

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN Q. GREB and U.S. POSTAL SERVICE, MONMOUTH  
PROCESSING & DISTRIBUTION CENTER, Eatontown, NJ

*Docket No. 03-148; Submitted on the Record;  
Issued March 27, 2003*

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DECISION and ORDER

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

The issues are: (1) whether appellant has more than a 21 percent permanent impairment of her right upper extremity and a 19 percent permanent impairment of her left upper extremity, for which she received schedule awards; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim, which was filed on July 15, 1994 after she hurt her neck and back clearing a mail-processing machine, was initially accepted for a cervical sprain. She returned to work intermittently, but filed a recurrence of disability claim on November 7, 1994, which the Office accepted for bilateral shoulder impingement. Appellant's treating physician, Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, released her to limited-duty work for four hours a day. She began full-time limited duty on April 15, 1996.

Based on an August 20, 1997 second opinion report by Dr. Bernard P. Murphy, a Board-certified orthopedic surgeon, the Office authorized right shoulder arthroscopy and subacromial decompression, which was done by Dr. Strouse on October 10, 1997. Following left shoulder arthroscopy and subacromial decompression on April 7, 1998, appellant returned to full-time limited duty on July 20, 1999.

On May 5, 2000 appellant filed a schedule award claim and submitted a March 8, 2000 report from Dr. David Weiss, an osteopathic practitioner, who found a 48 percent impairment of appellant's right upper extremity and a 42 percent impairment of her left upper extremity.

On June 13, 2000 the Office medical adviser reviewed Dr. Weiss' report and concluded that appellant had a 30 percent impairment of her right upper extremity and a 34 percent impairment of her left upper extremity. The Office referred appellant to Dr. John H. de Jong, a Board-certified orthopedic surgeon, who stated, in an October 2, 2000 report, that appellant had 23 percent impairment of her right upper extremity and a 21 percent impairment of her left upper extremity, with no loss of strength noted.

To resolve the conflict in medical opinion evidence between appellant's physician, Dr. Weiss, and the Office's referral physician, Dr. de Jong, the Office sent appellant to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, who reported on December 5, 2000 that appellant had a 21 percent impairment on the right and 19 percent impairment on the left. Dr. Weiss reviewed Dr. Fries' conclusions and reiterated that impairment due to appellant's shoulder arthroplasties should be rated at 24 percent, not 10 percent. Also, Dr. Weiss explained why he had rated appellant's loss of motor strength.

On May 15, 2001 the Office medical adviser stated that Dr. Fries' impairment ratings were the most accurate and detailed. Accordingly, on June 8, 2001 the Office issued a schedule award for a 21 percent impairment of appellant's right upper extremity and a 19 percent impairment of her left upper extremity. The award ran from March 3, 2000 to July 25, 2001 at a rate of \$2,251.00 every four weeks. The Office noted that Dr. Weiss' January 18, 2001 report relied on appellant's subjective complaints rather than on objective findings.

Appellant requested a hearing, which was held on December 11, 2001. She submitted reports of her arthroscopy operations and argued that her surgeries qualified for a greater degree of impairment than Dr. Fries had found. On February 11, 2002 the hearing representative found that Dr. Fries' conclusions represented the weight of the medical opinion evidence and established the 21 and 19 percent impairment ratings for appellant's upper extremities.

Appellant requested reconsideration and submitted a March 8, 2002 report from Dr. Weiss. On July 10, 2002 the Office denied appellant's request on the grounds that the evidence was insufficient to warrant merit review of its prior decision.

The Board finds that appellant has no more than a 21 percent impairment of her right upper extremity and a 19 percent impairment of her left upper extremity, for which she has received a schedule award.

Section 8107 of the Federal Employees' Compensation Act<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> The Act's implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule award losses.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8109.

<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

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 or hearing requested prior to that date, in which additional medical evidence is submitted, will be recalculated using the fifth edition.

In this case, the Office issued the schedule awards, based on Dr. Fries' December 5, 2000 report, on June 8, 2001, which was after the effective date of the fifth edition. However, a comparison of the impairment ratings in the fourth and fifth editions reveals the same percentages.

Dr. Fries provided internal and external rotation measurements of 70 and 60 degrees for both right and left shoulders, which, according to Figure 44 on page 3/45 of the fourth edition of the A.M.A., *Guides*, results in 1 percent and 0 percent impairments. The same ratings are found in Chapter 16 of the fifth edition of the A.M.A., *Guides* at Figure 16-46 on page 479.

The measurement of 70 and 80 degrees for flexion results in a 7 percent rating according to Figure 38 on page 3/43 of the fourth edition and the same according to Figure 16-40 on page 476 of the fifth edition. Similarly, the measurement of 40 and 50 degrees for extension results in 1 and 0 percent ratings in both editions. Also, 50 degrees for abduction of both shoulders results in a 6 percent impairment according to Figure 41 on page 3/44 of the fourth edition and the same according to Figure 16-43 on page 477 of the fifth edition. Finally, 40 degrees for adduction of both shoulders results in 0 percent impairment in both editions.

Comparing Table 27, page 3/16 of the fourth edition with Table 16-27, page 506 of the fifth edition for resection and distal clavicle arthroplasty shows 24 and 30 percent for the former and 10 percent for the latter, but appellant did not have either of these procedures. Therefore, the Board concludes that the Office's use of the fourth edition after February 1, 2001 is harmless error in this case.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

Dr. Weiss determined impairment ratings of 48 and 42 percent for appellant's upper extremities. Based on Dr. Weiss' measurements, the Office medical adviser calculated 30 and

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<sup>5</sup> See *Irene M. Williams*, 47 ECAB 619 (1996) (finding that the Office's failure to provide appellant's representative with copies of its physician referral letters was harmless error); see also *Louis L. Jackson, Sr.*, 39 ECAB 1158, 1160 (1988) (finding that an error in the calculation of the impairment of a toe was harmless because the overall rating remained the same).

<sup>6</sup> *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

<sup>7</sup> *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

34 percent ratings. Because these figures differed so significantly, the Office referred appellant for a second opinion evaluation by Dr. de Jong. He provided his own measurements of appellant's upper extremities and found 23 and 21 percent ratings. Because these ratings were less than Dr. Weiss' and the two physicians disagreed over the extent of appellant's shoulder surgeries and impairment due to loss of strength, the Office properly referred appellant to an impartial medical examiner to resolve the conflict.<sup>8</sup>

In a report dated December 5, 2000, Dr. Fries reviewed appellant's extensive medical records and the statement of accepted facts provided by the Office. He noted appellant's complaints of pain during his physical examination and reported his physical findings: full range of bilateral thoracoscapular motion; normal deltoid strength bilaterally; no sensory deficits and intact median; radial and ulnar nerve function.

Dr. Fries provided a table of his and the other physicians' ratings for appellant's loss of shoulder motion, noting that the right averaged 9 percent and the left averaged 11 percent, which he termed "fair and uniform assessments." He added that he based his impairment calculation on these averages because his own measurements were substantially impacted by appellant's intentional limitation of her movements during the testing.

Next, Dr. Fries discussed the extent of appellant's shoulder surgeries. He noted that the A.M.A., *Guides* do not provide a specific rating for a subacromial decompression or for any arthroscopic shoulder procedure. However, appellant did not undergo a resection arthroplasty, which Table 27, page 3/61 rates as a 24 percent impairment. Nor did she have a distal clavicular resection, which is rated at 10 percent. Dr. Fries concluded that while the decompressions appellant underwent did not fit the strict definitions of arthroplasty, a 10 percent rating for each surgery was reasonable, based on "a liberal interpretation of Table 27, page 3/61."

Finally, Dr. Fries addressed the differing assessments of strength. He noted that Dr. Weiss included impairments of 20 percent for loss of strength in each shoulder while Dr. de Jong found no loss of strength. Dr. Fries stated that, based on his grip strength measurements, he had found no convincing evidence of muscle weakness or atrophy in appellant's shoulders that qualified for additional impairment. He added that Dr. Strouse stated in March 1999 that appellant should be able to return to full duty within three months. Dr. Strouse saw appellant again on June 2, 1999 and indicated that she was doing well.

In conclusion, Dr. Fries calculated a 10 percent impairment rating for appellant's bilateral shoulder surgeries. He added an 11 percent rating for loss of range of motion in appellant's right arm and 9 percent for her left arm, totaling a 21 percent impairment of her right upper extremity and a 19 percent impairment of the left arm.

The Board finds that the conclusions of Dr. Fries represent the weight of the medical opinion evidence and establish that appellant is entitled to no more than the total 40 percent impairment rating she received for her upper extremities. Dr. Fries provided a thorough report

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<sup>8</sup> Section 8123(a) of the Act states: "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."

discussing his clinical findings, the medical conclusions of other physicians who had examined appellant, her medical and work histories, and his conclusions regarding her degree of permanent impairment. He explained his medical reasoning in assessing no loss of strength and averaging the results of other physicians' measurements because his own were influenced by appellant's actions. Dr. Fries' report is well rationalized and based on an accurate factual background. Therefore, it is entitled to special weight.<sup>9</sup>

The Board also finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

Section 8128(a) of the Federal Employees' Compensation Act<sup>10</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>11</sup> Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>12</sup>

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>13</sup> The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>14</sup>

Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.<sup>15</sup>

With her request for reconsideration, appellant submitted a June 8, 2001 report from Dr. Weiss, who stated that he had reviewed Dr. Fries' report dated December 5, 2000 and the May 15, 2001 report of the Office medical adviser. Dr. Weiss discussed the difference between objective and subjective findings and disagreed with the Office medical adviser's opinion that

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<sup>9</sup> See *Raymond A. Fondots*, 53 ECAB \_\_\_ (Docket No. 01-1599, issued June 26, 2002) (finding that the report of the impartial medical examiner was well rationalized in explaining why appellant's two surgeries could not be considered arthroplasties; thus appellant was entitled to no more than a two percent impairment of his right upper extremity).

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>12</sup> *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

<sup>13</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>14</sup> 20 C.F.R. § 10.606(b) (1)-(2).

<sup>15</sup> 20 C.F.R. § 10.608(b).

muscle strength deficits are subjective findings. He stated that strength testing of appellant's shoulder muscles was repeated several times before her muscle weakness was rated. Therefore, the strength deficits he had measured -- 26 percent of the right shoulder and 18 percent of the left-shoulder stand.

Further, Dr. Weiss agreed that appellant had not undergone complete resection arthroplasty on her shoulders, but argued that a rating somewhere between the 24 percent impairment for such a procedure and the 10 percent impairment for a distal clavicular resection should be given. He explained that appellant had a resection of the acromioclavicular joint and undersurface of the acromion, which the A.M.A., *Guides* did not cover.

The Board finds that Dr. Weiss' opinion regarding the Office medical adviser's opinion is irrelevant because his report was not part of the conflict in medical opinion evidence between Dr. Weiss and the second opinion physician, Dr. de Jong. Dr. Weiss found strength deficits while Dr. de Jong found none. Dr. Fries resolved the conflict, based on his strength test measurements.

The Board has long held that additional reports from a physician on one side of the conflict in medical opinion resolved by the impartial specialist are insufficient to create another conflict or overcome the special weight accorded that specialist's conclusions.<sup>16</sup> Thus, Dr. Weiss' conclusions and criticisms of Dr. Fries do not constitute relevant and pertinent new evidence sufficient to create a second conflict with Dr. Fries.<sup>17</sup>

Appellant has failed to show that the Office erred in interpreting the law and regulations governing her entitlement to a schedule award under the Act. Nor has she advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.<sup>18</sup>

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<sup>16</sup> *Alice J. Tysinger*, 51 ECAB 638, 646 (2000).

<sup>17</sup> *See Barbara J. Warren*, 51 ECAB 413, 416 (2000) (finding that additional reports from appellant's treating internist merely reiterated previous findings and were insufficient to overcome the special weight of the impartial specialist's opinion).

<sup>18</sup> *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

The July 10 and February 11, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
March 27, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member