Office issued a decision denying modification on October 1, 1999.<sup>1</sup>

The Board has duly reviewed the case on appeal and finds that the case is not in posture for a decision.

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<sup>1</sup> The Board finds that the Office did not have the authority to issue its October 1, 1999 decision denying modification. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case. *Arlonia B. Taylor*, 44 ECAB 591 (1993). At that time, the Office issued its October 1, 1999 decision, appellant had already filed an appeal with the Board regarding the Office's June 23, 1999 schedule award. Inasmuch as the Board obtained jurisdiction over the case on August 30, 1999, the Office lacked the authority to issue the October 1, 1999 decision denying modification. Accordingly, the Office's decision dated October 1, 1999 is set aside as null and void. *Terry L. Smith*, 51 ECAB \_\_\_\_ (Docket No. 97-808, issued November 29, 1999). The Board further notes that the record on appeal includes evidence that was received by the Office subsequent to the issuance of its June 23, 1999 schedule award. The Office considered this additional evidence when rendering its October 1, 1999 decision denying modification. However, as the Office's most recent decision denying modification is null and void and the Board's review is limited to the evidence of record that was before the Office at the time of its final decision dated June 23, 1999, the Board cannot consider the newly submitted evidence. 20 C.F.R. § 501.2(c).

In support of his claim for a schedule award, appellant submitted an April 22, 1999 report from his treating physician, Dr. Andre Eglevsky, Jr., a Board-certified orthopedic surgeon. In his report, Dr. Eglevsky concluded that appellant had an 11 percent permanent impairment of his right upper extremity. He explained that appellant had a three percent impairment for loss of flexion at the wrist combined with a nine percent impairment for sensory deficit involving the median nerve below the mid-forearm. In a report dated May 28, 1999, the Office medical adviser concurred with Dr. Eglevsky's assessment of a three percent impairment for loss of wrist flexion. The Office medical adviser, however, disagreed with Dr. Eglevsky's impairment rating for sensory deficit due to the apparent lack of diagnostic studies documenting a median nerve injury. Consequently, the Office medical adviser concluded that appellant had only a three percent permanent impairment of his right upper extremity. The Office relied upon the opinion of its medical adviser in issuing its June 23, 1999 schedule award.

Contrary to the Office medical adviser's finding, the record includes diagnostic studies performed in September 1996, which were referenced by Dr. Eglevsky in his April 22, 1999 report as revealing right median nerve neuropathy. Inasmuch as this evidence was apparently either overlooked by the Office medical adviser or not forwarded to him for consideration, the Office's June 23, 1999 schedule award is set aside.<sup>2</sup> Accordingly, the case is remanded to the Office to fully consider the evidence that was properly submitted prior to the issuance of the Office's June 23, 1999 schedule award.

The decision of the Office of Workers' Compensation Programs dated June 23, 1999 is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC  
November 20, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>2</sup> As previously noted, the Board's jurisdiction over a case is limited to reviewing that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Inasmuch as the Board's decisions are final as to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office. 20 C.F.R. § 501.6(c); *see William A. Couch*, 41 ECAB 548, 553 (1990).