U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARNOLD F. ZAFFOS and U.S. POSTAL SERVICE,
POST OFFICE, Jersey City, NJ

Docket No. 02-254; Submitted on the Record;
Issued July 8, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he had more than a 10 percent permanent impairment of each wrist for which he received a schedule award.

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

This case was previously before the Board.[1] By decision dated April 20, 1998, the Board found that appellant had no more than a 10 percent permanent impairment of the left upper extremity but remanded the case for further development regarding his right upper extremity impairment. The Board's April 20, 1998 decision is herein incorporated by reference.

On May 27, 1992 appellant, then a 38-year-old mailhandler, filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome due to his job. The Office of Workers' Compensation Programs accepted appellant's claim for aggravation of bilateral carpal tunnel syndrome and approved surgery on both wrists. On August 17, 1994 appellant filed a claim for a schedule award. On April 15, 1995 appellant received a schedule award for a 10 percent permanent impairment of each upper extremity. By decision dated January 19, 1996, an Office hearing representative affirmed the Office's April 15, 1995 schedule award decision.

Following the issuance of the Board's April 20, 1998 decision, the Office referred appellant to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, for an examination and evaluation to resolve the conflict in medical opinion concerning the degree of appellant's permanent impairment of his right upper extremity due to his April 12, 1992 employment injury. The record shows that appellant was examined by Dr. Fries on July 30, 1998. However, an Office telephone memorandum dated August 18, 1998 indicates that a secretary in Dr. Fries' office told an Office claims examiner that Dr. Fries was unable to determine how much of

[1] *See* Docket No. 96-1470 (issued April 20, 1998).

appellant's impairment was due to his employment injury and how much was due to a subsequent nonwork-related motor vehicle accident.

By decision dated September 14, 1998, the Office found that the report of Dr. Fries established that appellant had no more than a 10 percent permanent impairment of the right upper extremity.

By decision dated July 9, 1999 and finalized July 15, 1999, an Office hearing representative remanded the case on the grounds of an unresolved conflict in the medical opinion evidence. The Office hearing representative noted that there was no written medical report of record from Dr. Fries and the information obtained from him was the result of a telephone conversation between the Office and a secretary in Dr. Fries' office. The Office hearing representative remanded the case for further evidentiary development to resolve the conflict in medical evidence as to the degree of permanent impairment to appellant's right upper extremity. The hearing representative stated:

> "Specifically, the Office is to refer [appellan]t to *another* impartial specialist for a referee medical opinion to resolve this conflict. [Appellant] should be referred to an appropriate specialist, along with the case record and a statement of accepted facts. The specialist should be requested to provide rationalized medical opinion as to the degree of the work-related impairment which exists in the RUE [right upper extremity]." (Emphasis in the original.)

In a report dated January 17, 2000, Dr. Irving D. Strouse, the impartial medical specialist selected by the Office to resolve the conflict in the medical opinion evidence, provided findings on examination and stated that appellant had a 10 percent permanent impairment of the right upper extremity.

By decision dated February 2, 2000, the Office found that the medical report of the impartial medical specialist, Dr. Strouse, established that appellant had no more than a 10 percent permanent impairment of the right upper extremity for which he received a schedule award.

By decision dated and finalized August 17, 2000, an Office hearing representative set aside the Office's February 2, 2000 decision on the grounds that it was not clear whether the Office followed its established procedures for selection of an impartial medical specialist.

By letter dated October 17, 2000, the Office referred appellant, together with the case record, a statement of accepted facts and a list of specific questions, to Dr. Fries for an examination and evaluation in order to resolve the conflict in the medical opinion evidence.

In a report dated November 1, 2000, Dr. Fries provided a history of appellant's condition and findings on examination and stated that appellant had a 10 percent permanent impairment of each upper extremity based on Table 16 at page 57 of the American Medical Association (A.M.A.), *Guides to the evaluation of permanent impairment*. He stated:

> "[Appellant] has subjective complaints documented above. They include loss of temperature sensation and parasthesias and numbness in his right hand

predominantly the right middle finger. [Appellant] claims slightly more numbness in his right hand symptoms over the past eight years, though now he can sense small objects like needles much better. This appears contradictory. He has no subjective complaints referable to his left hand.

"I assess [appellant] has a ten percent right upper extremity impairment and a ten percent (*Richard L. Ballard*, 44 ECAB 146, 150 (1992.) left upper extremity impairment. I base this upon the [A.M.A., *Guides*] [f]ourth [e]dition, [p]age 57, Table 16.

"According to the table, median nerve entrapments at the wrist should be assessed as mild, moderate and severe severity. [Appellant] clearly has *mild* severity, as he has no objective neurologic deficits, no atrophy and no measurable weakness.

"The [A.M.A., *Guides*] also advise ([p]age 56): 'Impairment of the hand and upper extremity secondary to entrapment neuropathy may be derived by measuring the sensory and motor deficits as described in the preceding parts of this section.' As [appellant] has no measurable sensory or motor deficits other than subjective, I have chosen in fairness to use the accepted alternative method. Again to quote the [A.M.A., *Guides*] ([p]age 56): 'An alternative method is provided in Table 16 ([p]age 57).' The evaluator should not use both methods." (Emphasis in the original.)

By decision dated December 4, 2000, the Office found that the weight of the medical evidence of record, as represented by the report of Dr. Fries, established that appellant had no more than a 10 percent permanent impairment of each upper extremity for which he had received a schedule award.

By letter dated December 7, 2000, appellant requested a hearing that was held on May 15, 2001.

By decision dated and finalized July 26, 2001, an Office hearing representative affirmed the Office's December 4, 2000 decision.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4]

The Board finds that the opinion of Dr. Fries is not entitled to special weight. The record shows that Dr. Fries was asked to act as an impartial medical specialist in 1998 but did not submit a report because, as his secretary advised the Office by telephone, Dr. Fries felt he was unable to determine how much of appellant's permanent impairment was related to his employment and how much was related to a nonwork-related motor vehicle accident. In his July 15, 1999 decision, the Office hearing representative directed the Office to refer appellant to "another" impartial specialist. The Board has held that the physician serving as the impartial specialist should be one who is wholly free to make a completely independent evaluation and judgment, untrammeled by a conclusion rendered on prior examination.[5] There is no indication that Dr. Fries was biased or would be ineligible on any particular ground to serve as an impartial specialist. However, to give special weight to a physician who, it appears from the record, previously felt that he was unable to rate appellant's impairment for schedule award purposes, would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists. Additionally, as Dr. Fries was twice selected to be an impartial specialist in this case, it is unclear whether the Office correctly followed its rotational system as provided in its procedure manual.[6] The Office notes in its procedure manual that the Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.[7]

On remand, the Office should refer appellant, together with a statement of accepted facts and the medical evidence, to a new impartial medical specialist not previously connected with the case for an examination and evaluation of appellant's work-related permanent impairment to his upper extremities. Following such development as the Office deems necessary, the Office shall issue an appropriate *de novo* decision.

[4] *See Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

[5] *Raymond E. Heathcock*, 32 ECAB 2004, 2008 (1981).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b, (March 1994), 7 (September 1995).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examination*, Chapter 3.500.4a(3) (March 1994).

The decisions of the Office of Workers' Compensation Programs dated July 25, 2001 and December 4, 2000 are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
July 8, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member