U. S. DEPARTMENT OF LABOR

Employees’ Compensation Appeals Board

In the Matter of CHESTER A. TRUSS and U.S. POSTAL SERVICE, POST OFFICE, Columbus, OH

Docket No. 02-1193; Submitted on the Record;
Issued December 19, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant has established that he sustained greater than a four percent impairment of the right upper extremity, for which he received a schedule award.

The Office of Workers’ Compensation Programs accepted that on or before May 28, 1999 appellant, then a 45-year-old mailhandler, sustained right carpal tunnel syndrome, right cubital tunnel syndrome compressing the ulnar nerve and right ulnar neuropathy, due to frequent lifting of weights up to 75 pounds with his right arm. The Office authorized a right median nerve release performed July 28, 1999, with a repeat procedure on August 1, 2000.

June 24, 1999 electromyography (EMG) and nerve conduction velocity studies showed “[s]ignificant acute right ulnar neuropathy at the elbow … suggestive of an acute injury with evidence of healing,” and “moderate to severe right carpal tunnel syndrome with chronic electrodiagnostic appearance.”

Dr. Majed Tahboub, an attending Board-certified plastic and reconstructive surgeon, performed a right carpal tunnel release on July 28, 1999. Dr. Tahboub held appellant off work from July 27 to August 15, 1999 and released appellant to unrestricted duty effective August 16, 1999.

In a September 28, 1999 report, Dr. Tahboub stated that appellant had a long history of right grip weakness with right wrist pain, severe carpal tunnel syndrome diagnosed by nerve conduction velocity and EMG studies, positive Tinel’s and Phalen’s signs and thenar atrophy. He opined that appellant’s condition was related to repetitive hand movements at work.

A March 20, 2000 EMG study showed “normal ulnar nerve studies and “moderate right carpal tunnel syndrome.”

In a March 20, 2000 chart note, Dr. Michael E. Ruff, an attending Board-certified orthopedic surgeon specializing in surgery of the hand, found “moderately severe” compression

of the median nerve in the right wrist by EMG study, with some slowing in the ulnar nerve distribution. Dr. Ruff opined that appellant did not require a cubital tunnel release as there was "no evidence of any intrinsic atrophy," and "good strength in his ulnar intrinsic muscles." He recommended a repeat carpal tunnel release on the right.

In a June 18, 2000 note, an Office medical adviser reviewed Dr. Ruff's reports and found that appellant had work-related "residual or recurrent median nerve compression at the wrist … and repeat surgical decompression is appropriate and medically indicated."

On August 1, 2000 Dr. Ruff performed an "open right carpal tunnel release for recurrent compression," to alleviate "[r]ecurrent right carpal tunnel syndrome." He noted that, due to a "heavy, epineural scar and synovium" at the site of the previous surgery, the current "decompression extended well into the distal forearm and includes incising a portion of the forearm fascia."[1] Dr. Ruff held appellant off work through September 4, 2000, then released him to full duty without restrictions.

In a May 2, 2001 letter, Dr. Ruff noted that appellant had good relief from the August 2000 right carpal tunnel release. He stated that, as a "consequence of his preexisting carpal tunnel [syndrome], [appellant] continues to have weakness in his right hand with pinch strength and overall grip strength. [Appellant] does have a permanent partial impairment."

On May 14, 2001 appellant claimed a schedule award for permanent impairment of the right upper extremity.

In a May 21, 2001 report, the Office requested that Dr. Ruff provide a report detailing any permanent impairment of the right upper extremity, referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). There is no response of record from Dr. Ruff. Therefore, on October 1, 2001 the Office referred appellant, the medical record and a statement of accepted facts to Dr. James H. Rutheford, a Board-certified orthopedic surgeon, for determination of the percentage of any permanent impairment of the right upper extremity.

In an October 10, 2001 report, Dr. Rutheford provided a history of condition and treatment and noted appellant's symptoms of weakness, pain and clumsiness in the right hand, particularly in the fourth and fifth fingers. On examination he found a full range of motion of all joints of both upper extremities, "mild atrophy of the right thenar eminence," a 50 percent loss of sensation of the fourth and fifth fingers of the right hand including the fingertips and "all of the ulnar distribution dorsally of the right hand," mild tremor of the fourth and fifth fingers of the right hand, diminished pinch and grip strength and weakness of the fingers of the right hand on adduction. Dr. Rutheford also noted increased paresthesias in the ulnar distribution of the right hand with Phalen's test. He opined that appellant had reached maximum medical improvement as of Dr. Ruff's May 2001 examination.

Referring to the fifth edition of the A.M.A., *Guides*, Dr. Rutheford stated that appellant had a "25 percent loss of motor function distal to the forearm in the right upper extremity," with

[1] Appellant received appropriate compensation for work absences from August 1 through September 5, 2000.

thenar atrophy and decreased pinch strength." As the median nerve distribution equated to 10 percent of the upper extremity, this equaled a 3 percent permanent impairment of the right upper extremity according to Table 16-11 on page 489 and Table 16-15 on page 492. Dr. Rutheford also found a 13 percent permanent impairment of the right upper extremity due to ulnar neuropathy, due to a 25 percent loss of strength according to Table 16-11 on page 484, equaling a 9 percent impairment of the right arm according to Table 16-15 on page 492. He further found a 50 percent loss of sensation in the ulnar distribution of the right hand, equaling a 4 percent impairment of the right upper extremity according to Table 16-10 on page 482 and Table 16-15 on page 492. Dr. Rutheford found that the "combined value of these impairments is a 13 impairment of the right upper extremity related to ulnar nerve motor and sensory problems. The combined value of the 13 percent impairment related to ulnar nerve, sensory and motor problems and the 3 percent impairment related to distal median nerve motor weakness related to carpal tunnel syndrome equates to a 16 percent permanent impairment of the right upper extremity."

In a December 10, 2001 file note, an Office medical adviser reviewed Dr. Rutheford's October 10, 2001 report. The Office medical adviser stated that appellant had a 50 percent sensory deficit in the ulnar nerve distribution in the right upper extremity according to Table 16-10 on page 482 and that impairment of the ulnar distribution could constitute a maximum 7 percent impairment of the upper extremity according to Table 16-15 on page 492. The Office medical adviser multiplied 7 percent by 50 percent, resulting in a 3.5 percent impairment. The Office medical adviser found that Dr. Rutheford provided no evidence for "sensory or motor loss of median nerve of the right hand," and did not quantify the weakness in adduction of the fingers. The Office medical adviser noted that "[p]age 494 under the heading of 'Entrapment/Compression Neuropathies' states that 'additional impairment values are not given for decreased grip strength.'" The Office medical adviser concluded that appellant had a 3.5 percent impairment of the right upper extremity, based solely on the sensory deficit in the ulnar nerve distribution of the right hand.

In a December 21, 2001 file worksheet, the Office determined that appellant had a 4 percent permanent impairment of the right upper extremity, entitling him to 87.36 days of compensation at the 75 percent rate.

By decision dated January 16, 2002, the Office awarded appellant a schedule award equivalent to a four percent permanent impairment of the right upper extremity. The period of award listed in the decision was from May 2 to July 28, 2001, equivalent to 87.36 days of compensation, payable in a lump sum check in the amount of $7,411.62.

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

On August 1, 2000 appellant's attending Board-certified orthopedic surgeon, Dr. Ruff, performed a surgical release of the right median nerve to alleviate recurrent right carpal tunnel syndrome. He noted that the procedure entailed incising the forearm fascia as there was heavy scarring at the median nerve due to the July 28, 1999 procedure. In a May 2, 2001 letter, Dr. Ruff explained that, even after the August 2000 procedure, appellant had "weakness in his

right hand with pinch strength and overall grip strength" due to a permanent impairment of the median nerve. Dr. Ruff did not indicate a permanent impairment in the ulnar nerve distribution.

In contrast to Dr. Ruff's opinion, in an October 10, 2001 report, Dr. Rutheford, a Board-certified orthopedic surgeon and second opinion physician, found impairments in both the median and ulnar nerve distributions. He referred to the fifth edition of the A.M.A., *Guides* in determining a 16 percent permanent impairment of the right upper extremity: 3 percent due to a 25 percent loss of motor function in the median nerve distribution; 9 percent due to ulnar neuropathy; 4 percent impairment due to a 50 percent loss of sensation in the ulnar distribution of the right hand.

In a December 10, 2001 file note, an Office medical adviser reviewed Dr. Rutheford's October 10, 2001 report and disagreed substantially with his findings. The Office medical adviser found only a 3.5 percent impairment of the right upper extremity due to a 50 percent sensory deficit in the ulnar nerve distribution. The Office medical adviser found no impairment of the median nerve as observed by Drs. Rutheford and Ruff. The Office relied on the Office medical adviser's opinion as the weight of the medical evidence in the case and used her calculation in issuing the January 16, 2002 schedule award.

The Board finds, however, that there is an outstanding conflict of medical opinion between Drs. Ruff and Rutheford and the Office medical adviser, regarding whether there is impairment of the ulnar nerve or the median nerve or both and whether such impairment is due to loss of strength or sensation. Dr. Ruff opined that there was impairment of the median nerve but not the ulnar nerve. Dr. Rutheford opined that both nerves were affected, but the Office medical adviser found an impairment only of the ulnar nerve.

The Federal Employees' Compensation Act, at 5 U.S.C. § 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 so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding the percentage of permanent impairment to the right upper extremity. This opinion should clearly set forth whether appellant has any residual median nerve impairment, or any ulnar nerve impairment and explain the precise degree of such impairment according to the appropriate tables of the A.M.A., *Guides*. Similarly, the specialist should discuss whether or not appellant has any loss of strength or sensation in the right upper extremity, or any impairment due to pain and quantify these impairments according to the A.M.A., *Guides*. Following this and

other such development the Office deems necessary, the Office shall issue an appropriate decision in the case.[2]

The decision of the Office of Workers' Compensation Programs dated January 16, 2002 is hereby set aide and the case remanded for further development consistent with this decision and order.

Dated, Washington, DC
December 19, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[2] The file contains an April 11, 2002 letter from appellant to the Office requesting reconsideration. He filed his appeal with the Board on April 18, 2002. There is no evidence of record that the Office took any action on appellant's request for reconsideration. Also, appellant submitted new medical evidence on appeal that has not been considered by the Office. The Board may not consider evidence for the first time on appeal that was not before the Office at the time of the final decision in the case. This new medical evidence may be submitted to the Office accompanying a valid request for reconsideration. 20 C.F.R. § 501.2(c).