

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN KOSTYK and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 03-96; Submitted on the Record;
Issued June 17, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has more than a 45 percent permanent impairment of the right arm and an 87 percent permanent impairment of the left arm, for which he received schedule awards.

Appellant's claim filed on January 19, 1994 was initially denied on July 20, 1994. Appellant requested a hearing, which was held on May 24, 1995. Appellant retired on May 7, 1993, explaining that his condition began with injuries in April 1960 and continued throughout his working career. He added that he experienced pain in his hands, forearms, shoulders and neck resulting from his duties as a coppersmith, pipe fitter and draftsman.

A hearing representative of the Office of Workers' Compensation Programs set aside the July 20, 1994 decision and remanded the claim for further development. On remand the Office referred appellant to Dr. Andrew Sattel, a Board-certified orthopedic surgeon. After receiving his April 29 and July 30, 1996 reports,¹ the Office denied appellant's claim on April 16, 1997 as untimely filed.² The Office noted that appellant's last exposure to the duties that aggravated his carpal tunnel syndrome was in 1964, that he was aware of a relationship between his condition and his employment in 1987 but did not file a claim until 1994. The Office added that there was no evidence that his supervisor had actual knowledge of appellant's condition.

Appellant requested a hearing, which was held on January 27, 1998. On April 6, 1998 the hearing representative vacated the April 16, 1997 decision, finding that the Office had failed to provide Dr. Sattel with an accurate description of a draftsman's duties and remanded the claim

¹ Appellant worked as a draftsman on light duty from 1964 until he retired in 1993. Dr. Sattel stated that appellant's work as a draftsman had little material effect on his carpal tunnel syndrome, which was caused by heavy use of pneumatic tools prior to 1964.

² Previously, the Board had affirmed the Office's denial of an earlier claim based on carpal tunnel syndrome. Docket No. 91-1771 (issued January 29, 1993).

for further development. On remand Dr. Sattel reiterated his opinion that the duties required of a draftsman did not significantly contribute to appellant's carpal tunnel syndrome.

By decision dated October 8, 1998, the Office denied the claim as untimely filed, relying on the facts that appellant's heavy use of tools ceased in 1964 and that he did not file a claim until 1994. A third hearing requested by appellant was held on March 31, 1999. The hearing representative reversed the Office's October 8, 1998 decision, finding that the claim was timely filed, and accepted bilateral carpal tunnel syndrome as work related.

On November 2, 1999 appellant requested a schedule award and submitted a report from Dr. David Weiss, an osteopathic practitioner. Appellant's treating physician, Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, agreed with Dr. Weiss' ratings of a 75 percent permanent impairment of the right upper extremity and a 78 percent impairment of the left upper extremity.

An Office medical adviser reviewed Dr. Weiss' report, noting that his opinion that all appellant's problems with his upper extremities were work related was not supported by the history of appellant's injuries. The Office medical adviser stated that, for schedule award calculations, the conditions related to and prior to the work injury were included, but the unrelated conditions occurring later were excluded. The Office medical adviser concluded that application of the tables of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to Dr. Weiss' findings resulted in a 53 percent impairment of the left arm. For the right arm, the Office medical adviser assigned a 20 percent impairment of the right arm for carpal tunnel syndrome, and stated that appellant's right shoulder and thumb conditions, which were rated by Dr. Weiss, occurred after his work injury.

On February 11, 2000 the Office issued a schedule award for a 53 percent permanent impairment of the left arm and a 20 percent permanent impairment of the right arm, running from September 16, 1999 to January 24, 2004.

Appellant requested a hearing, which was held on July 20, 2000. On October 19, 2000 the hearing representative set aside the Office's February 11, 2000 decision and remanded the claim for resolution of a conflict in the medical opinion evidence between the Office medical adviser and Dr. Weiss. The hearing representative instructed the Office to prepare a comprehensive statement of accepted facts listing all the injuries, conditions and surgical procedures accepted as work related.

On remand the Office listed the following as work related: 1960, bilateral shoulder/arm strains and left scapular resection; 1971, ruptured left biceps tendon; 1975, fall, disassociation of the scapholunate ligament of the left wrist; and 1987, bilateral carpal tunnel syndrome and releases in 1988. The Office noted that trigger release of the left long finger in 1992, right rotator cuff repair in 1994 and left thumb surgery in 1996 and 1998 were not work related.

The Office referred appellant to Dr. Marvin N. Kallish, a Board-certified orthopedic surgeon, to resolve the conflict.³ In a report dated January 3, 2001, Dr. Kallish listed the multiple injuries to appellant's upper extremities and found "a total disability of approximately 70 percent of both upper extremities including shoulders, hands and wrists." He noted that appellant needed x-rays and magnetic resonance imaging (MRI) scans of both shoulders, plus an electromyography to evaluate a peripheral neuropathy, to determine an absolute impairment rating.

January 17, 2001 MRI scans showed a complete rotator cuff tear and humeral shaft defect of the left shoulder and a long-standing chronic rotator cuff tear with high-riding humeral head and loss of articular cartilage in the right shoulder. On January 31, 2001 Dr. Kallish reviewed these studies and stated that his 70 percent impairment of each upper extremity remained unchanged.

On March 2, 2001 the Office issued an additional schedule award of 17 percent for appellant's left arm (for a total of 70 percent), extending benefits to June 18, 2005. Impairment of the right upper extremity remained at 20 percent. The Office noted that, although Dr. Kallish provided a 60 percent impairment rating for the right shoulder, no right shoulder condition had been accepted as work related.

Appellant requested a hearing, but the hearing representative set aside the March 2, 2001 decision and remanded the claim for the Office to obtain further clarification of the medical evidence. The hearing representative found that Dr. Kallish's opinion was insufficient to resolve the conflict because he failed to provide specific information or measurements showing how he derived his ratings.

On remand the Office provided a list of questions to Dr. Kallish and requested that he submit a supplemental report, with references to the A.M.A., *Guides*, on the impairment of appellant's arms due only to his bilateral wrist conditions and his left shoulder condition.

On October 12, 2001 Dr. Kallish noted that he did not understand how "the right shoulder is not work related in 1994, when in 1960 there was an accepted shoulder injury as an underlying problem." He explained what impairments he had considered in reaching his previous conclusions but did not cite any figures or tables of the A.M.A., *Guides*.

On November 16, 2001 the Office informed appellant that Dr. Kallish's report was insufficient to resolve the conflict of medical opinion and thereafter referred him to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The accompanying statement of accepted facts conveyed that the 1960 right shoulder condition had resolved and the 1994 rotator cuff repair was not work related.

In a report dated March 12, 2002, Dr. Okin reviewed the prior medical evidence and described each of the surgeries appellant underwent on his upper extremities. Using the tables of

³ 5 U.S.C. § 8123(a) states in pertinent part: "If 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."

the fifth edition of the A.M.A., *Guides*, Dr. Okin assigned, for the left shoulder, 10 percent for 30 degrees of forward flexion, 7 percent for 30 degrees of abduction, 1 percent for 10 degrees of adduction, 1 percent for 35 degrees of external rotation, 5 percent for 5 degrees of internal rotation and 12 percent for arthropathy with superior instability. Dr. Okin assigned 6 percent for flexion of the left elbow to 100 degrees, 16 percent for scapholunate disassociation and instability and 45 percent for symptomatic carpal tunnel syndrome. Adding these sums, Dr. Okin concluded that appellant had an 87 percent impairment of his left upper extremity. Dr. Okin then stated: “On the contralateral right upper extremity I will not do an impairment rating on any other part of the extremity except that which is accepted as work related, which would be the right carpal tunnel syndrome. I would rate his residual from that upper extremity at 45 percent impairment of the right upper extremity.”

In an April 23, 2002 decision, the Office amended the schedule awards, with an additional 17 percent impairment of the left upper extremity (for a total of 87 percent) and an additional 25 percent for the right upper extremity (for a total of 45 percent).

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

Section 8107 of the Federal Employees’ Compensation Act⁴ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁵ The Act, however, does not specify the manner, by which the percentage loss of a member, function, or organ shall be determined.

To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁶ The Act’s implementing regulation has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule award losses.⁷

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.⁸ The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.⁹

In this case, appellant’s physician found a 75 percent impairment of the right upper extremity and a 78 percent impairment of the left upper extremity. The Office medical adviser

⁴ 5 U.S.C. §§ 8101-8109.

⁵ 5 U.S.C. § 8107.

⁶ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

⁹ *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

calculated 20 percent impairment for the right upper extremity and 53 percent for the left upper extremity, both using the standards found in the fourth edition of the A.M.A., *Guides*. In remanding the case, the hearing representative instructed the Office to resolve the conflict, using the fifth edition.¹⁰

Because Dr. Kallish's supplemental report was incomplete, the Office properly referred appellant to another specialist to resolve the conflict in medical opinion. Dr. Okin noted that Dr. Weiss' 75 percent rating for appellant's right arm included conditions -- right shoulder and thumb arthroplasties -- that were not work related.

In calculating the right upper extremity impairment, Dr. Okin rated residuals from appellant's carpal tunnel syndrome for both arms and his left shoulder and elbow conditions. As instructed by the Office, Dr. Okin did not rate any impairments of appellant's right shoulder, on which a rotator cuff repair was performed in 1994, or of his left long finger or thumb.

The Board has long held that in a schedule award determination, preexisting impairments of the body are to be included.¹¹ This is so because the well-established rule in worker disability is that the employer takes the employee as he finds him.¹² In this case, while Dr. Okin expressed his willingness to reconsider his impairment rating of the right upper extremity if medical evidence surfaced showing that appellant's right shoulder problems were work related, he considered only the work-related condition -- carpal tunnel syndrome -- in calculating his rating. Dr. Okin did not consider any impairment of the left long finger, on which surgery was performed in 1992, his left thumb, on which surgery was performed in 1996 and 1998, and his right thumb, on which surgery was performed in 1998.

These additional areas of impairment were not considered by Dr. Okin based on the Office's advice that they were not related to appellant's employment. Even though surgeries on these areas (except for the left long finger) were performed after appellant retired from the employing establishment, this does not show that the impairments to these areas were acquired subsequent to appellant's employment. Without such a showing, these nonwork-related conditions should have been considered in calculating appellant's schedule awards. Because they were not, Dr. Okin's report is insufficiently probative to resolve the conflict of medical opinion.¹³

Therefore, the Board will remand this case for the Office to refer appellant to an appropriate specialist to resolve the issue of the amount of permanent impairment of appellant's upper extremities, including the nonwork-related conditions not acquired subsequent to his

¹⁰ The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date. Any schedule award decision on or after February 1, 2001, resulting from a reconsideration of hearing requested prior to that date, in which additional medical evidence is submitted, will be recalculated using the fifth edition.

¹¹ *Lela M. Shaw*, 51 ECAB 372, 374 n.7 (2000).

¹² See Larson, *The Law of Workers' Compensation* § 9.02[1], 87.02, 90.04[3] (2000).

¹³ See *Michael C. Milner*, 53 ECAB ____ (Docket No. 01-620, issued March 13, 2002).

employing establishment. After such development as the Office deems necessary, the Office shall issue a *de novo* decision.

The April 23, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
June 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member