U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EILEEN M. BAUER and DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Norma, NJ

Docket No. 00-1876; Submitted on the Record; Issued June 4, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained more than a nine percent impairment of the left shoulder, for which she received a schedule award.

On January 10, 1997 appellant, then a 39-year-old poultry inspector, filed a claim for left arm and knee injuries sustained on January 9, 1997 when she slipped and fell in an icy parking lot.[1] The Office of Workers' Compensation Programs initially accepted the claim for multiple contusions and authorized physical therapy. The Office later accepted left shoulder instability with joint derangement and impingement syndrome and authorized June 2, 1997 arthroscopy, debridement and capsular shift.[2] The Office also accepted a recurrence of disability beginning May 30, 1997.[3] Appellant then claimed a schedule award.

Appellant submitted periodic progress reports from June through September 1997 from Dr. Larry S. Rosenberg, an attending Board-certified orthopedic surgeon, noting appellant's continuing left shoulder pain and instability with ligamentous laxity, particularly in the glenohumeral complex. On June 2, 1997 he performed "diagnostic arthroscopy with debridement of the superior labral complex and open-T capsular shift procedure for multi-directional instability." In a December 16, 1997 letter, Dr. Rosenberg recommended continuing physical therapy.

In a September 16, 1998 report, Dr. David Weiss, an attending Board-certified orthopedist specializing in disability evaluations, provided a history of injury and treatment,

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[1] Appellant sought treatment in an emergency room on January 11, 1997 and was referred for physical therapy. She was off work from January 13 to 26, 1997 and returned to full duty effective January 27, 1997.

[2] In a January 30, 1998 note, Dr. D. Kalash, an Office medical adviser, opined that the June 2, 1997 surgery was "warranted and related to" the January 9, 1997 injury.

[3] The record indicates that appellant returned to limited duty as of September 14, 1997.

reviewed the medical record and related appellant's difficulty with self-care and inability to participate in sports. On examination he noted left shoulder "forward elevation of 160/180 degrees, abduction of 130/180 degrees," with full adduction, internal and external rotation. Dr. Weiss found joint crepitus, "acromioclavicular point tenderness" and positive Hawkin's and apprehension signs indicating impingement. Muscle strength was 5/5 throughout the left upper extremity and supraspinatus.

Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. he found a 24 percent impairment for "the arthroplasty left shoulder" according to Table 27, page 61[4] and an 18 percent impairment for "the crepitance left shoulder" according to Table 19, page 59.[5] Dr. Weiss combined these impairments to arrive at a 38 percent permanent impairment of the left upper extremity. He noted that appellant had reached maximum medical improvement as of August 21, 1998.

The Office then referred the medical record and a statement of accepted facts to an Office medical adviser for a schedule award calculation. In a November 30, 1998 report, he reviewed Dr. Weiss' findings of "[f]orward elevation 160 degrees, [a]bduction 130 degrees, [a]dduction 75 degrees, [e]xternal rotation 90 degrees," with crepitus noted. The Office medical adviser stated that according to the A.M.A., *Guides*, "page 43 through 45, [F]igure 38 through 44 there is a 3 percent impairment due to ROM [range of motion] abnormalities. Another 10 percent impairment of the total joint value is given for crepitus or an additional 6 percent of the upper extremity, [T]ables 18 to 19 pages 59 to 59." He concluded that appellant had a nine percent permanent impairment of the left upper extremity.

By decision dated April 27, 1999, the Office issued a schedule award for a nine percent permanent impairment of the left arm.[6]

Appellant disagreed with this decision and in a May 3, 1999 letter requested an oral hearing, which was held on October 25, 1999. At the hearing, appellant, through her attorney, asserted that there was an outstanding conflict of medical evidence between Dr. Weiss and the

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[4] Table 27, page 61 is entitled "Impairment of the Upper Extremity After Arthroplasty of Specific Bones or Joints." "Resection arthroplasty" without an implant of the "[t]otal shoulder" is rated as a 24 percent permanent impairment of the upper extremity.

[5] Table 19, page 59 is entitled "Impairment from Joint Crepitation." This table provides that "mild" crepitation, which is "inconsistent during active range of motion," connotes a ten percent impairment of the joint. "Moderate" crepitus, which is "constant during active range of motion," is rated as a 20 percent impairment of the joint. "Severe" crepitus is described as "constant during passive range of motion," and is rated as a 30 percent impairment of the joint. The A.M.A., *Guides* instructs the examiner to multiply these percentages by the values provided in Table 18, page 58, entitled "Impairment Values for Digits, Hand, Upper Extremity, and the Whole Person for Disorders of Specific Joints." Impairment of the glenohumeral joint is rated as a 60 percent impairment of the upper extremity, and an impairment of the acromioclavicular joint is rated as a 25 percent impairment of the upper extremity. Dr. Weiss appears to have arrived at the 18 percent impairment due to left shoulder crepitus by multiplying the severe crepitus rating of 30 percent from Table 27 by the 60 percent rating for impairment of the glenohumeral joint from Table 19.

[6] The period of the award ran from September 16, 1998 to March 31, 1999.

Office medical adviser. Appellant requested the appointment of a "second opinion" examiner to resolve the conflict.

On December 23, 1999 the Office hearing representative referred the record to an Office medical adviser for clarification regarding the percentage of permanent impairment due to crepitus and arthroplasty. The hearing representative noted that the Office medical adviser "should have used the diagnostic table as outlined by Dr. Weiss, or at least referenced why he used range of motion tables rather than the diagnostic table." The hearing representative requested that the Office medical adviser "advise if [the] use of the diagnostic table for arthroplasty would result in a larger award to [appellant]" and "whether crepitance can also be included."

In a January 7, 2000 report, a second Office medical adviser opined that Dr. Weiss was incorrect in using Table 27, which notes impairments due to joint arthroplasty, as the debridement and capsular shift procedure appellant underwent was not a "total shoulder" resection arthroplasty. Therefore, the "24 percent impairment for the 'arthroplasty of the left shoulder' [was] not warranted." The Office medical adviser could not determine how Dr. Weiss arrived at an 18 percent impairment due to crepitus, but opined that the record supported a "mild" crepitus according to Table 19. He concluded that Dr. Levine's assessment of impairment due to loss of range of motion was correct.

By decision dated January 13, 2000, the Office hearing representative affirmed the Office's April 27, 1999 decision.

The Board finds that the case is not in posture for decision due to an outstanding conflict of medical opinion evidence.

The schedule award provisions of the Federal Employees' Compensation Act[7] and its implementing regulations[8] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. The method used in making such a determination is a matter which rests in the sound discretion of the Office.[9] The Board has concurred with the Office's adoption of the A.M.A., *Guides* (4th ed., 1993) as an appropriate, uniform standard for evaluating schedule losses and to ensure equal justice for all claimants.[10]

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

[7] 5 U.S.C. §§ 8107-8109.

[8] 20 C.F.R. § 10.404.

[9] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[10] FECA Bulletin No. 89-30 (issued September 28, 1990).

tables in the A.M.A., *Guides*.[11] All factors that prevent a limb from functioning normally should be considered, such as pain and weakness, together with loss of motion, in evaluating the degree of permanent impairment.

In this case, the Office medical adviser did not provide a complete evaluation of all factors impairing appellant's left upper extremity according to the A.M.A., *Guides*. In his January 7, 2000 report, the Office medical adviser did not explain why he characterized the crepitation observed by Dr. Weiss as mild, when Dr. Weiss rated it as severe. Further, the Office medical adviser did not provide his calculations determining the six percent impairment due to crepitation or the three percent impairment due to loss of motion. Also, he did not state a total percentage of permanent impairment to the left upper extremity, only commenting that he concurred with Dr. Levine's assessment of loss of range of motion.

Section 8123(a), in pertinent part, provides: "If there is a 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."

Consequently, the case must be remanded to the Office for further development. To resolve the outstanding conflict of medical opinion evidence, the Office shall refer appellant, the case record and a statement of accepted facts to an appropriate specialist to obtain a detailed, well-rationalized opinion regarding the degree of permanent impairment of appellant's left upper extremity according to the A.M.A., *Guides*.

Such opinion should contain explicit calculations of all elements of the impairment rating with references to all tables and figures used to obtain the result. The impartial specialist shall include a detailed explanation of whether the arthroscopic debridement with "open-T capsular shift procedure for multi-directional instability" is considered an arthroplasty under Table 19. The impartial specialist shall also provide a detailed discussion regarding the severity of left shoulder crepitance and calculate an appropriate percentage of impairment for that element. Following this and any other development the Office deems necessary, the Office shall issue an appropriate decision in the case.

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

The January 13, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded to the Office for further development consistent with this decision.

Dated, Washington, DC
June 4, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member