U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE LEE and DEPARTMENT OF THE ARMY,
MILLS DENTAL CLINIC, Fort Dix, NJ

Docket No. 00-2631; Submitted on the Record;
Issued March 14, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant is entitled to more than a 20 percent permanent impairment of the right and left upper extremities for which she received schedule awards.

On January 23, 1991 appellant, then a 58-year-old dental assistant, filed a notice of occupational disease claiming that she developed carpal tunnel syndrome as a result of her federal employment. The Office of Workers' Compensation Programs accepted appellant's claim for bilateral carpal tunnel syndrome. On May 23, 1995 the Office awarded appellant a 20 percent permanent disability of the left upper extremity.

In support of an amended schedule award claim for the left upper extremity and an award for the right upper extremity, appellant submitted a November 18, 1996 report from Dr. Ronald Potash, a Board-certified surgeon, in which he found that appellant had a 34 percent impairment to the left upper extremity and a 95 percent impairment to the right upper extremity.[1] The Office referred the case record to Dr. Scott R. Sharetts, a Board-certified psychiatrist and neurologist, for a second opinion examination. In a report dated August 18, 1997, Dr. Sharetts stated that appellant had a 20 percent impairment of the left upper extremity and a 7 percent impairment of the right upper extremity. The Office awarded appellant a two percent permanent disability of the right upper extremity.[2]

In a decision dated May 14, 1998, a hearing representative found a conflict between appellant's treating physician, Dr. Potash, and the district medical adviser. Appellant was

[1] Appellant stated that she also submitted an addendum report from Dr. Potash dated July 21, 1997 stating that appellant had an 87 percent impairment to the right upper extremity and a 61 percent impairment to the left upper extremity, but this report was not found in the record.

[2] The decision actually states that appellant was awarded a two percent impairment for the left upper extremity, but the Office later acknowledged that the two percent was actually for the right upper extremity.

referred to Dr. Dean A. Nachtigall for an independent medical examination. In a report dated July 21, 1998, Dr. Nachtigall stated:

> "Since there is full range of motion of the upper extremity and a normal EMG [electromyogram] nerve conduction study, I would postulate that a Grade II decreased sensibility with or without abnormal sensation or pain which is forgotten during activity would have a maximum percent sensory deficit of 25 percent. (Table 11, page 48, A[merican] M[edical] A[ssociation], *Guides to the Evaluation of Permanent* [*Impairment*]).
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> "If one were to add the maximum percent upper extremity impairment from Table 15, Page 54 of the median nerve impairment table, we would have a 38 percent maximum upper extremity impairment. Twenty five percent of 38 percent is 9.5 percent upper extremity impairment. The accepted fact is that the left upper extremity has been awarded a 20 percent disability. If Page 322 of the text is being used, compliance would be values of 20 percent and 10 percent with a total impairment of 28 percent.
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> "In summary, I feel that giving the patient a 20 percent disability of the left upper extremity is generous and even if you would double the disability of the right upper extremity to 20 percent, we would have a total disability of 36 percent from the chart on Page 322, [American Medical Association,] *Guides to the Evaluation of Permanent Impairment*."

The district medical adviser found that appellant had a 10 percent impairment of the right upper extremity based on Dr. Nachtigall's report.

On August 3, 1998 the Office awarded appellant an additional 8 percent permanent disability of the right upper extremity, totaling 10 percent.[3] By decision dated April 1, 1999, a hearing representative found that Dr. Nachtigall's July 21, 1998 report required clarification. In a report dated July 23, 1999, Dr. Nachtigall stated that his continued opinion was that appellant had a 20 percent dysfunction of the left upper extremity and that "20 percent disability of the right upper extremity is also suggested." In a note dated July 30, 1999, the district medical adviser stated that appellant had a 20 percent impairment of both upper extremities.

On September 2, 1999 appellant was awarded an additional 10 percent permanent impairment of the right upper extremity, totaling 20 percent for each upper extremity. Appellant requested a hearing which was held on February 15, 2000. By decision dated April 25, 2000, the hearing representative affirmed the Office's September 2, 1999 decision.

The Board has duly reviewed the record on appeal and finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

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[3] The Office stated that the "additional" 8 percent was 10 percent less the 2 percent previously paid. The Office found that Dr. Nachtigall supported a 10 percent impairment of the right upper extremity and did not dispute a 20 percent impairment of the left extremity.

The schedule award provisions of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[6] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act[7] will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[8]

In this case, the July 23, 1999 report from Dr. Nachtigall is not sufficiently complete to constitute the weight of the medical evidence. While Dr. Nachtigall provided range of motion for the left and right hand and wrist and mentioned range of motion of the fingers and thumbs, he did not refer to the tables and pages of the A.M.A., *Guides* or explain how he derived his assessment of appellant's degree of permanent impairment in both upper extremities. It is not possible to determine whether Dr. Nachtigall based his findings that appellant has a 20 percent impairment in each upper extremity on these factors in accordance with the A.M.A., *Guides*. In addition, the district medical adviser did not provide any calculations in accordance with the A.M.A., *Guides* or show how he arrived at the 20 percent impairment rating for each upper extremity. The Board also notes that the record reveals that appellant suffers from ulnar nerve neuropathy at the right elbow and that she underwent right ulnar nerve transposition in the right elbow area. This area of neuropathy in appellant's right upper extremity was also not taken into consideration in Dr. Nachtigall's report. As Dr. Nachtigall failed to explain his findings of

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Nathan L. Harrell*, 41 ECAB 402 (1990).

[7] 5 U.S.C. § 8123(a) provides the following: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is 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] *Harold Travis*, 30 ECAB 1071 (1979).

permanent impairment in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses, his report is not sufficiently complete to constitute the weight of the medical evidence.[9] On remand, the Office should request Dr. Nachtigall to provide a rationalized medical report on the issue of the degrees of permanent impairment of both upper extremities in accordance with the A.M.A., *Guides*.

The April 25, 2000 and September 2, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further findings consistent with this opinion of the Board.

Dated, Washington, DC
March 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *James Kennedy, Jr.*, 40 ECAB 620 (1989).