U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PARISH T. SIM'KEN and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Norfolk, VA

Docket No. 02-1706; Submitted on the Record;
Issued March 17, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant is entitled to an increased schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On June 18, 1999[1] appellant, then a 47-year-old employee relation's assistant, filed an occupational disease claim alleging that on August 11, 1998, he first realized that his carpal tunnel syndrome was caused or aggravated by his employment.[2]

The Office accepted appellant's claim for bilateral carpal tunnel syndrome on September 30, 1999 and authorized left hand carpal tunnel release surgery.[3]

On September 26, 2000 appellant filed a request for a schedule award.

On June 19, 2000 appellant's physician, Dr. Sidney S. Loxley, a Board-certified orthopedic surgeon, opined that appellant had abduction of 90 degrees, which equated to an impairment of 4 percent; forward elevation of 110 degrees, which equated to an impairment of

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[1] The record indicated September 9th or 10th of 1996 or 1997 and the date of August 13, 1998, is crossed out with June 18, 1999 inserted.

[2] The record reflects that on June 2, 1982 appellant, then a 30-year-old sandblaster, filed an occupational disease claim alleging that he had developed and suffered pain in his left shoulder and his claim was accepted for mild rotator cuff tendinitis left shoulder and chronic bilateral tendinitis with bursitis. Appellant also filed a notice of recurrence of April 9, 1993, which the Office accepted for tear, anterior labrum, left. He underwent left rotator cuff repair on April 15, 1994. He returned to duty on September 1, 1994. The record reflects that he subsequently received a schedule award for a 20 percent impairment rating to his left shoulder for the period December 27, 1984 through March 8, 1986. Appellant also filed an additional claim for a schedule award to the left upper extremity, which was denied on January 29,1996.

[3] The surgery was performed on March 14, 2000.

5 percent; internal rotation of 40 degrees, which equated to 0 impairment; external rotation of 20 degrees, which equated to 1 percent impairment, backward elevation of 40 degrees adduction of 20 degrees and extension of 40 degrees for no impairment. Additionally, Dr. Loxley indicated that the degree of retained active flexion was 120 degrees and the degree of retained active extension was 40 degrees. He concluded that appellant had an additional impairment of function of the arm due to sensory deficit, pain or loss of strength estimated at 10 percent for an impairment rating of 19 percent of the right upper extremity. Further, he added that appellant had reached maximum medical improvement.

In a report dated July 20, 2001, Dr. Raymond Iglecia, a Board-certified psychiatrist and neurologist, indicated that appellant had been under his care for several years secondary to a work injury that happened several years ago. He indicated that appellant was suffering from bilateral carpal tunnel syndrome; however, the attempts to correct it with surgeries were unsuccessful. He opined that the rotator cuff injury, secondary to the work-related injury, was also problematic. Dr. Iglecia indicated that the functional capacity evaluation showed appellant to be in the light physical demand category. He opined that appellant's injuries involving the bilateral wrist, the hand pain and the shoulder pain should render him permanently impaired under the guidelines. He indicated that appellant had abnormal motions with pain at the level of the wrist and at the level of the shoulder, which made him completely and totally ineffective in being able to do a job for eight hours even in a light category. The physician indicated that, based on his evaluation of both upper extremities, appellant had lost at least 50 percent of his anatomical motor activity at the level of the wrist and 25 percent at the level of the shoulder.

On November 14, 2001 the Office medical adviser opined that appellant was entitled to an award of 14 percent to the right upper extremity. He opined that flexion was 120 degrees and according to page 476, Table 16-40, equated to 4 percent; that extension was 40 degrees and according to page 476, Table 16-40, equated to 1 percent; that abduction was 90 degrees and according to page 477, Table 16-43, equated to 4 percent; that adduction was 30 degrees and according to page 477, Table 16-43, equated to 1 percent; and that internal rotation was 40 degrees and according to page 479, Table 16-46, equated to 3 percent; and that external rotation was 20 degrees and according to page 479, Table 16-46, equated to 1 percent. The Office medical adviser concluded that the total schedule award for the right upper extremity was 14 percent and it was not an additional impairment but a total impairment. He indicated that the date of maximum medical improvement was June 19, 2000.[4]

In a report dated November 15, 2001, Dr. Loxley referred to page 492 of the A.M.A., *Guides* at Table 16-15 and indicated that the median nerve below the forearm combined with motor and sensory deficits warranted an impairment rating of 45 percent to both upper extremities.

On January 4, 2002 the Office granted appellant a schedule award of 14 percent permanent impairment of the right upper extremity. The award covered a period of 43.68 weeks from June 19, 2000 to April 20, 2001.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (4th ed. 1993).

On January 7, 2002 appellant filed a claim for a schedule award.

By letter dated February 4, 2002, which was faxed to the Office on February 7, 2002, appellant requested a hearing with respect to the January 4, 2002 schedule award.[5]

By decision dated March 21, 2002, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. The Office further noted that the issue in the case could be equally addressed through the reconsideration process.

The Board finds that this case is not in posture for a decision regarding whether appellant has more than a 14 percent impairment of the right upper extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[6] and its implementing regulation[7] 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.[8]

In this case, there was disagreement between appellant's physician, Dr. Loxley, and the Office medical adviser regarding the percentage of impairment in appellant's right upper extremity caused by his accepted condition, as well as the proper method of calculation used under the A.M.A., *Guides.*[9] When such conflicts in medical opinion arise, section 8123(a)

[5] In his request, he indicated that he believed that he was entitled to an additional 10 percent for his right shoulder, as his physician indicated that he had a 24 percent impairment.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] *Id.*

[9] The record reflects that both parties used the fourth edition of the A.M.A., *Guides,* despite the fact that the fifth edition of the A.M.A., *Guides,* became effective after February 1, 2001. *See* FECA Bulletin No. 01-05 (issued January 29, 2001).

requires the Office to appoint a third or referee physician, also known as an "impartial medical examiner."[10] Because the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

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 right arm. 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*[11] in making his findings and rendering his impairment rating and to indicate that 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 January 4, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development as set forth in this section.[12]

Dated, Washington, DC
March 17, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] Section 8123(a) of the 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).

[11] A.M.A., *Guides* (5th ed. 2001).

[12] The issue regarding the denial of appellant's request for hearing is moot.