U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUTHER J. CAMP and DEPARTMENT OF THE ARMY, TRAINING SUPPORT CENTER, Fort Bragg, NC

Docket No. 03-472; Submitted on the Record;
Issued May 16, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained greater than a 20 percent impairment of the right upper extremity, for which he received a schedule award.

This is the second appeal before the Board in this case. By decision dated February 7, 2002,[1] the Board affirmed an April 17, 2000 decision of the Office of Workers' Compensation Programs finding that the position of recreation aide properly represented appellant's wage-earning capacity as of March 29, 1999. However, the Board found that, in the April 17, 2000 decision, the Office improperly computed appellant's compensation effective March 29, 1999, as it did not use the recurrent pay rate to which appellant was entitled due to a July 24, 1992 recurrence of total disability. Therefore, the Board returned the case to the Office for calculation of the appropriate rate of compensation and payment of compensation due and owing beginning on July 24, 1992. The Board also affirmed a June 20, 2000 decision of the Office finding that appellant had not established that he sustained a recurrence of disability beginning June 24, 1999 causally related to an accepted October 2, 1990 right shoulder injury. The law and facts of the case as set forth in the Board's February 7, 2002 decision and order are hereby incorporated by reference.

In a February 20, 2002 post appeal worksheet, the Office noted that appellant was "entitled to a recurrent pay rate as of July 23, 1992. He [was] underpaid TTD [total temporary disability] [compensation] from July 23, 1992 through March 28, 1999. A new *Shadrick* calculation is required beginning March 29, 1999." The Office noted that there were two unadjudicated claims of record, one for a "recurrence of June 24, 1999," and another "for an increased schedule award."

[1] Docket No. 2000-2065. The final decision addressed in the February 7, 2002 decision is dated June 20, 2000. The latest medical evidence addressed in the February 7, 2002 decision is Dr. Gwenesta Melton's, an attending Board-certified rheumatologist, October 20, 1999 report.

In a March 12, 2002 letter, the Office requested that appellant submit updated medical evidence regarding his continuing disability.[2] The Office requested that appellant's physician supply work restrictions and indicate whether they were permanent and work related. The Office also inquired as to whether appellant was able to perform light-duty work. Appellant responded by a May 28, 2002 letter and asked if he was "still due to get the other 20 percent of the schedule award." He submitted additional medical evidence.

In a May 17, 2002 form report, Dr. Melton diagnosed a right shoulder "rotator cuff tear, 1990 with calcific tendons, with recurrence," and severe osteoarthritis of the right shoulder and both knees. She stated that the accepted 1990 fall and right shoulder injury aggravated preexisting osteoarthritis of the right shoulder, both knees and hips. Dr. Melton attributed these conditions to the accepted 1990 injury, opining that appellant was permanently and totally disabled for all work due to these conditions.

In a May 17, 2002 work capacity evaluation, Dr. Melton proscribed use of the right arm "to work, no fine manipulation." She explained that appellant experienced "severe pain with movement," had "minimal range of motion of r[ight] arm, needs chronic pain med[ication]s which interfere with driving ability. There is calcification of r[ight] shoulder tissue with degenerative change of bone and ligament." Dr. Melton found appellant unfit for light-duty work, as he was unable to perform "useful work with the right arm," and had osteoarthritis of the left arm, both knees and both hips.

In a May 17, 2002 narrative report, Dr. Melton answered the Office's March 12, 2002 inquiries. She stated that appellant's work restrictions were permanent, as "imposed by the operating orthopedic surgeon and verified by three other Board-certified orthopedic surgeons and the employing establishment medical officer." Dr. Melton noted that appellant's work restrictions were "based on his fall sustained on October 2, 1990. The fall accelerated his osteoarthritis in his attempt to return to work on March [29,] 1999 … which also aggravated and accelerated his right shoulder injury and caused symptoms of a recurrence of this injury." Dr. Melton stated that appellant's right shoulder impairment was permanent and would prevent him from performing his October 2, 1990 date-of-injury position. Regarding light-duty work, she opined that considering the right shoulder in isolation, appellant would be able to perform light duty for four hours per day, five days per week, with no use of the right arm and no fine manipulation with either hand. However, Dr. Melton explained that appellant's work capacity was diminished by sleep deprivation due to chronic right shoulder pain, deterioration of muscle strength and tone in the right upper extremity, narcotic pain medication which precluded him from driving and osteoarthritis of both shoulders, knees and hips which was aggravated by the October 2, 1990 fall. She noted that nonsteroidal anti-inflammatories caused a gastropathy, necessitating the use of narcotics. Dr. Melton therefore concluded that appellant could not return to light duty as he "cann[o]t use his right arm for any useful work," had "very limited movement of the right arm, severe pain with any movement and any jarring sensation of his shoulder will cause excruciating pain and will increase his risk for reinjury." She stated that any return to work would accelerate the osteoarthritis in appellant's right shoulder. Dr. Melton opined that

[2] Appellant filed a March 28, 2002 Form EN-1032 indicating that he had not worked during the previous 15 months. He noted that he owned a small farm, purchased in 1986, but that the land was rented to others, he performed no work and received no income.

appellant had "too many concurrent arthritic conditions from his prior work at [the employing establishment] for" a return to light duty "to be feasible."

In an August 26, 2002 file memorandum, the Office stated that it had made "numerous attempts to schedule an IME [impartial medical examination] to determine" his entitlement to an additional schedule award greater than the 10 percent awarded by the February 5, 1992 decision.[3] The Office explained, however, that an examination of the record revealed that appellant was "entitled to an additional 10 percent schedule award, without a referee referral." The Office noted that an Office medical adviser determined on January 28, 1993 that appellant had a 20 percent permanent impairment of the right upper extremity. Also, the Office noted that Dr. Fred Benedict, a Board-certified orthopedic surgeon, who served as an impartial examiner in 1995 to determine the degree of permanent impairment, stated in an October 19, 1995 report that appellant had a 20 percent impairment of the right upper extremity. Based on this report, the Office found that appellant was entitled to an augmented schedule award reflecting a 20 percent permanent impairment of the right upper extremity. The Office noted that an impartial medical examination was not warranted, as there was no current conflict of medical opinion. The Office did not mention Dr. Melton's reports in this memorandum.

By decision issued August 26, 2002, the Office awarded appellant a schedule award for a 10 percent permanent impairment of the right upper extremity, in addition to the 10 percent previously awarded, "for a total of 20 percent permanent impairment of the right upper extremity." The Office based this determination on Dr. Benedict's October 19, 1995 report. The period of the award ran from August 11, 2002 to March 17, 2003.

In a September 20, 2002 letter, appellant requested an "appeal" of the August 26, 2002 schedule award decision from the Office's Branch of Hearings and Review. He asserted that the Office should rely on one particular copy of Dr. Benedict's October 19, 1995 report,[4] proposing a 30 percent permanent impairment of the right upper extremity.[5]

By letter dated September 23, 2002, the Office advised appellant that "additional benefits for a schedule award ha[d] been awarded from August 11, 2002 to March 17, 2003," in addition

[3] In a June 17, 1999 worksheet, the Office stated that there was a "conflict between the attending physician and the district medical adviser regarding the permanent partial impairment of the right upper extremity." The Office identified Dr. Zane Walsh, a Board-certified orthopedic surgeon, as a candidate to perform an impartial medical examination. There is no indication of record that appellant was referred to Dr. Walsh or that Dr. Walsh performed an examination. In a June 1, 2000 worksheet, the Office indicated that there was a conflict of medical opinion regarding the "extent and degree of [appellant's] permanent impairment of the upper extremities. The Office therefore appointed Dr. William Young-Bae Oh, a Board-certified orthopedic surgeon, as an impartial medical examiner. The Office sent a copy of the case file to Dr. Oh and a referral letter to appellant on June 7, 2000. However, there is no indication of record that Dr. Oh performed an examination.

[4] In this report, Dr. Benedict did not provide any measurements for range of motion, stating that he could not "accurately examine him due to pain." He noted that there was additional impairment of the right upper extremity due to weakness or pain estimated at 20 percent. However, the photocopy of the report appellant submitted accompanying his September 20, 2002 letter changed the 20 percent figure to 30 percent.

[5] Appellant also related his difficulties with supervisors at work since he began working light duty, including being physically threatened, resulting in the supervisor's removal.

to the 10 percent previously awarded. The Office noted that the first payment for the additional schedule award benefits was issued on September 7, 2002. The Office stated that the medical evidence of record supported that appellant sustained a 20 percent impairment of the right upper extremity. The Office explained that Dr. Benedict, in his October 19, 1995 report, recommended an impairment rating between 20 and 40 percent, but could not "determine the exact impairment rating due to noncooperation of the patient." The Office also noted that it did not consider an altered photocopy of Dr. Benedict's October 19, 1995 report, which changed Dr. Benedict's rating from 20 to 30 percent without any evidence supporting this increase. The Office advised appellant that, if he wished to claim an additional schedule award, he should submit a report from his attending physician referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, describing specific impairments of the right upper extremity due to pain, sensory deficit, weakness or restricted motion.[6]

Appellant filed his appeal with the Board on December 22, 2002.

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

The schedule award provisions of the Federal Employees' Compensation Act[7] and its implementing regulation[8] 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 how 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 and guidelines so that there are uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses. As of February 21, 2001, the Office uses the fifth edition of the A.M.A., *Guides* to calculate new claims for a schedule award, or to recalculate prior schedule awards pursuant to an appeal, request for reconsideration, or decision of an Office hearing representative.[9]

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb

[6] Appellant submitted an October 28, 2002 letter to the Office's Branch of Hearings and Review again requesting an "appeal" of the August 26, 2002 schedule award decision. He mentioned a "30-day appeal window," indicating that he might have been requesting an oral hearing. Appellant enclosed a copy of a May 10, 1991 surgical report and November 13, 1991 schedule award evaluation and treatment notes from Dr. Glenn Subin which was previously considered by the Office, finding a 30 percent impairment of the right upper extremity, but without reference to the A.M.A., *Guides*. He also enclosed a May 10, 1994 report from Dr. Mark E. Brenner, a second opinion physician, who found a 32 percent permanent impairment of the right upper extremity. This report was also previously considered by the Office. Arguendo, should this letter be construed as a second request for an oral hearing, the Office did not issue a final decision of record on this issue.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *See* FECA Bulletin No. 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards which result from hearings, reconsideration or appeals should; however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[10] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.[11]

In this case, the Office based the August 26, 2002 schedule award for a 20 percent permanent impairment of the right upper extremity on the October 19, 1995 report of Dr. Benedict. Typically, the report of the impartial medical specialist is entitled to special weight if it is based on a complete medical background, accurate history and contains sufficient rationale.[12] However, the Board notes that Dr. Benedict's October 19, 1995 report was issued nearly seven years prior to the August 26, 2002 schedule award decision. The Office attempted to explain this extreme gap in time in an August 26, 2002 memorandum, asserting that for nearly all of the seven years it believed that there was a conflict of medical evidence that required resolution by appointing an impartial medical specialist. Without explanation, the Office found that there was no longer a conflict of medical evidence, and gave Dr. Benedict's October 19, 1995 report the weight of the medical evidence, due to his status as impartial medical examiner. The Office did not seek to obtain a more current opinion. The Board finds that it was wholly inappropriate for the Office to rely on this report in determining appellant's percentage of permanent impairment, as it was not sufficiently contemporaneous to the Office's determination.[13]

The Board notes that the August 26, 2002 decision and memorandum fail to mention that there are far more recent medical reports of record than Dr. Benedict's October 19, 1995 report. In particular, appellant submitted May 17, 2002 narrative and form reports from Dr. Melton, an attending Board-certified rheumatologist, who found appellant totally and permanently disabled for work, due in part to permanent impairment of the right upper extremity from the accepted October 2, 1990 fall. She opined that the accepted rotator cuff tear and subsequent surgery caused calcific tendinitis and aggravated and accelerated preexisting osteoarthritis.

Although appellant's osteoarthritis has not been accepted as work related the Office is not precluded from considering this condition in formulating a schedule award. It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments are to be included.[14] Dr. Benedict did not consider appellant's osteoarthritis in preparing the October 19, 1995 schedule award evaluation and his opinion is therefore deficient in this respect. Arguendo, even if he had mentioned the preexisting osteoarthritis, Dr. Benedict's opinion was nearly seven years old at the time of the August 26, 2002 schedule award decision. Therefore, his opinion is based

[10] *See Paul A. Toms*, 28 ECAB 403 (1987).

[11] A.M.A., *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

[12] *Richard L. Rhodes*, 50 ECAB 259 (1999).

[13] *See Barbara J. Hines*, 37 ECAB 445 (1986).

[14] *Lela M. Shaw*, 51 ECAB 372 (2000).

on appellant's condition in the remote past and is no longer relevant in determining the present percentage of permanent impairment.

Therefore, the Office must undertake additional development to determine the present percentage of permanent impairment of the right upper extremity attributable to the accepted 1990 injury and preexisting osteoarthritis. The Office shall refer appellant and a copy of the medical record, an updated statement of accepted facts, all appropriate forms, worksheets and procedures regarding the precise information required and the appropriate methods of calculation to an appropriate orthopedic physician for a permanent impairment evaluation of his right upper extremity. Following receipt of the orthopedic report, the Office shall issue an appropriate schedule award decision reflecting any increase above and beyond the 20 percent awarded.

The decisions of the Office of Workers' Compensation Programs dated September 23 and August 26, 2002 are hereby set aside and the case remanded to the Office for further development consistent with this decision.

Dated, Washington, DC
May 16, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member