U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN R. DUTY and DEPARTMENT OF THE AIR FORCE, OKLAHOMA CITY AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, OK

Docket No. 02-1361; Submitted on the Record; Issued October 16, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issue is whether appellant has more than a five percent impairment of each upper extremity, for which he received a schedule award.

On April 3, 1996 appellant, then a 42-year-old aircraft mechanic, filed an occupational disease claim alleging that he developed carpal tunnel syndrome as a result of using pneumatic rivet guns, drills, impact wrenches, hand ratchets and screwdrivers in the performance of duty.

The Office of Workers' Compensation Programs accepted appellant's claim for bilateral carpal tunnel syndrome and subsequently expanded its acceptance to include bilateral epicondylitis.

In a report dated April 3, 1997, Dr. Houshang Seradge, appellant's Board-certified orthopedic surgeon opined that appellant had reached maximum medical improvement on March 24, 1997, and concluded that, pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a one percent permanent impairment of each wrist based on loss of range of motion.

In a May 9, 1997 report, an Office medical adviser reviewed the findings of Dr. Seradge and concurred that appellant had a one percent permanent impairment of each wrist due to loss of range of motion.

On August 26, 2000 appellant filed a claim for a schedule award. In support of his claim, appellant submitted an August 1, 2000 report from Dr. John W. Ellis, a treating physician Board-certified in environmental medicine and family practice. He examined appellant and reviewed his medical records and concluded that, pursuant to the fourth edition of the A.M.A., *Guides*, appellant had a 10 percent impairment of the right hand due to loss of range of motion, hypertrophy, median nerve impingement and median nerve entrapment neuropathy, a 5 percent impairment of the right elbow due to loss of range of motion, medial and lateral epicondylitis

and hypertrophy, ulnar nerve impingement and mild ulnar nerve entrapment neuropathy, and 3 percent impairment of the right shoulder due to loss of range of motion, crepitation, hypertrophy, and brachial plexus impingement, for a total right upper extremity impairment of 18 percent. With respect to the left upper extremity, Dr. Ellis concluded that appellant had 20 percent impairment of the left hand due to loss of range of motion, hypertrophy, median nerve impingement and median nerve entrapment neuropathy, a 6 percent impairment of the left elbow due to loss of range of motion, medial and lateral epicondylitis and hypertrophy, ulnar nerve impingement and mild ulnar nerve entrapment neuropathy, and 6 percent impairment of the left shoulder due to loss of range of motion, crepitation, hypertrophy, and brachial plexus impingement, for a total left upper extremity impairment of 32 percent. In support of his conclusions, Dr. Ellis provided all of his specific physical measurements and cited to all of the relevant page numbers, tables and figures in the A.M.A., *Guides*.

On October 8, 2000 at the request of the Office, an Office medical adviser reviewed the medical evidence of record and recommended that due to the large discrepancies between the opinions of Drs. Ellis and Seradge, that appellant be referred for examination by another physician. On January 31, 2001 the Office referred appellant, together with the relevant medical evidence of record, a statement of accepted facts and a list of questions to be answered, to Dr. Richard A. Ruffin, a Board-certified orthopedic surgeon, designating him as an impartial medical examiner.

In a report dated February 15, 2001, Dr. Ruffin stated that examination of the upper extremities revealed full range of motion bilaterally of the fingers, thumbs, wrists, elbows and shoulders, adequate grip strengths, normal two-point discrimination testing of all digits and no evidence of crepitation, atrophy or swelling. He further stated that, while there was no impairment for the diagnoses of carpal tunnel syndrome and epicondylitis, appellant did have some impairment related to mild ulnar neuropathy bilaterally, due to cubital tunnel syndrome as demonstrated by Dr. Seradge's electrodiagnostic testing and his own physical examination findings. Dr. Ruffin concluded that pursuant to the fourth edition of the A.M.A., *Guides*, appellant's mild ulnar neuropathy equated to a five percent impairment of each upper extremity.

In a report dated March 19, 2001, an Office medical adviser reviewed Dr. Ruffin's report, and initially noted that, while the fifth edition of the A.M.A., *Guides* had gone into effect shortly before Dr. Ruffin's examination, as the remaining medical evaluation had been prepared under the fourth edition, he felt it was proper to continue to apply the fourth edition to this case. The Office medical adviser concluded that applying Dr. Ruffin's findings to the fourth edition of the A.M.A., *Guides* resulted in a five percent permanent impairment of each upper extremity due to mild neuropathy.

Accordingly, on March 30, 2001 the Office granted appellant a schedule award for a five percent permanent impairment of each upper extremity.

On April 26, 2001 appellant requested reconsideration of the Office's decision and submitted an April 3, 2001 report from Dr. Ellis in support of his request.

In a report dated July 5, 2001, an Office medical adviser noted that, while appellant's prior award was calculated pursuant to the fourth edition of the A.M.A., *Guides*, FECA Bulletin

No. 01-05 required that any recalculations resulting from reconsideration should be based on the fifth edition effective February 1, 2001. The Office medical adviser reviewed Dr. Ellis' report, noting that under the fifth edition of the A.M.A., *Guides*, carpal tunnel syndrome and epicondylitis were evaluated very differently than under prior editions. For example, ulnar neuropathy due to epicondylitis, the basis of the prior schedule award, was not a basis for an award in this case, as none of the requisite additional factors set forth on page 507 of the A.M.A., *Guides* was present. In addition, while the fifth edition of the A.M.A., *Guides* provides for evaluation of carpal tunnel syndrome on the basis of impairment due to medial nerve entrapment at the wrist, as Dr. Ruffin, the impartial medical examiner, did not find wrist neuropathy present, there was no basis for an increased schedule award.

Accordingly, in a decision dated July 24, 2001, the Office found the newly submitted medical evidence to be insufficient to warrant modification of the prior award.

On January 14, 2002 appellant requested reconsideration of the Office's decision and submitted a September 21, 2001 report from Dr. Ellis in support of his request. In his report, Dr. Ellis recalculated appellant's degree of impairment pursuant to the fifth edition of the A.M.A., *Guides,* and, citing to the relevant page numbers, tables and figures, concluded that appellant had 37 percent combined impairment of the left upper extremity due to decreased range of motion, mild hypertrophy and peripheral nervous system deficits of the wrist, elbow and shoulder, and a combined 28 percent impairment of the right upper extremity due to loss of range of motion, hypertrophy and peripheral nervous system deficits of the wrist, elbow and shoulder.

In a February 5, 2002 decision, the Office found that appellant had not provided any further medical evidence to support more than the five percent impairment of each upper extremity and that the weight of the medical evidence continued to rest with Dr. Ruffin, the impartial medical examiner.

The Board finds that this case is not in posture for decision.

In this case, the Board initially notes that at the time of the Office's referral of this case to Dr. Ruffin to act as an impartial medical examiner, there was no conflict of medical opinion in the record. In order for a conflict to exist, there must be opposing medical opinions of virtually equal weight. In this case, Dr. Seradge opined that appellant had a one percent permanent impairment of each upper extremity, with which the Office medical examiner concurred. However, when asked to review Dr. Ellis' initial report, which differed substantially from that of Dr. Seradge, the Office medical examiner stated that he could not give an opinion and recommended that the Office seek another medical opinion, which resulted in the case being referred to Dr. Ruffin. As there was no conflict in medical opinion at the time of the referral to Dr. Ruffin, he must be considered a second opinion physician, and not an impartial medical examiner. However, there now exists a conflict in medical opinion in that there is a disagreement regarding the percentage of impairment in appellant's upper extremities caused by his accepted conditions, as well as the proper method of calculation used under the A.M.A.,

Guides. When such conflicts in medical opinion arise, section 8123(a) requires the Office to appoint a third or referee physician, also known as an impartial medical examiner.[1]

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures, to resolve the outstanding conflict in medical evidence regarding the appropriate percentage of impairment in appellant's upper extremities. On remand, the Office should instruct the impartial medical examiner to provide a well-rationalized opinion, to refer specifically to the applicable tables and standards of the A.M.A., *Guides* in making his findings and rendering his impairment rating and to indicate the specific background upon which he based his opinion. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated February 5, 2002 and July 24, 2001 are hereby set aside and the case is remanded for further development consistent with this opinion.

Dated, Washington, DC
October 16, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[1] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "[i]f 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." *See Dallas E. Mopps,* 44 ECAB 454 (1993).