U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. SEREMET and U.S. POSTAL SERVICE,
POST OFFICE, Belmar, NJ

Docket No. 02-1457; Submitted on the Record;
Issued March 3, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has more than a 50 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the right thumb for which he received a schedule award.

On August 25, 1997 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim alleging that on August 21, 1997 he was injured when his employing establishment's vehicle struck a vehicle that suddenly crossed in front of him. The Office of Workers' Compensation Programs accepted appellant's claim for ulnar neuropathy of the upper extremity, a left elbow fracture, right thumb sprain, contusions of the ribs and jaw, and a cervical strain. Appellant subsequently filed a claim for a schedule award.

In a report dated July 10, 2000, Dr. Weiss provided findings on examination and determined that appellant had a 61 percent permanent impairment of the left upper extremity and a 10 percent permanent impairment of the right thumb according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a memorandum dated August 28, 2000, an Office medical adviser, using the July 10, 2000 report of Dr. Weiss, determined that appellant had a 50 percent permanent impairment of the left elbow and a 5 percent permanent impairment of the right thumb based on the A.M.A., *Guides*.

By decision dated December 5, 2000, the Office granted appellant a schedule award for 159.75 weeks based on a 50 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the right thumb.

By decision dated April 5, 2001, an Office hearing representative found that a conflict existed between Dr. Weiss and the Office medical adviser as to the extent of appellant's permanent impairment and remanded the case for resolution of the conflict by an impartial medical specialist.

By letter dated May 1, 2001, appellant, through his attorney, requested that he be permitted to participate in the selection of the impartial medical specialist. He stated that the reason for his request was to attempt to assure that he received an impartial evaluation.

By letter dated May 11, 2001, the Office referred appellant, together with the case file and statement of accepted facts, to Dr. Ian B. Fries, a Board-certified orthopedic surgeon and an impartial medical specialist, selected to resolve the conflict in the medical opinion evidence as to the extent of appellant's permanent impairment of his left arm and right thumb.

In a report dated June 1, 2001, Dr. Fries stated that he had reviewed the medical records and statement of accepted facts and he provided a history of appellant's condition and course of treatment. He conducted a thorough examination of appellant's upper extremities and a review of electrodiagnostic studies performed on May 31, 2001. Dr. Fries noted that electrical findings had significantly improved since the last study performed in 1998. He determined that appellant had an eight percent permanent impairment of the left upper extremity and a two percent permanent impairment of the right upper extremity. Dr. Fries stated:

> "[Appellant's] residuals of right thumb injury include metacarpophalangeal joint flexion 5 degrees **greater** on the injured right thumb than the normal left side. This provides no impairment. He lacks five degrees of metacarpophalangeal extension of the right, and has full (zero) extension on the left. This equates to no impairment (See Figure 16-12, page 456 [of the A.M.A., *Guides*, 5th edition]. Interphalangeal joint flexion is 55 degrees right, and 70 degrees left, and hyperextension is equal bilaterally. This equates to a 5 [percent] thumb impairment (Figure 16-11, page 455), which translates to a 2 [percent] [impairment] of the hand (Table 16-1, page 438), which equals two percent of the upper extremity (Table 16-2, page 439). [Appellant] has insufficient symptoms or other findings beyond metacarpophalangeal joint bony swelling, and thus does not qualify for additional impairment of the thumb. (See 17.7a, page 499)
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> "I will assume the mild residual left ulnar neuropathy is due to [appellant's] accident, though it is a common idiopathic condition and does not imply trauma. [Appellant] has only minor electrical evidence of the condition, with no current symptoms nor clinical findings. Therefore, as he has neither motor nor sensory findings (two point testing and sensory discrimination is normal at five millimeters over all fingers), he is not entitled to any upper extremity impairment on a neurological basis. (See Tables 16-10a, 16-11a, and 16-15, on pages 482, 484, and 492.)

'However, it is critical to understand there is *no correlation* between the severity of conduction delay on nerve conduction velocity testing and the severity of either symptoms or[,] more important[,] impairment rating.' (Page 493, paragraph 4, lines 8-12)

> "[Appellant] lacks five degrees of left elbow flexion, ten degrees of extension, and five degrees of total rotation. This equates to a 3 [percent] impairment of the [left] upper extremity (Figure 16-14, page 472 and Figure 16-36, page 473).

> "It is my opinion the above strict use of the A.M.A.,[*Guides*] standards does not adequately reflect [appellant's] left elbow injury and required two operations. There are also some effects upon activities of daily living, a factor the A.M.A., *Guides* permits an examining physician to consider (refer to page 434-435). Thus, in my opinion eight percent of the left upper extremity is a more balanced assessment than the calculated three percent." (Emphasis in the original.)

In a memorandum dated June 12, 2001, an Office medical adviser stated that Dr. Fries' report was well prepared and documented and his calculations did not support a schedule award greater than the award calculated on August 28, 2000.

By decision dated June 18, 2001, the Office granted appellant a schedule award for 159.75 weeks based on a 50 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the right thumb.

By letter dated June 21, 2001, appellant requested an oral hearing, that was held on November 14, 2001.

By decision dated and finalized February 7, 2002, the Office hearing representative affirmed the Office's June 18, 2001 decision.

The Board finds that appellant has no more than a 50 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the right thumb for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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.

Section 8123(a) of the Act provides, 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."[3]

In this case, Dr Weiss determined that appellant had a 61 percent permanent impairment of the left upper extremity and a 10 percent permanent impairment of the right thumb. The Office medical adviser determined that appellant had a 50 percent impairment of the left upper

[1] 5 U.S.C. § 8107).

[2] 20 C.F.R. § 10.404.

[3] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB ___ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan (Henry Lusignan*, 45 ECAB 207, 210 (1993).

extremity and a 5 percent impairment of the right thumb. As a conflict existed in the medical opinion evidence between Dr. Weiss and the Office medical adviser, the Office properly referred appellant to Dr. Fries for an impartial medical examination.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4]

The Board finds that the thorough and well-documented report of Dr. Fries, the impartial medical specialist selected to resolve the conflict in the medical opinion evidence, is based on correct application of the A.M.A., *Guides* (5th edition) and is entitled to special weight. This report established that appellant had no more than the 50 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the right thumb determined by the Office medical adviser in his August 28, 2000 memorandum. There is no medical evidence of record establishing that appellant has more than a 50 percent permanent impairment of the left upper extremity or a 5 percent permanent impairment of the right thumb for which he received a schedule award by Office decision dated June 18, 2001, affirmed by the February 7, 2002 decision of the Office hearing representative.

By letter dated May 1, 2001, appellant, through his attorney, requested that he be permitted to participate in the selection of the impartial medical specialist. He stated that the reason for his request was to attempt to assure that he received an impartial evaluation. A claimant who asks to participate in the selection of an impartial medical specialist or who objects to the selected physician must provide a valid reason.[5] In this case, appellant stated that he wished to participate in the selection of an impartial medical specialist because he wanted to receive an impartial evaluation. However, this is not a valid reason for requesting participation in the selection of an impartial medical specialist. The Office's use of a rotational system among all qualified and willing medical specialists is designed to assure an impartial evaluation. The Board finds that appellant did not provide a valid reason for wishing to participate in the selection of the impartial medical specialist and, therefore, the Office properly denied his request to participate in the selection.

[4] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

[5] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994); *see also Terrance R. Stath*, 45 ECAB 412, 422 (1994); *Roger S. Wilcox*, 45 ECAB 265, 273 (1994).

The decisions of the Office of Workers' Compensation Programs dated February 7, 2002 and June 18, 2001 are affirmed.

Dated, Washington, DC
March 3, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member