

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA K. PETERSON and U.S. POSTAL SERVICE,
GENERAL POSTAL ANNEX, Kansas City, MO

*Docket No. 00-513; Oral Argument Held April 3, 2001;
Issued July 27, 2001*

Appearances: *Michael J. Joshi, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than 10 percent permanent impairment of her right upper extremity for which she received a schedule award.

Appellant, a 37-year-old clerk, filed a notice of traumatic injury on July 30, 1996 alleging that she injured her right shoulder lifting mail. The Office of Workers' Compensation Programs accepted appellant's claim for right shoulder strain, cyst right shoulder, and resulting surgeries on October 4 and November 25, 1996, and January 27, 1997. The Office also accepted cervical strain.

Appellant filed a claim for a schedule award on February 11, 1998. By decision dated June 23, 1998, the Office granted appellant a schedule award for 10 percent permanent impairment of her right upper extremity. Appellant requested reconsideration on November 10, 1998 and submitted additional medical evidence. By decision dated February 4, 1999, the Office denied modification of its June 23, 1998 decision. Appellant requested reconsideration on May 21 and June 17, 1999. The Office reviewed appellant's claim on the merits and declined to modify its prior decision on June 2 and September 15, 1999 respectively.

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

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

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 adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

In support of her initial request for a schedule award, appellant submitted a report dated February 6, 1998 from her attending physician, Dr. Larry F. Frevert, a Board-certified orthopedic surgeon, who stated that appellant experienced both myofascial and trapezial pain. He noted that appellant lost 10 degrees of external rotation and 10 degrees of abduction. Dr. Frevert opined that appellant had 13 to 14 percent permanent disability at the level of the shoulder due to continued pain in the shoulder and scapular area. He did not provide an impairment for loss of strength.

The Office referred appellant for a second opinion evaluation with Dr. George Varghese, a Board-certified physiatrist. In his April 8, 1998 report, Dr. Varghese provided appellant's range of motion for her right shoulder as 150 degrees of flexion; 120 degrees of abduction; extension, 50 degrees; adduction, 60 degrees, internal rotation, 50 degrees; and external rotation, 60 degrees. He found that appellant had seven percent impairment due to loss of range of motion. Dr. Varghese noted that appellant's strength was within normal limits. He found that appellant had 60 percent impairment of the axillary nerve for 3 percent impairment due to pain. Dr. Varghese concluded that appellant had a 10 percent permanent impairment of her right upper extremity.

Following the Office's June 23, 1998 schedule award decision, appellant submitted additional medical evidence. In a report dated August 25, 1998, Dr. Frevert stated that his impairment rating was in accordance with the A.M.A., *Guides* including, loss of range of motion and pain. Dr. Frevert also stated: "She also has a strength deficit in the shoulder, which over time should continue to improve. But at the time of the rating it showed some decrease in her strength overall, specifically with the majority in the supraspinatus/infraspinatus area and also some taken into account the deltoid."

The Office medical adviser reviewed this report on February 3, 1999 and found that Dr. Frevert's August 25, 1998 report did not comport with the A.M.A., *Guides* because it indicated that appellant had not reached maximum medical improvement with regard to her loss of strength.

In a report dated May 3, 1999, Dr. P. Brent Koprivica, Board-certified in preventative medicine, performed a physical examination and noted that appellant underwent surgery on her right lateral epicondyle on February 25, 1999. He provided her range of motion of the right shoulder as: abduction, 150 degrees; adduction, 70 degree; flexion, 145 degrees; extension, 40 degrees; internal rotation 30 degrees; and external rotation, 85 degrees. Dr. Koprivica found that appellant had nine percent permanent impairment due to loss of range of motion in accordance with the A.M.A., *Guides*. He noted that appellant had shoulder strength deficits in the right

³ A.M.A., *Guides* (4th ed. 1993).

⁴ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

deltoid and right supraspinatus. Dr. Koprivica stated that 35 percent maximum impairment multiplied by a Grade 4 weakness was a 9 percent upper extremity weakness.⁵ He noted that the suprascapular nerve had a 16 percent maximum impairment multiplied by 25 percent grade equaling a 4 percent upper extremity impairment. Dr. Koprivica combined the values for loss of range of motion and loss of strength to reach a 21 percent permanent impairment.

The Office medical adviser found that Dr. Koprivica's range of motion and loss of strength findings were not probative given that appellant recently underwent surgery on her right lateral epicondyle.

Dr. Koprivica completed a report on June 10, 1999 and disagreed with the conclusions of the Office medical adviser. He stated that the delay of 10 weeks following elbow surgery was sufficient to allow appellant full range of motion and strength in the shoulder. Dr. Koprivica further noted that at the time of Dr. Varghese's examination appellant's right lateral epicondyle had been symptomatic.

Section 8123(a) of the Federal Employees' Compensation Act,⁶ provides: "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."

In this case, appellant offered medical opinion evidence from Dr. Koprivica, a Board-certified physician, opining that appellant had reached maximum medical improvement and that she had additional impairment of her upper extremity. The Office medical adviser, who had not examined appellant, found that this report lacked probative value and that therefore appellant had not established an additional impairment. The Board finds that there is a conflict of medical opinion evidence regarding the date of maximum medical improvement following appellant's February 25, 1999 surgery and the extent of her permanent impairment. This conflict requires referral to an appropriate Board-certified specialist. On remand, the Office shall refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician, to determine whether appellant has reached maximum medical improvement and the extent of her permanent impairment in her right upper extremity. After this and such other development as the Office deems necessary, the Office shall issue an appropriate decision.

⁵ A.M.A., *Guides*, 54, Table 15; 49, Table 12.

⁶ 5 U.S.C. §§ 8101-8193, 8123(a).

The September 15, June 2 and February 4, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further development consistent with this opinion.

Dated, Washington, DC
July 27, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member