U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY N. PAYNE and DEPARTMENT OF THE ARMY, TAG-MT, Lincoln, NE

Docket No. 00-1544; Submitted on the Record;
Issued February 21, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has more than a 19 percent permanent impairment of his left upper extremity for which he received a schedule award.

On September 27, 1995 appellant, then a 31-year-old automation clerk, sustained a traumatic injury to his left arm and shoulder in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for left shoulder sprain, left distal clavicle excision and left shoulder impingement. The Office further authorized left shoulder arthroplasty with subacromial decompression and bursectomy, which was performed by Dr. Dennis Bozarth, an orthopedic surgeon, on February 9, 1996. Appellant returned to work on July 28, 1997 and a wage-earning capacity determination was issued on October 7, 1997.

On February 25, 1998 appellant, by counsel, filed a Form CA-7, claim for schedule award.[1] Medical notes from Dr. Bozarth dated June 23, 1998 indicated that appellant had reached maximum medical improvement and that he was scheduled for a functional capacity evaluation (FCE) in August 1998. Following receipt of the FCE report, the case file was referred to Dr. Daniel D. Zimmerman, the Office's district medical director, for review. Because Dr. Zimmerman was unable to provide an impairment rating based on the record evidence, the Office referred appellant for a second opinion evaluation with Dr. David Diamant, a Board-certified orthopedic surgeon.

In a report received by the Office on January 20, 1999, Dr. Diamant noted that he had examined appellant on January 4, 1999. He discussed appellant's history of injury and course of medical care. Physical findings with respect to manual muscle testing were reported as middle deltoid (left 5/5, right 5/5), supraspinatus (left 5-/5, right 5/5), external rotators (left 5/5, right 5/5), biceps (left, 5/5, right 5/5), triceps (left 5/5, right 5/5), wrist extensors (left 5/5, right 5/5), finder abductors (left 5/5, right 5/5). Range of motion was listed as shoulder flexion left 130

[1] Appellant retired from work effective March 3, 1998.

degrees, right 180 degrees; shoulder extension left 50 degrees, right 50 degrees; abduction left 100 degrees, right 180 degrees; adduction left 50 degrees, right 50 degrees; external rotation left 70 degrees, right 85 degrees; internal rotation left 50 degrees, right 80 degrees.

Dr. Diamant diagnosed chronic left shoulder pain with impaired function and status post arthroscopic distal clavicle resection, subacromial decompression and bursectomy of the left shoulder. He noted that appellant had reached maximum medical improvement and opined that appellant had a 10 percent impairment of the left upper extremity due to loss of range of motion under section 3.1j, page 41 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He further stated:

> "Mild weakness was noted in the left supraspinatus, strength being 5-/5. The supraspinatus is innervated by the suprascapular nerve. According to Table 15, [p]age 54, the suprascapular nerve can derive a maximum of 16 percent upper extremity impairment, due to motor deficit. Utilizing Table 12, [p]age 49, [appellant] qualifies most appropriately for [G]rade 4. Thus, 25 percent motor deficit multiplied by 16 percent yields 4 percent upper extremity impairment."

Utilizing the Combined Values Chart on page 322, Dr. Diamant concluded that appellant had a 14 percent impairment of the left arm under the A.M.A., *Guides.*

In a report dated February 8, 1999, Dr. Zimmerman indicated that he concurred with Dr. Diamant's finding of 14 percent impairment of the left arm and recommended that the Office issue a schedule award.

In a decision dated February 11, 1999, the Office issued a schedule award for 14 percent permanent impairment of the left upper extremity. The period of the award was from June 23, 1998 to April 24, 1999.

Appellant disagreed with the amount of the award and requested a review of the written record. He also submitted additional evidence.

In a report dated January 28, 1999, Dr. Bozarth reviewed the evaluation of impairment performed by Dr. Diamant and stated:

> "I would agree with everything that [Dr. Diamant] placed on the impairment; however, he neglected to add in the impairment form a distal clavicle excision. From Table 27 of the [A.M.A., *Guides*], for resection arthroplasty of the clavicle add an additional 10 percent impairment to the shoulder. Therefore, instead of the 14 percent impairment of the upper extremity, I would give [appellant] a 9 percent total as using the value added tables and give a 23 percent impairment of the upper extremity."

In May 10, 1999 decision, an Office hearing representative found that a conflict existed between Drs. Bozarth, Diamant and Zimmerman as to whether appellant had a 23 percent impairment or a 14 percent impairment of the left arm. The Office hearing representative

specifically noted that Dr. Zimmerman had not considered whether appellant was entitled to an additional nine percent impairment for the resection arthroplasty of the clavicle.[2]

On remand the Office referred the case record back to Dr. Zimmerman. In a report dated June 6, 1999, Dr. Zimmerman explained that Dr. Bozarth's finding of an additional 10 percent impairment was incorrect under FECA Bulletin 95-17. He stated that, "If one offers 10 percent for resection arthroplasty, the only other factors of assessment permitted are [range of motion] restriction generated ratings." Dr. Zimmerman advised that the four percent rating for weakness assessed under Table 12 must be deleted from consideration. He concluded that appellant was entitled to have 5 percent added to his original impairment rating of 14 percent for a total of 19 percent permanent impairment for the left upper extremity.[3]

In a decision dated June 22, 1999, the Office awarded appellant an additional 5 percent impairment for a total of 19 percent impairment of the left upper extremity.

Appellant subsequently requested a review of the written record by letter dated July 21, 1999.

In a December 21, 1999 decision, an Office hearing representative affirmed the Office's June 22, 1999 decision.

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

Section 8107 of the Federal Employees' Compensation Act[4] provides that, if there is permanent disability involving the loss or loss of use of a specific enumerated member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[5] The Act does not specify the manner by which the percentage of impairment for a schedule award shall be determined. For consistent results and to

[2] The Office hearing representative did not specifically direct an impartial medical evaluation. Rather, the Office was ordered to forward the case record to the district medical Director for consideration of the impairment rating offered by Dr. Bozarth and if necessary to obtain any additional medical evidence.

[3] Dr. Zimmerman noted that the 10 percent range of motion impairment when combined to the 10 percent impairment for arthroplasty resection yielded 19 percent permanent impairment under the Combined Values Chart.

[4] 5 U.S.C. §§ 8101-8193; § 8107.

[5] *Id.* This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a) (1999).

ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6]

In this case, appellant contests the decision of the Office hearing representative dated December 21, 1999, that he does not have greater than a 19 percent impairment of the left upper extremity. The Board finds that a conflict exists in the record that must be resolved in order to ascertain the degree of appellant's permanent impairment of the left upper extremity.

The Board notes that the Office's referral physician, Dr. Diamant, assessed appellant's permanent impairment for the left arm to be 14 percent in accordance with the A.M.A., *Guides*. Dr. Zimmerman reviewed the record and Dr. Diamant's report on January 26 and February 8, 1999. He also opined that appellant had a 14 percent impairment of the left upper extremity.

Following the Office's decision on February 11, 1999 granting a schedule award for a 14 percent permanent impairment of the left extremity, appellant requested an oral hearing. At the hearing he submitted a January 28, 1999 report of his treating orthopedic surgeon, Dr. Bozarth, who noted that he concurred with the prior assessment of 14 percent impairment but pointed out that Table 27 of the A.M.A., *Guides* indicated that an additional impairment of the shoulder should be given for resection arthoplasty of the clavicle. He opined that appellant had a 23 percent impairment of the left upper extremity using the value added tables.

Instead of declaring a conflict in the medical evidence under section 8123 of the Act[7] between Dr. Bozarth and Dr. Diamant, the Office directed that the case be referred back to Dr. Zimmerman, the district medical adviser, for consideration of Dr. Bozarth's opinion. This was error. Both Drs. Bozarth and Diamant had rendered their opinions using the A.M.A., *Guides*. The Act mandates that such disagreements be decided by an impartial physician pursuant to section 8123 of the Act.[8] Therefore, because there continues to exist a conflict in the medical opinion evidence regarding the degree of permanent impairment of appellant's left upper extremity, the case must be remanded for referral of the case to an impartial medical specialist to resolve the conflict.

[6] *Mary L. Henninger*, 51 ECAB ____ (Docket No. 00-552, issued June 20, 2001); 20 C.F.R. § 10.404 (1999). The Office first utilized *A Guide to the Evaluation of Permanent Impairment of the Extremities and Back*, published in The Journal of the American Medical Association, Special Edition, February 15, 1958. From 1958 until 1971 a series of 13 *Guides* was published in the Journal of the American Medical Association. The American Medical Association published the first hardbound compilation edition of the *Guides* in 1971, which revised the previous series of JAMA, *Guides*.

[7] 5 U.S.C. § 8123.

[8] Section 8123 provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict. *Robert D. Reynolds*, 49 ECAB 561 (1998); *Harry T. Mosier*, 49 ECAB 688 (1998).

The decision of the Office of Workers' Compensation Programs dated June 22, 1999 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
February 21, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member