U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND A. FONDOTS and U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA

Docket No. 01-1599; Submitted on the Record; Issued June 26, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has more than a two percent impairment of the right upper extremity for which he received a schedule award.

On March 21, 1989 appellant, then a 25-year-old clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on October 3, 1988 he first realized that his bilateral epicondylitis was due to his repetitive work.[1] The Office of Workers' Compensation Programs accepted the claim for bilateral epicondylitis and authorized surgery.[2]

In a report dated August 29, 1997, Dr. Ronald J. Potash, an attending Board-certified surgeon, concluded appellant had a 29 percent impairment in both his right and left upper extremities. In reaching this determination, he relied upon Figure 32 at page 40 to find a 2 percent impairment for motion deficit flexion and Table 27 at page 61 for right elbow arthroplasty for a total impairment of 29 percent. Regarding his left upper extremity, he found a one percent impairment for motion deficit flexion using Figure 32 at page 40 and a 28 percent impairment for his left elbow arthroplasty using Table 27 at page 61 for a total impairment of 29 percent.[3]

In an October 27, 1997 report, the Office medical adviser concurred with Dr. Potash regarding the impairment for the left elbow. Regarding the right elbow, he opined appellant had only a two percent impairment as the two surgeries performed on the arm could not be considered arthroplasties.

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[1] This was assigned claim number A03-0142164

[2] The Office approved appellant's recurrence claims for July 1, 1992, May 31, November 14, 1994 and April 8, 1996.

[3] The identified tables, figures and page numbers refer to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

In a November 4, 1997 report, Dr. Seymour Shlomchik, a second opinion Board-certified orthopedic surgeon, opined that appellant's surgeries on the right arm were not arthroplasties and thus, he was only entitled to a two percent impairment of the right upper extremity pursuant to the A.M.A., *Guides*.

In a decision dated November 13, 1997, the Office issued a schedule award for a 29 percent impairment of the left upper extremity with no award for the right upper extremity.

The Office medical adviser determined appellant had a two percent impairment of the right upper extremity based upon Dr. Potash's August 29, 1997 report.

In a letter dated November 21, 1997, appellant's counsel requested a hearing which was held on June 25, 1998.

Dr. David Weiss opined that appellant had a 29 percent impairment of the right upper extremity. He disagreed with the Office medical adviser that appellant's surgeries on his right elbow could not be considered arthroplasties.

By decision dated September 14, 1998, the hearing representative found a conflict in the medical evidence regarding the degree of impairment in appellant's right upper extremity. The hearing representative vacated the decision and remanded the case for referral to an impartial medical examination to resolve the conflict in the medical opinion evidence.[4]

On October 6, 1998 the Office referred appellant to Dr. Kevin A. Mansmann, a Board-certified orthopedic surgeon, to resolve the conflict in evidence regarding whether appellant's August 20, 1992 and May 28, 1993 surgeries could be classified as arthroplasties.

In a report dated November 30, 1998, Dr. Mansmann concluded that appellant was capable of lifting no more than 10 to 15 pounds and this restriction was permanent. He also determined that appellant's "bilateral epicondylar complaints" were due to "his repetitive work back in the 1980s."

Dr. Mansmann, in a February 18, 1999 supplemental report, opined that neither of appellant's surgeries on August 22, 1992 or May 28, 1993 could be classified as an arthroplastic surgery. He noted that the first surgery involved debridement of appellant's lateral epicondyle while the second surgery involved releasing the annular ligament.

On March 8, 1999 appellant was issued a schedule award for a two percent impairment of the right upper extremity. The award was based on the two-thirds rate and ran from April 22 through June 5, 1999.

On March 16, 1999 appellant's counsel requested a hearing which was held on September 23, 1999.

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[4] Regarding appellant's carpal tunnel syndrome, the hearing representative advised appellant to submit medical evidence establishing that this condition was causally related to his employment.

By decision dated December 15, 1999, the hearing representative found that there was still an outstanding conflict in the medical opinion evidence which Dr. Mansmann had not resolved. In finding Dr. Mansmann's reports insufficient to resolve the conflict in the medical opinion, the hearing representative found Dr. Mansmann's initial report failed to address the issue of impairment as requested by the Office and the supplemental report was equivocal as to whether the surgery on the right arm was an arthroplasty. Furthermore, the hearing representative determined that Dr. Mansmann's supplemental report was unrationalized as he provided no supporting rationale for his opinion. The March 8, 1999 decision was vacated and the hearing representative remanded the case to resolve the outstanding conflict. The hearing representative also instructed the Office to correct appellant's pay rate and recompute his schedule award as he was entitled to the augmented rate of 75 percent and the Office paid him at the basic rate of 66 2/3 percent.

On January 28, 2000 the Office referred appellant to Dr. Robert E. Liebenberg, a Board-certified orthopedic surgeon, to resolve the outstanding conflict in the medical opinion evidence.

In a report dated March 6, 2000, Dr. Liebenberg concluded that appellant had a two percent impairment of his right upper extremity due to loss of flexion in his arm. Regarding the issue of whether appellant had arthroplastic surgery in his right arm, he stated:

> "[Appellant] has not had an arthorplasty performed. In the elbow there are two types of arthroplasty; one is total arthroplasty which involves the placement of artificial materials in the elbow joint after resection of bone. The other involves lining the joint itself with fascial or other tissue after resection of bone. [She] has not had either one of these operations. The operations listed in the A.M.A., *Guides* under [a]rthroplasty do not include the tennis elbow operations which the patient has had."

On April 26, 2000 an Office medical adviser reviewed Dr. Liebenberg's report and concurred that appellant had only a two percent impairment of the right upper extremity.

By decision dated April 26, 2000, the Office awarded appellant a schedule award for a two percent impairment of the right upper extremity.

On May 4, 2000 appellant requested a hearing which was held on November 29, 2000.

By decision dated February 22, 2001 and finalized on February 23, 2001, the hearing representative affirmed the April 26, 2000 decision awarding appellant a two percent permanent impairment of his right upper extremity.

The Board finds that appellant has no more than a two percent impairment of the right upper extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[5] and its implementing regulation[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule 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.[7]

Section 8123(a) of the Act provides that, 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.[8]

In the present case, Dr. Potash determined that appellant had a 29 percent permanent impairment of the right upper extremity, while Dr. Schlomchik and the Office medical adviser determined that appellant had a 2 percent permanent impairment of the right upper extremity. As a conflict existed in the medical opinion evidence between Drs. Potash and Shlomchik, the Office properly referred appellant to Dr. Mansmann for an impartial medical examination.

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[10] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] The Office properly used the fourth edition of the A.M.A., *Guides* to calculate the award. While the fifth edition of the A.M.A., *Guides* became effective on February 1, 2001, the hearing representative's February 23, 2001 decision clearly indicated that no new medical evidence was submitted in support of appellant's hearing request. Consequently, no recalculation of the award resulted from the hearing. *See* FECA Bulletin 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[8] 5 U.S.C. § 8123(a); *see also Charles S. Hamilton*, 52 ECAB ___ (Docket No. 99-1792, issued October 13, 2000); *Leonard M. Burger*, 51 ECAB ___ (Docket No. 98-1532, issued March 15, 2000); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[9] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[10] *April Ann Erickson*, 28 ECAB 336, 341-42 (1977).

a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[11] While the Office initially referred appellant to Dr. Mansmann for an impartial medical examination, the Board finds that Dr. Mansmann's report did not adequately address the issue of whether appellant's August 20, 1992 and May 28, 1993 right elbow surgeries could be considered arthroplasties nor did he provide an impairment determination. His opinion is not well rationalized. The Office, therefore, properly referred appellant to Dr. Liebenberg for a second impartial examination.[12]

The Board finds that the weight of the medical evidence is represented by the thorough and well-rationalized opinion of Dr. Liebenberg, the impartial medical specialist selected to resolve the conflict in the medical opinion evidence. He reviewed the record and provided a reasoned explanation regarding why appellant's two surgeries were not arthroplasties. Consequently, Table 27 at page 61 was inapplicable. Other findings noted in Dr. Liebenberg's report also do not translate to any table of the fourth edition of the A.M.A., *Guides* that would entitle appellant to a greater right arm impairment rating. Therefore, the Office properly determined that appellant was not entitled to more than a two percent permanent impairment of the right upper extremity, for which he has already received a schedule award.

The decision of the Office of Workers' Compensation Programs dated February 22, 2001 and finalized on February 23, 2001 is hereby affirmed.

Dated, Washington, DC
June 26, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[11] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

[12] *See Margaret M. Gilmore*, 47 ECAB 718, 722 (1996).