U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY T. FERRANTE and U.S. POSTAL SERVICE,
POST OFFICE, Williamstown, NJ

Docket No. 99-2568; Submitted on the Record;
Issued February 2, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has more than a six percent permanent impairment of the left upper extremity, for which he received a schedule award.

On December 15, 1992 appellant's examining physician, Dr. Ronald Goldberg, a general practitioner, reported that appellant had a 48 percent permanent impairment of the left upper extremity. An Office of Workers' Compensation Programs' medical adviser reviewed Dr. Goldberg's clinical findings and determined that appellant had a four percent permanent impairment of the left upper extremity. On March 1, 1994 the Office issued a schedule award for a four percent permanent impairment of the left upper extremity.

In a decision dated October 27, 1994, an Office hearing representative set aside the March 1, 1994 schedule award on the grounds that a conflict in medical opinion existed between Dr. Goldberg and the Office medical adviser on the issue of the impairment rating. To resolve this conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Thomas O'Bade, a Board-certified orthopedic surgeon. He, however, was not able to perform the examination. The Office, therefore, referred appellant to Dr. James R. Rogers, Sr., a Board-certified orthopedic surgeon, to resolve the conflict.

In a report dated February 24, 1995, Dr. Rogers noted that appellant had a degenerative tendinopathy of the right shoulder.[1] In his opinion, however, appellant's job as a letter carrier played no role in the causality of this condition. Dr. Rogers gave several reasons for his opinion. On the issue of impairment, he reported that appellant had full range of motion of the left shoulder with no clear documentation of pathologic disease on diagnostic testing, no lessening of

[1] It is clear from Dr. Rogers' report that he meant to state that appellant had a degenerative tendinopathy of the left shoulder. The history he related and appellant's complaints implicated the left shoulder and Dr. Rogers' findings with respect to the right shoulder were entirely negative.

his ability to work and no evidence of disc herniation or nerve root involvement. Dr. Rogers estimated a zero percent permanent impairment of the shoulder.

In a decision dated March 10, 1995, the Office found that the weight of the medical evidence, as represented by the opinion of the referee medical specialist, Dr. Rogers, established that appellant was not entitled to a schedule award as he sustained no permanent impairment.

In a decision dated January 22, 1996, an Office hearing representative found that Dr. Rogers' report did not demonstrate how he concluded that range of motion was "full." The hearing representative remanded the case for him to provide actual measurements, such as abduction, adduction, internal and external rotation and flexion and extension.

In a supplemental report dated March 6, 1996, Dr. Rogers related appellant's complaints and his findings on physical examination and diagnosed tendinitis of the left shoulder. He noted a 30 degree decrease in abduction and a 20 degree decrease in flexion but indicated that these findings were not reliable:

> "Disability in this case, using the [American Medical Association [A.M.A.], *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993)] is based on reduction in range of motion. In this case, however, there are some problems with this. During examination when attempting to abduct passively, the patient resisted passive abduction instead of assisting and this is consistent with embellishment. The same finding was found on flexion. Impingement occurs whenever the greater trochanter gets pushed into the shoulder joint, *i.e.*, abduction and internal rotation. The patient had pain on abduction but not on internal rotation and this is inconsistent. Furthermore, the patient has increased muscle size in both the biceps and the forearm on the left with increased muscular tone and this is inconsistent with his history. Finally, the patient had decreased sensation from the elbow distally in a long glove-like fashion and this is not dermatomal and does not follow brachial plexus roots and thus is inconsistent. All of these inconsistencies go against being able to appropriately assign disability."

Based on his examination of appellant, which he again pointed out was inconsistent, Dr. Rogers estimated a four percent loss of the shoulder secondary to flexion and a three percent loss of the shoulder secondary to abduction, for a seven percent permanent disability of the shoulder or a four percent permanent disability of the upper extremity.

An Office medical adviser reviewed the clinical findings reported by Dr. Rogers and determined that a 30 degree decrease in abduction represented a 3 percent impairment, according to Table 41, page 44, of the A.M.A., *Guides*. He also determined that a 20 degree decrease in flexion represented a 3 degree impairment, according to Table 38, page 43. The Office medical adviser found that appellant, therefore, had a six percent permanent impairment of the left upper extremity.

On May 1, 1996 the Office issued a schedule award based on a six percent permanent impairment of the left upper extremity.

In a decision dated September 18, 1997, an Office hearing representative found that the May 1, 1996 decision was premature. The hearing representative noted that the Office had selected Dr. Rogers to resolve a conflict on the rating of appellant's permanent impairment but that his opinion had created a different conflict with Dr. Goldberg on the issue of causal relationship. The hearing representative determined that this new conflict must first be resolved before giving consideration to the rating of permanent impairment.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Walter Poprycz, a Board-certified orthopedic surgeon. On January 10, 1998 Dr. Poprycz, the second referee medical specialist, estimated that appellant had a five percent permanent impairment of the left upper extremity as a result of his duties carrying and casing mail.

Dr. Poprycz based this estimate on his experience as an orthopedic surgeon, however, and not on the A.M.A., *Guides*. The Office, therefore, referred appellant to Dr. Gregory Maslow, a Board-certified orthopedic surgeon. On April 6, 1998 Dr. Maslow reported that appellant had a rotator cuff tendinitis and impingement syndrome with a suggestion of abnormality at the glenoid labral area. He had no history, however, that would definitely relate the problems at the left shoulder to appellant's job as a letter carrier. Dr. Maslow reported that he did not feel there was an employment-related shoulder condition; the causation of the impairment was uncertain. In a supplemental report dated June 9, 1998, Dr. Maslow explained that the stress of the weight on the shoulder with a heavy downward pull of a leather bag would not be expected to cause either degenerative change at the acromioclavicular joint or cuff tendinopathy.

In a decision dated July 31, 1998, the Office rejected appellant's claim for a schedule award and found that appellant's left shoulder condition was not causally related to his employment.

In a decision dated May 12, 1999, an Office hearing representative found that appellant had no more than a six percent permanent impairment of the left upper extremity as a result of his work-related shoulder condition. The hearing representative found that appellant's referral to Dr. Maslow for a second referee medical opinion was in error as the first referee medical examiner, Dr. Poprycz, had already clarified the issue of causal relationship with a well-reasoned and detailed report that was consistent with the medical evidence of record. His failure to provide an impairment rating in accordance with the A.M.A., *Guides* did not discount his opinion on causal relationship. The hearing representative further found that Dr. Maslow's opinion was not well reasoned as it appeared to be based on the lack of a traumatic injury, while appellant's claim was one of an occupational disease. The hearing representative, therefore, set aside the Office's finding in regard to causal relationship and found that the Office had properly referred the clinical findings of Dr. Rogers to an Office medical adviser for the calculation of permanent impairment.

The Board finds that the medical evidence of record fails to establish that appellant has more than a six percent permanent impairment of the left upper extremity.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."[2]

A conflict in medical opinion arose between Dr. Goldberg, appellant's examining physician, and the Office medical adviser on the issue of the impairment rating. Dr. Goldberg reported a 48 percent permanent impairment while the Office medical adviser reported a 4 percent permanent impairment. The Office properly referred the case to Dr. Rogers to resolve the rating issue. In his supplemental report of March 6, 1996, Dr. Rogers provided his clinical findings with respect to appellant's left upper extremity.

Section 8107 of the Act[3] authorizes the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body. The Office evaluates the degree of impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[4]

According to Table 41, page 44, of the A.M.A., *Guides* (4th ed. 1993), a 30 degree decrease in shoulder abduction, as reported by the referee medical specialist, Dr. Rogers, represents a 1 percent impairment of the upper extremity. According to Table 38, page 43, a 20 degree decrease in shoulder flexion, as reported by Dr. Rogers, also represents a 1 percent impairment of the upper extremity. Because the relative value of each shoulder functional unit has been taken into consideration in the impairment charts, the impairment values for loss of each shoulder motion are added to determine the impairment of the upper extremity.[5] In this case, the impairment values for lack of abduction and lack of flexion support a two percent impairment of the left upper extremity. The reliability of appellant's clinical presentation aside, the findings of referee medical specialist clearly support no more than a six percent permanent impairment of the left upper extremity, for which appellant received a schedule award.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to a referee medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

In rendering his opinion on the extent of appellant's impairment, Dr. Rogers reported that appellant's job as a letter carrier played no role in the causality of his degenerative tendinopathy. This created a different conflict in medical opinion, with Dr. Goldberg, on the issue of causal relationship, an element of entitlement the Office had previously accepted. The Office properly

[2] 5 U.S.C. § 8123(a).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] A.M.A., *Guides* 45.

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

referred the case to Dr. Poprycz to resolve this conflict. In her May 12, 1999 decision, the Office hearing representative found that Dr. Poprycz had clarified the issue of causal relationship with a well-reasoned and detailed report that was consistent with the medical evidence of record. The Board agrees that the failure of Dr. Poprycz to provide an impairment rating in accordance with the A.M.A., *Guides* is immaterial because his only role as a referee medical specialist was to resolve the issue of causal relationship.

With the issue of causal relationship settled by the opinion of second referee medica specialist, Dr. Poprycz, and with the rating of impairment previously settled by the first referee medical specialist, Dr. Rogers, the Office's subsequent referral to Dr. Maslow was unnecessary and in error.

The May 12, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 2, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member