

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA J. MONROE and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

*Docket No. 01-1843; Submitted on the Record;
Issued May 20, 2002*

DECISION and ORDER

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

The issue is whether appellant has greater than a three percent permanent loss of use of her left arm.

Appellant sustained an injury to her left shoulder and neck in the performance of her duties as a clerk on November 7, 1989. On May 14, 1990 Dr. S. Mubashar Ahmad performed a left dorsal sympathectomy and first rib resection. The Office of Workers' Compensation Programs paid compensation for a recurrence of disability beginning May 12, 1990.

By letter dated June 27, 1991, appellant's attorney stated that a claim for a schedule award had been submitted and submitted a report dated May 7, 1991 from Dr. Ronald Goldberg, an osteopath. He concluded that appellant had a 46 percent permanent loss of use of her left arm: 6 percent for loss of motion; 30 percent for a sensory brachial plexus impairment; and 10 percent for a brachial plexus impairment due to loss of strength.

In a report dated February 5, 1992, Dr. Ahmad stated that appellant complained of intercostal discomfort and limited motion of her left arm. He stated: "This is my first experience with this type of postoperative complaint; usually thoracotomy patients are able to resume full use of their upper extremity." Dr. Ahmad concluded that he was "essentially unable to substantiate her disability. Whether her disabilities are voluntary or involuntary, I am unable to confirm."

On April 15, 1992 the Office referred appellant to Dr. Norman H. Eckbold, a Board-certified orthopedic surgeon, for an opinion on the permanent impairment of her left arm. In a report dated April 28, 1992, he stated that appellant lacked 20 degrees of overhead motion and assigned impairments of 1 percent for loss of 20 degrees of abduction and 1 percent for loss of 20 degrees of flexion.

By decision dated December 3, 1992, the Office issued appellant a schedule award for a two percent permanent loss of use of his left arm. This decision was affirmed by an Office hearing representative in an October 28, 1993 decision.

Appellant appealed to the Board, which, by decision dated October 20, 1995, found that there was a conflict of medical opinion between Drs. Eckbold and Goldberg as to the degree of permanent impairment of her left arm.¹

On December 28, 1995 the Office referred appellant, the case record and a statement of accepted facts to Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. In a report dated February 2, 1996, he stated that appellant sustained a cervical sprain/strain and a left shoulder strain/sprain, that an electromyogram four weeks after her employment injury was normal and that appellant had normal strength when she gave a full effort. Dr. O'Dowd then stated:

"However, on today's examination [appellant] has subjective discomfort. She has no objective evidence of deficit, either neurologic or range of motion to her neck or to her arm at this time. Therefore, based on this exam[ination] today, [appellant] does not have any objective evidence of any significant disability in her upper extremity at this time. There is no neurologic deficit nor motion deficit to be accounted today, therefore, [appellant] does not have any significant disability according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), [third ed.], on this date, February 2, 1996. In addition, [appellant's] frequent giving way indicates some degree of exaggeration on [her] part. In addition, the superficial tenderness [appellant] exhibits is also nonphysiologic. If [she] had changes in her skin tone, pallor, shininess, etc., or if [appellant] had a superficial wound or open wound or skin burn, we would account for [her] superficial sensitivity as to be objective. However, the discomfort that [she] evidenced on the exam[ination] is not borne up on the objective exam[amination]."

By decision dated March 11, 1996, the Office found that the evidence demonstrated that appellant did not have greater than a two percent permanent impairment of her left arm.

Following a hearing held on October 22, 1996 at appellant's request, an Office hearing representative, by decision dated December 13, 1996, found that further development of the evidence was necessary, as Dr. O'Dowd did not provide any measurements of range of motion and used the third rather than the fourth edition of the A.M.A., *Guides*.

On remand, the Office, by letter dated April 4, 1997, requested that Dr. O'Dowd provide measurements of the range of motion of appellant's left shoulder, use the fourth edition of the A.M.A., *Guides* and include any impairment preexisting her November 7, 1989 employment injury. In a report dated May 6, 1997, he stated that appellant complained that she had discomfort when she overused her left shoulder, that her left arm felt sore and tired at the end of the day and that her symptoms were related to shoulder motion. Dr. O'Dowd listed the degrees

¹ Docket No. 94-923.

of appellant's various shoulder motions and stated that she had no deficit due to loss of motion, that her strength was equal in both shoulders and that she had "normal sensation at all levels." He stated:

"Using Table 11a on page 48 in Chapter 3, because of [appellant's] subjective discomfort, paresthesia and diffuse discomfort about the left shoulder, which may be secondary to the thoracic outlet syndrome surgery and which was performed in 1990, [she] qualifies as a Grade II classification with a percent sensory deficit involving the brachial plexus through the thoracic outlet syndrome as two to three percent. This qualifies [appellant] as a three percent impairment of the left upper extremity, secondary to persistent discomfort and paresthesia."

On July 11, 1997 the Office issued appellant a schedule award for an additional one percent permanent loss of use of the left arm, for a total of three percent. This decision was affirmed by an Office hearing representative in an April 1, 1998 decision.

Appellant appealed to the Board. By decision dated March 24, 2000, the Board found that comparison of Dr. O'Dowd's measurements of the motion of appellant's left shoulder to the tables of Chapter 3 of the fourth edition of the A.M.A., *Guides* resulted in a zero percent permanent impairment. After noting that Dr. O'Dowd reported no loss of left arm strength, the Board found that his report did not show that he followed the procedure of Table 11 for rating impairment due to pain or sensory deficit, in that he did not identify the affected nerve or nerves, find the maximum impairment for the affected nerve and multiply the severity of the sensory deficit by the maximum impairment value.²

On remand, the Office, by letter dated April 20, 2000, requested that Dr. O'Dowd identify the nerve or group of nerves affected. In a report dated June 7, 2000, he stated:

"Apparently one step was not followed in my initial reasoning from this note from May 6, 1997. I reviewed that note and I reviewed my initial thinking and also reviewed the tables involved. As described by [appellant] and as elicited during the course of the exam[ination], using Table 11a, [she] qualifies as a Grade II sensory deficit or pain level. This correlates to a sensory deficit of 1 [to] 25 percent for the maximum and I felt that [appellant] had approximately a 3 percent sensory deficit because of her complaints and dysesthesia.

"[Appellant's] symptoms are diffuse. I could not localize it to one single trunk of the brachial plexus and, therefore, assigned it to the entire brachial plexus. Using Table 14 and assuming the entire brachial plexus because of her symptom complex, which involves C5-C8-T1, [appellant] has a three percent deficit of her entire upper extremity. This is based upon the fact that she is classified as a Grade II from Table 11a. This includes all percentage deficits from 1 to 25. I assigned [appellant] a three percent deficit based upon my estimation of her complaints and discomfort. Since I am assuming the entire brachial plexus

² Docket No. 98-2139.

because of the diffuse nature of her discomfort, then she had 3 percent of a total scale of 100 resulting in a 3 percent impairment of the upper extremity....”

By decision dated July 31, 2000, the Office found that appellant did not have greater than a three percent permanent loss of use of her left arm. Following a hearing held on January 23, 2001, an Office hearing representative, by decision dated April 10, 2001, found that Dr. O'Dowd's reports constituted the weight of the medical evidence and established appellant had a three percent permanent loss of use of her left arm.

The Board finds that appellant has no greater than a three percent permanent loss of use of her left arm.

As found by the Board on a prior appeal, there was a conflict of medical opinion on the extent of the permanent impairment of appellant's left arm. To resolve this conflict, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,³ referred appellant, the case record and a statement of accepted facts to Dr. O'Dowd, a Board-certified orthopedic surgeon. In situations where there are 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 on a proper factual background, must be given special weight.⁴

After Dr. O'Dowd submitted his initial report and a clarifying report dated May 6, 1997, the Board, in a March 24, 2000 decision, found that Dr. O'Dowd's reports showed zero percent impairment for motion and for strength. In a June 7, 2000 supplemental report, addressing appellant's permanent impairment due to her sensory deficit, Dr. O'Dowd explained, as requested, which group of nerves was affected: the entire brachial plexus. He also explained why he assigned three percent from Table 11a, explaining that this was based on “his estimation of her complaints and discomfort.” Examining physicians are charged with selecting a percentage from a range allowed by a table of the A.M.A., *Guides*.⁵ Dr. O'Dowd's estimate of percent from a table allowing 1 to 25 percent is consistent with his findings in his initial report, specifically his finding of nonphysiologic superficial sensitivity “not borne upon objective exam[ination].”

Multiplication of the 3 percent from Table 11 to the maximum of 100 percent for the brachial plexus from Table 14 results in the 3 percent impairment paid by the Office. Dr. O'Dowd's reports constitute the weight of the medical evidence and the A.M.A., *Guides* were properly applied to conclude appellant has a three percent permanent loss of use of her left arm.

³ 5 U.S.C. § 8123(a) states in pertinent part, “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.”

⁴ *James P. Roberts*, 31 ECAB 1010 (1980).

⁵ See *John Keller*, 39 ECAB 543 (1988); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 1995).

The April 10, 2001 and July 31, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 20, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member