

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE SPIRO and U.S. POSTAL SERVICE,
ST. LOUIS MANAGEMENT SECTION CENTER, St. Louis, MO

*Docket No. 01-1793; Submitted on the Record;
Issued June 26, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to more than an 8 percent impairment of the right upper extremity and a 13 percent impairment of the left upper extremity for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 21, 2000; and (3) whether appellant sustained a recurrence of disability causally related to his accepted employment injuries.

On October 4, 1994, October 8, 1996 and November 4, 1997 appellant sustained injuries while in the performance of duty as a letter carrier for the employing establishment. His claims were accepted for bilateral carpal tunnel syndrome and release, bilateral cubital tunnel syndrome, left ulnar nerve transposition, bilateral radial nerve entrapment and aggravation of right epicondylitis. Appellant was paid compensation benefits until July 21, 2000. By decision dated August 18, 2000, the Office terminated his benefits, finding that the evidence of record established that his injury-related disability had ceased.

Appellant filed a claim for a schedule award. By decision dated July 18, 2000, he was awarded an eight percent permanent impairment for the right upper extremity and a thirteen percent permanent impairment for the left upper extremity. Appellant disagreed with the Office's decision and requested an oral hearing. By decision dated April 30, 2001, the hearing representative affirmed the Office's decisions regarding the schedule award and termination of benefits. Appellant also filed a claim for recurrence on March 15, 2001. The Office denied his claim for recurrence on July 5, 2001.

With regard to the schedule awards, the Board finds that the issue is not in posture for decision.

Dr. David C. Haueisen, a Board-certified orthopaedic surgeon and appellant's attending physician, stated in a July 22, 1999 report that appellant had reached maximum medical improvement but still had some tenderness above the carpal tunnel incision areas in his hands. He stated that appellant had full wrist and elbow range of motion with some residual weakness.

Dr. Haueisen found that appellant had a 5 percent impairment of each wrist from the carpal tunnel release surgery and a 15 percent impairment of the left arm from the elbow ulnar nerve surgery.

The district medical adviser stated on April 9, 2000 that Dr. Haueisen's report was insufficient to determine a schedule award rating since he did not state that his ratings were based upon the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He indicated that Dr. Haueisen failed to report range of motion of the elbow and wrist, did not grade residuals of pain or sensory deficit and discomfort and did not offer a grade for weakness.¹ The Office referred appellant to a second opinion physician.

Dr. Martin B. Wice, a Board-certified internist, examined appellant on June 7, 2000 and measured range of motion, chronic pain, sensory deficit and chronic weakness by using the 4th edition of the A.M.A., *Guides*. He addressed appellant's bilateral carpal tunnel and found a 6 percent impairment of the right upper extremity based on loss of range of motion of one percent and sensory deficit of five percent and a 3 percent impairment of the left upper extremity based on sensory loss of one percent and median nerve weakness of two percent. Dr. Wice next addressed the bilateral carpal tunnel syndrome and found a 2 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity secondary to loss of range of motion, sensory loss and weakness.

The district medical adviser reviewed Dr. Wice's report and found his ratings to be acceptable based upon the A.M.A., *Guides*. The medical adviser applied the Combined Values Chart, pages 322-24, to determine that appellant had a total 8 percent impairment of the right upper extremity and a 13 percent impairment of the left upper extremity when combining the carpal tunnel and cubital tunnel impairments.

On July 18, 2000 the Office issued a schedule award for 8 percent of the right upper extremity and 13 percent of the left upper extremity. Appellant disagreed and submitted a September 11, 2000 report from Dr. Bruce S. Schlafly, a Board-certified orthopedic surgeon, at his February 8, 2001 oral hearing. Dr. Schlafly determined that appellant had a 35 percent permanent impairment of the right upper extremity and a 43 percent permanent impairment of the left upper extremity, based on the 4th edition of the A.M.A., *Guides*.

Section 8123 of the Federal Employees' Compensation Act² 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.³

The Board finds a conflict created by the opinion of Dr. Wice, who found that appellant has a 8 percent permanent impairment of the right upper extremity and a 13 percent permanent impairment of the left upper extremity and Dr. Schlafly, who found that appellant has a 35

¹ The Office did not receive an additional report from Dr. Haueisen.

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

³ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

percent permanent impairment of the right upper extremity and a 43 percent permanent impairment of the left upper extremity.

On remand the Office should refer appellant, the case record, and the statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation to determine the percentages of impairment based on the A.M.A., *Guides*, pursuant to section 8123(a).⁴

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation benefits without establishing that the disability has ceased or that it is no longer related to the employment.⁶

In this case, appellant's attending physician, Dr. Haueisen, released appellant to full-time work on March 30, 1999, indicating: "full duty with only limitation of one bundle-work only." He also stated in a May 4, 1999 work capacity evaluation: "regular duty, no multiple bundles." The Office asked Dr. Haueisen to describe appellant's limitations by using physical restrictions and not work methods and referred appellant to a second opinion physician.⁷

Dr. John A. Gragnani, Board-certified in physical medicine and rehabilitation, examined appellant on May 10, 1999 and stated that appellant may have hereditary neuropathy or fascial disease since both his hands and feet were affected. He stated that appellant had reached maximum medical improvement and indicated that he could work without any restrictions.

The Office received additional reports from Dr. Haueisen dated January 7, April 24 and July 21, 2000, which stated that it was difficult from a medical standpoint to determine whether appellant needed permanent restrictions, since his symptoms seemed to be due to overuse and might resolve with time. He indicated, however, that appellant should avoid lifting when his elbow was fully extended. Dr. Haueisen also stated in his April 24, 2000 report that he had reviewed Dr. Gragnani's May 10, 1999 report and recommended that appellant not work with his elbow fully extended. He also stated: "[appellant] has regained a good grip strength and as far as I can tell, he would be capable of returning to the full duties of his position of a letter carrier." Dr. Haueisen recommended a functional capacity evaluation. He also stated in his July 21, 2000 report that appellant should not lift while the elbow was fully extended.

⁴ 20 C.F.R. § 10.321.

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

⁶ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ As noted earlier, an additional report was not received.

The Board finds that Dr. Gragnani's report is in conflict with that of Dr. Haueisen. At the time of the July 21, 2000 termination, the record contained several medical reports from Dr. Haueisen indicating that appellant's work-related injuries had not have ceased. Dr. Haueisen stated several times from January to July 2000 that appellant should avoid lifting when his elbow was fully extended. The Board notes that the position description of letter carrier includes rearranging mail trays, which requires extension of the arm and shoulder. In contrast, Dr. Gragnani stated that appellant could return to his regular duties without any physical limitations.

The Federal (FECA) Procedure Manual states that the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased.⁸ The medical evidence of record consists of conflicting opinions by Drs. Haueisen and Gragnani. Since the weight of the medical evidence does not establish that appellant's work-related residuals had ceased, the Office did not meet its burden of proof in terminating appellant's compensation benefits.

The Board further finds that the issue of recurrence is not in posture for decision and requires further development by the Office.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁹

In this case, appellant indicated on his recurrence of disability statement that he had "various pain and swelling" after returning to work. He submitted a February 21, 2001 report from Dr. Haueisen indicating that his symptoms had increased since he started working with multiple bundles. Dr. Haueisen indicated that appellant had increased pain in his wrists and shoulders but stated that the symptoms were difficult to localize. He also discussed conditions of shoulder bursitis and tenosynovitis but did not provide a definitive diagnosis regarding these conditions. Dr. Haueisen also did not relate the shoulder bursitis or the tenosynovitis to any of appellant's accepted work injuries. Appellant did not submit any other medical evidence dated after February 5, 2001 discussing his alleged recurrence and how it was related to his original work injuries. It is appellant's burden to establish by the weight of the substantial, reliable and probative evidence that the nature and extent of his accepted conditions has changed. Since appellant did not submit rationalized medical opinion evidence showing that his conditions had expanded or changed, he did not meet his burden of proof.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.0812(3) (July 1993).

⁹ *Fallon Bush*, 48 ECAB 594 (1997).

Appellant also indicated that his limited-job duties had changed. When he returned to full-duty work in March 1999, his job restrictions consisted of “full duty with only limitation of one bundle work only” per Dr. Haueisen. Appellant testified at the February 8, 2001 oral hearing that when he returned to work he was working with only one bundle, but that on July 21, 2000 he was required to work the multiple bundle method. He explained that the one bundle method involved less repetitive motions with all short arm motions and that the multiple bundle method required the arm to travel a greater distance. Dr. Haueisen also indicated in his February 21, 2001 report:

“[Appellant] indicates that this [multiple bundles] involves reaching and lifting bundles with the arm fully extended. His office duty is 2.5 hours. [Appellant] does full arm extensions across the body to lift. He lifts heavy tubes and parcels. [Appellant’s] street duties are 5.5 hours, which include the same motions. He notes that he does about two thousand motions in an eight-hour day. Appellant notes that when he was working a one bundle method, that he gained ‘synergies’ and was able to do an entire eight[-]hour job.”

While the record does not contain an official document from appellant’s employing establishment stating that his limited-job duties changed on July 21, 2000, the Board finds that appellant’s statements, given the absence of evidence to the contrary, are sufficient to require further development of the evidence. It is well established that proceedings under the Act,¹⁰ are not adversarial in nature¹¹ and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.¹² On remand the Office should obtain a report from appellant’s employing establishment establishing that his limited-job duties changed on July 21, 2000. After such development as the Office deems necessary, a *de novo* decision shall be issued.

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

¹² *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

The July 5, 2001 decision of the Office of Workers' Compensation Programs regarding recurrence of disability is set aside and the issue is remanded; the April 30, 2001 decision is remanded on the issue of the amount of the schedule award and reversed on the issue of termination of compensation; the August 18, 2000 decision regarding termination is reversed and the July 18, 2000 decision is set aside and remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
June 26, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member