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. 03-1500; Submitted on the Record;
Issued August 12, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to more than an additional three percent impairment of his left upper extremity, for which he received a schedule award.

This is the second appeal in this case.[1] On the first appeal, the Board, by decision dated October 16, 2002, found that there existed a conflict of medical opinion as a disagreement arose between the Office of Workers' Compensation Programs' referral physician, Dr. Richard A. Ruffin, a Board-certified orthopedic surgeon, and Dr. John W. Ellis, appellant's treating physician, regarding the percentage of impairment to appellant's upper extremities caused by his accepted conditions, as well as the proper method used to calculate the impairment. The Board set aside the July 24, 2001 and February 5, 2002 Office decisions and remanded the case to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist to resolve the conflict in medical evidence. The complete facts of this case, as set forth in the Board's October 16, 2002 decision, are herein incorporated by reference.

By letter dated January 2, 2003, the Office referred appellant together with the case record, a list of questions to be resolved and a statement of accepted facts to Dr. Robert S. Unsell, an orthopedic surgeon, to determine whether appellant has any additional impairment to his upper extremities. In a report dated January 15, 2003, Dr. Unsell reviewed the medical and factual evidence of record and noted his findings on physical examination. He diagnosed appellant as having a history of repetitive stress injury arising out of his exposure to various employment duties, with a resultant diagnosis of multiple crush injury. Dr. Unsell measured appellant's range of motion in his elbows and wrists bilaterally and measured appellant's bilateral grip strength. He concluded that, pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, with respect to his left upper

[1] Docket No. 02-1361 (issued October 16, 2002). Appellant received schedule awards for a five percent impairment of each upper extremity.

extremity, appellant had a 2 percent impairment to the wrist for loss of motion, 1 percent impairment of the elbow for loss of motion and a 15 percent impairment from the loss of strength in the forearm, for a combined impairment rating of 28 percent.[2] Dr. Unsell noted, however, that because appellant's coefficient of variance of 16 suggested that his rating should be downgraded, he suggested that appellant had a 20 percent impairment of the left upper extremity from combined loss of strength and motion. With respect to appellant's right upper extremity, Dr. Unsell initially noted that rapid exchange testing showed that appellant's right upper extremity grip strength measurements were valid and accurate. He concluded that appellant had a 6 percent impairment of the wrist from loss of motion, 2 percent impairment to the elbow from loss of motion and an additional 26 percent impairment from loss of strength of the forearm, for a combined impairment to the right upper extremity of 32 percent.

On February 15, 2003, at the request of the Office, an Office medical adviser reviewed Dr. Unsell's findings and determined that, pursuant to Dr. Unsell's wrist and elbow range of motion measurements, appellant had an eight percent left upper extremity impairment and a three percent right upper extremity impairment. The Office medical adviser explained that, while Dr. Unsell found that appellant was additionally impaired by grip strength weakness, the fifth edition of the A.M.A., *Guides* specifically provides, at section 16.8a, page 508, that decreased strength cannot be measured in the presence of decreased motion. Therefore, no additional percentage of impairment was allowable for grip strength in this case. The Office medical adviser concluded that, as appellant had already received a schedule award for a five percent permanent impairment of each upper extremity, while he was not entitled to any additional impairment rating for his right upper extremity, he was entitled to receive an additional three percent for his left upper extremity.

By decision dated February 21, 2003, the Office granted appellant a schedule award for an additional three percent impairment of the left upper extremity.

By letter dated April 10, 2003, appellant requested reconsideration and raised additional arguments in support of his request.

In a decision dated April 14, 2003, the Office found appellant's additional arguments, submitted on reconsideration, to be insufficient to warrant a further merit review of his claim.

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

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice

[2] The Board notes that this appears to be a typographical error, as the measured impairments actually yield a combined impairment rating of 18 percent, not 28 percent.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

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*[5] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[6] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is utilized to calculate any awards.[7]

In this case, to resolve the conflict between Dr. Ruffin and Dr. Ellis, regarding the percentage of impairment in appellant's upper extremities caused by his accepted conditions, the Office referred appellant to the impartial medical specialist, Dr. Unsell, for a complete physical examination. The Board has held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of the specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.[8] In the present case, although the Office sought to refer appellant to an impartial medical specialist in order to resolve the conflict, the referral should have been to a physician certified by the American Board of Medical Specialties (ABMS). The record reflects that Dr. Unsell is an orthopedic surgeon and a hand surgeon, but he is not listed in the applicable medical directory[9] as a Board-certified specialist in any field. Absent any documentation of special qualifications which might exempt Dr. Unsell from the requirement that he be Board-certified by a Board recognized by the ABMS, he cannot serve as an impartial specialist in the present case.[10]

Therefore, there remains an unresolved conflict in medical opinion in this case. The Office should refer appellant, the case record and a statement of accepted facts to an appropriate physician who is properly Board-certified for a reasoned medical opinion regarding appellant's degree of upper extremity impairment.

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[5] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[6] *See Joseph Lawrence, Jr.*, *supra* note 5; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[7] FECA Bulletin No. 01-05 (issued January 29, 2001).

[8] *Mary A. Moultry*, 48 ECAB 566 (1997).

[9] The Official ABMS Directory of Board Certified Medical Specialists, (30th edition 1998).

[10] "A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the MMA [medical management assistant] must document the reasons for the selection in the case record." Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (March 1994).

The decisions of the Office of Workers' Compensation Programs dated April 14 and February 21, 2003 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
August 12, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member