U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVATORE MINNECI and U.S. POSTAL SERVICE,
POST OFFICE, Great Neck, NY

Docket No. 03-1372; Submitted on the Record;
Issued November 4, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant established that he has more than a three percent impairment of the right upper extremity for which he has received a schedule award.[1]

On August 8, 1999 appellant, then a 25-year-old letter carrier, filed a claim for traumatic injury alleging that, on August 7, 1999, he injured his right biceps when he lifted two tubs of mail to place on top of a case. The Office of Workers' Compensation Programs accepted the claim for right biceps strain, surgery of the right arm and later expanded the accepted injuries to include a rupture of the right biceps muscle. Appellant stopped work on August 9, 1999 and returned to a limited-duty position on January 3, 2000. He again stopped work on June 10, 2002 and has not returned to work since that time. On January 10, 2001 appellant filed a claim for a schedule award.

On January 26, 2001 the Office requested that Dr. Steven M. Erlanger, appellant's Board-certified orthopedic surgeon, evaluate appellant for a schedule award. Dr. Erlanger did not respond. The record includes a client's confirmation copy of a letter dated April 26, 2001 referring appellant, a copy of his medical record, a statement of accepted facts and list of specific questions to Dr. Richard S. Goodman, a Board-certified orthopedic surgeon, to determine whether appellant had recovered from his work-related injury, whether he had a permanent impairment based on his work-related injury and the date of his maximum medical improvement, if appropriate.

In a report dated May 25, 2001, Dr. Goodman advised that he had examined appellant on May 21, 2001 and stated:

> "[Appellant] has fully recovered from the effects of the injury despite his complaints. He has reached maximum medical improvement. [Appellant] is able

[1] The record in this case contains documents not associated with this appeal.

to perform his duties as a letter carrier without restrictions. He became capable of doing such on December 1, 1999. [Appellant's] prognosis is excellent. There is no indication for further care."[2]

On September 21, 2001 appellant filed a claim for a schedule award. On October 18, 2001 the Office again requested that Dr. Erlanger provide an impairment assessment of appellant and noted that he should use the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[3]

By report dated November 28, 2001, Dr. Erlanger stated that appellant remained symptomatic with pain, that "a repeat MRI [magnetic resonance imaging] [scan] has been suggestive of a partial retear. [Appellant] has declined further surgery."[4] On examination Dr. Erlanger noted that the surgical scar had widened and that appellant was tender at the distal biceps insertion. He noted that appellant had full range of motion of the elbow. Biceps strength was four by five on the right compared to five by five on the left and supraspinatus strength was four by five on the right compared to five by five on the left. Dr. Erlanger found that appellant had reached maximum medical improvement and noted his limited-duty restrictions. He stated that appellant "has a permanent disability of 20 percent based on his weakness and ruptured biceps tendon."

On February 8, 2002 the Office issued a decision denying appellant's claim for wage loss on the grounds that the medical evidence established that he no longer had medical residuals causally related to his August 7, 1999 work-related injury. On that same date, the Office proposed termination of appellant's medical benefits on the basis that the weight of the medical evidence established that he no longer had medical residuals of his August 7, 1999 work-related injury.

In a letter dated February 16, 2002, appellant stated that the only benefit he was seeking was a schedule award, authorization for either laser or plastic surgery for his postoperative scar and reimbursement for his travel expenses. In a letter dated March 22, 2002, the Office advised appellant that it had received his claim for a schedule award and that it was being sent to the Office medical adviser for review.

By decision dated May 31, 2002, the Office terminated appellant's medical benefits. The Office based its decision on the report of the second opinion physician who found that appellant had no residuals of his work-related injury. In a letter dated June 17, 2002, appellant requested an oral hearing.

[2] Dr. Goodman's date of December 1, 1999 as the date of maximum medical improvement is based on a report from Dr. Erlanger that day wherein he notes that appellant had retained full flexion, supination and pronation of the right arm, but that he remained symptomatic with pain.

[3] The Board notes that the fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001).

[4] A February 22, 2000 MRI scan revealed a partial retear of the distal portion of the biceps tendon.

On August 27, 2002 appellant, through counsel, filed a claim for a recurrence of disability. He stated that he was performing his limited-duty position until June 10, 2002, at which time the employing establishment withdrew the position. Appellant has not returned to work since that day.

In a report dated September 26, 2002, Dr. Erlanger stated:

> "According to the New York State Worker's Compensation Medical Guidelines, page 16, a rupture of the distal insertion of the biceps has at least a 20 percent loss of use of the right arm. Because of the partial rerupture and persistent pain, additional disability may be awarded up to 33 1/3 percent."

Dr. Erlanger also noted that appellant had reached maximum medical improvement.

By decision dated November 25, 2002, an Office hearing representative determined that the February 8 and May 31, 2002 decisions were premature and set them aside. He then remanded the case to the Office for referral to an impartial medical examiner to resolve the conflict in medical opinion between Drs. Erlanger and Goodman regarding appellant's continuing disability. The hearing representative noted that the Office should argue its statement of accepted facts by including appellant's August 7, 1999 work-related injury caused a rupture of the right biceps muscle and also advised the Office to include a copy of appellant's position description as a letter carrier in the record. The hearing representative also required the specialist to offer an opinion as to whether the claimant had any work-related permanent impairment, utilizing the fifth edition of the A.M.A., *Guides* [hereinafter A.M.A., *Guides*].[5] Appellant was advised to bring a copy of the February 22, 2000 MRI scan to the examination with the impartial medical examiner. The hearing representative further instructed the Office to determine whether the employing establishment withdrew appellant's limited-duty position on June 10, 2002 and, if so, that the Office should then direct the claimant to submit a claim for payment of wage loss from that date.

On February 14, 2003 the Office referred appellant, his medical record, a statement of accepted facts and specific questions to Dr. Donald Goldman, an impartial medical examiner and an orthopedic surgeon, to resolve the conflict in medical opinion between Drs. Erlanger and Goodman. The questions for resolution included whether appellant sustained a permanent impairment of the right upper extremity causally related to the August 9, 1999 work-related injury.

In a report dated March 17, 2003, Dr. Goldman stated that appellant had a continuing work-related disability established by the February 18, 2000 MRI scan which revealed a tear of the distal right biceps tendon. In response to the question regarding whether appellant sustained any permanent impairment, he answered "Yes."

By decision dated March 31, 2003, the Office awarded appellant a three percent impairment for the right upper extremity.

[5] The hearing representative also requested the specialist to offer an opinion as to whether "revision of the scar is recommended for other than cosmetic reasons."

The Board finds that this case is not in posture for decision on the issue of whether appellant has more than a three percent impairment of his right upper extremity.

Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. The Federal Employees' Compensation Act, however, does not specify the manner in which the percentage of impairment for a schedule award 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 Office through regulation has adopted the A.M.A., *Guides*[6] as the standard for evaluating permanent impairment for schedule award purposes and the Board has concurred in such adoption as an appropriate standard for evaluating schedule losses.[7]

In this case, an Office hearing representative remanded the case to the Office for further review by an impartial medical examiner on the issue of appellant's continuing disability. However, the hearing representative also requested that the specialist provide an opinion on whether appellant had any permanent impairment based on his August 7, 1999 work-related injury. The hearing representative did not identify a conflict between Drs. Erlanger and Goodman regarding an impairment rating as Dr. Goodman did not address that issue. Thus, the referral to Dr. Goldman on the issue of appellant's impairment is as a second opinion physician, not as an impartial medical examiner.

While Dr. Goodman advised that appellant had a 20 percent disability based on weakness and a ruptured biceps tendon, his impairment estimate was not made under the A.M.A., *Guides*. Dr. Erlander opined that appellant had a 33 1/3 percent impairment under the New York state guidelines. However, it is well established that an impairment rating under the Act is to be made utilizing the A.M.A., *Guides*.[8] The reports of Drs. Goodman and Erlanger are therefore, insufficient to establish the nature and extent of any permanent impairment.

In his March 17, 2003 report, Dr. Goldman opined that appellant had a permanent impairment causally related to his August 7, 1999 work-related injury, but did not provide any ratings for a schedule award and did not refer to the A.M.A., *Guides* in his report. Because his report failed to provide any analysis under the A.M.A., *Guides*, as required by Office regulations, it is of limited probative value. There is no indication of record that the medical evidence was referred to an Office medical adviser for an opinion regarding appellant's entitlement to a schedule award. The record thus, does not contain sufficient medical evidence to allow a fully informed adjudication of appellant's entitlement to a schedule award.

[6] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[7] *Ronald R. Kraynak*, 53 ECAB ___ (Docket No. 00-1541, issued October 2, 2001); *see* 20 C.F.R. § 10.404.

[8] *Joseph Lawrence, Jr., supra* note 6.

The case will be remanded to the Office to submit the case record, together with a statement of accepted facts to an appropriate physician for a rationalized medical opinion on the issue of the degree of any impairment of appellant's right upper extremity.[9] The physician should be instructed to refer to the applicable tables and standards of the fifth edition of the A.M.A., *Guides* in making an impairment rating and to describe the physical findings upon which the opinion is based. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

The March 31, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further findings consistent with this opinion of the Board.[10]

Dated, Washington, DC
November 4, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] Dr. Goldman is not a Board-certified physician and, thus, appellant, his record and a statement of accepted facts should be referred to a Board-certified specialist for a second opinion evaluation.

[10] The Board notes that this case record contains evidence which was submitted subsequent to the Office's March 31, 2003 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).