

**United States Department of Labor
Employees' Compensation Appeals Board**

SHARON L. MEURER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Commack, NY, Employer**

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**Docket No. 04-152
Issued: April 29, 2004**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 28, 2003 appellant filed a timely appeal of the September 24, 2003 decisions of the Office of Workers' Compensation Programs, which granted appellant a schedule award and denied modification of a May 20, 2002 decision terminating her wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over both the schedule award and the merit decision terminating wage-loss compensation.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation effective May 19, 2002 on the basis that her injury-related disability had ceased; and (2) whether appellant has more than a four percent permanent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On August 9, 1999 appellant, then a 32-year-old letter carrier, sustained a traumatic injury to her right arm while in the performance of duty. She reported that, while walking down

a grassy hill, she slipped and fell on her right side, hitting her elbow. Appellant received an initial diagnosis of right arm contusion and right elbow epicondylitis. An August 20, 1999 x-ray revealed a radial head fracture of the right elbow. Appellant ceased working August 13, 1999 and she returned to limited duty on August 17, 1999. On or about October 7, 1999, the employing establishment terminated appellant's employment.¹ The Office initially accepted her claim for right elbow epicondylitis. Appellant received appropriate wage-loss compensation and the Office placed her on the periodic compensation rolls effective December 5, 1999.

The Office authorized surgery, which appellant underwent on May 10, 2000. Dr. Neal L. Hochwald, a Board-certified orthopedic surgeon, performed a release of right elbow flexion contracture and right ulnar nerve subcutaneous transposition. He initially anticipated that she would be disabled from working with her right arm for approximately three months following her surgery. However, in an August 31, 2000 report, Dr. Hochwald stated that appellant remained unable to work using her right arm and that this limitation would continue in effect for another six weeks.

In a report dated October 2, 2000, Dr. Richard S. Goodman, a Board-certified orthopedic surgeon and Office referral physician, noted that appellant had fully recovered from her right elbow epicondylitis. While her physical examination revealed a loss of range of motion at the elbow, Dr. Goodman explained that limited range of motion and ulnar nerve neuropathy were not consistent with right elbow epicondylitis. He further stated that appellant was not able to return to work due to the dysfunction of the right upper extremity, which he expected to be permanent. However, appellant's activities were not limited with respect to her left upper extremity and both lower extremities. Dr. Goodman indicated that appellant could perform sedentary or light duty. In an addendum dated November 20, 2000, he explained that epicondylitis was an inflammation of the epicondyle, which does not produce limited range of motion in the elbow or affect the ulna nerve. Dr. Goodman further explained that the limited range of motion of the elbow was related to the scarring of the radial head with secondary scarring of the elbow.

Dr. Hochwald, appellant's surgeon, reported on November 20, 2000 that she was able to do some work with her right arm. He stated that there were some limitations due to loss of extension and continued numbness and tingling in appellant's fingers. Dr. Hochwald also reported the presence of some shoulder discomfort with use of her arm. He advised that a lighter, modified duty should be considered with no lifting of more than 10 pounds. In a subsequent report dated January 6, 2001, Dr. Hochwald again stated that appellant could perform light-duty work. He also indicated that she had a 35 percent permanent loss of use of her right upper extremity due to her employment injury. On February 22, 2001 Dr. Hochwald released appellant from his care. He also reiterated that she could perform light-duty work.

Believing that a conflict of medical opinion existed between the opinions of Drs. Hochwald and Goodman, the Office referred appellant for an impartial medical evaluation. Dr. Anthony J. Puglisi, a Board-certified orthopedic surgeon, examined appellant on January 23, 2002 and in a report dated February 6, 2002, he diagnosed status post contusion right elbow with undisplaced fracture of the head of the right radius and possibly olecranon process. He explained

¹ Appellant began work with the employing establishment on July 17, 1999 and she was relieved of her duties prior to the expiration of her 90-day probationary period.

that the fall caused the fracture and the injury to the olecranon process as well as possible swelling causing early on signs of possible cubital tunnel syndrome. However, Dr. Puglisi acknowledged that these conditions as well as a contusion of the elbow were beyond the realm of the statement of accepted facts, which listed right elbow epicondylitis as the only accepted condition. Regarding ongoing disability, he stated that the work-related condition brought on early disability, however, at this point the residuals of the injury still allowed appellant a functional range of motion and the ability to work with her arm. Dr. Puglisi stated that appellant could function at her job as a letter carrier. He further stated that the permanency of appellant's condition was the scar over the posterior medial aspect of her right elbow and the loss of motion, which was in the range of some 20 degrees of full extension and about 20 degrees of full flexion of the elbow.

In summation, Dr. Puglisi stated that an undisplaced fracture of the head of the radius holds with it an excellent prognosis even if added to the epicondylitis that was initially diagnosed. He further stated that from an orthopedic standpoint he could find no objective basis for appellant's subjective complaints and certainly no reason why she should continue in her disability even with the noted restrictions of motion. Dr. Puglisi reasoned that appellant was able to raise two children, one of which was born in the year 2000 and if she could do this with her arm, she could certainly perform the duties of a letter carrier. He added that he personally worked as a letter carrier in the past and that he is the son of a letter carrier. Additionally, Dr. Puglisi submitted a January 28, 2002 work capacity evaluation (Form OWCP-5c), wherein he noted limitations that included 4 hours of pushing, pulling and lifting "[right] side only," with a weight restriction of 5 to 10 pounds. He also imposed time limitations with respect to reaching and reaching above the shoulder. Dr. Puglisi commented that the "above limitations still allow [appellant] to perform activities of a letter carrier."

On April 5, 2002 the Office issued a notice of proposed termination of compensation. The Office found that Dr. Puglisi's report represented the weight of the medical evidence of record.²

In response to the proposed termination, the Office received a May 1, 2002 work capacity evaluation from Dr. Hochwald, who reported right arm weakness, pain and numbness as well as limitation of elbow motion. He advised that appellant had reached maximum medical improvement and there was no reason why she could not work eight hours a day. However, Dr. Hochwald imposed permanent right arm restrictions that included reaching, reaching above the shoulder, operating a motor vehicle and repetitive movements of both the wrist and elbow. He also limited pushing, pulling and lifting to 10 pounds.

In a decision dated May 20, 2002, the Office found that appellant's injury-related disability had ceased. Accordingly, the Office terminated her compensation. The Office based its determination on Dr. Puglisi's February 6, 2002 report.

² The Office explained that, as a conflict of medical opinion did not exist between Drs. Hochwald and Goodman, Dr. Puglisi's report was considered only as a second opinion examination and not a referee medical examination as originally anticipated.

On May 30, 2002 appellant filed a claim for a schedule award. She requested reconsideration on June 12, 2002. Appellant submitted additional reports from Dr. Hochwald dated April 12 and May 15, 2002. Among other things, he found that she had a 35 percent permanent impairment of her right upper extremity. Dr. Hochwald also stated that appellant was capable of limited or light-duty work.

The request for reconsideration challenged the office's reliance on Dr. Puglisi's opinion regarding appellant's ability to work, noting, among other things, that he premised his opinion on the mistaken belief that appellant gave birth in 2000, when in fact her youngest child was born in 1992. The request also asked that the claim be expanded to include additional employment-related conditions identified by Dr. Puglisi in his February 6, 2002 report.

The Office sought clarification from Dr. Puglisi on June 24, 2002 and in a supplemental report dated July 1, 2002 he indicated that his prior opinion had not changed. Additionally, the Office referred the case record to its medical adviser for purposes of determining appellant's entitlement to a schedule award. In a report dated July 24, 2002, the Office medical adviser found that appellant had a four percent impairment of her right upper extremity.

By decision dated September 6, 2002, the Office denied modification of the prior decision terminating compensation.

In a separate decision also dated September 6, 2002, the Office granted appellant a schedule award for a four percent impairment of the right upper extremity. The award covered a period of 12.48 weeks, beginning May 19, 2002 and continuing through August 14, 2002. The Office based its award on the July 24, 2002 report of its medical adviser, who relied on Dr. Puglisi's February 6, 2002 findings.

Appellant filed an appeal and pursuant to an order of the Board dated May 29, 2003,³ the Office reissued its September 6, 2002 decisions on September 24, 2003.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office improperly terminated appellant's wage-loss compensation. The Office relied on Dr. Puglisi's February 6, 2002 opinion to find that appellant

³ Docket No. 03-367.

⁴ *Curtis Hall*, 45 ECAB 316 (1994).

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

no longer had any injury-related disability and was physically capable of performing the duties of a letter carrier. In his January 28, 2002 work capacity evaluation (Form OWCP-5c), Dr. Puglisi noted, among other things, right arm limitations of 4 hours of pushing, pulling and lifting “[right] side only,” with a weight restriction of 5 to 10 pounds. He commented that the “above limitations still allow [appellant] to perform activities of a letter carrier.” The record reveals that her duties as a letter carrier entail carrying a shoulder bag of up to 35 pounds, continuous lifting of 0 to 10 pounds and occasional lifting of 0 to 70 pounds. As indicated, Dr. Puglisi limited appellant to 4 hours of lifting with a 10-pound weight limitation. Thus, notwithstanding his stated opinion that her limitations still allowed her to perform the duties of a letter carrier, his 4-hour lifting restriction of 5 to 10 pounds indicates that appellant remains unable to perform her regular duties as a letter carrier. Accordingly, the Office improperly relied on Dr. Puglisi’s opinion as a basis for concluding that she was no longer disabled. The Office bears the burden to justify modification or termination of benefits and the Board finds that the Office failed to meet its burden in the instant case.⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees’ Compensation Act 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.⁷ 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁸ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁹

ANALYSIS -- ISSUE 2

Appellant’s schedule award for four percent permanent impairment of the right upper extremity was based on the July 24, 2002 report of the Office medical adviser, who relied on Drs. Puglisi’s February 6, 2002 findings. The Office medical adviser explained that Dr. Puglisi’s examination was given more weight because he was a impartial medical examiner used to resolve a conflict between Drs. Goodman and Hochwald. The Office medical adviser added that Dr. Puglisi’s report was the most thorough and most rationalized of all the reports. Dr. Puglisi did not specifically calculate appellant’s permanent impairment in accordance with the A.M.A., *Guides* (5th ed. 2001). Instead, the Office medical adviser calculated four percent impairment based on Dr. Puglisi’s physical examination findings of loss of motion, which was in the range of some 20 degrees of full extension and about 20 degrees of full flexion of the elbow. Dr. Puglisi

⁶ *Id.*

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

⁹ FECA Bulletin No. 01-05 (Jan. 29, 2001); FECA Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

further indicated that much of appellant's symptoms were somewhat of an exaggeration of what he would consider the expected result of the trauma she sustained.

Dr. Hochwald reported on April 12, 2002 that appellant had a 35 percent permanent impairment of her right upper extremity under the A.M.A., *Guides* (5th ed. 2001). He noted that he had last examined appellant on December 12, 2000. Dr. Hochwald provided a slightly higher rating of 5.5 percent for loss of elbow flexion and extension. He also calculated an additional one percent impairment due to loss of forearm pronation. However, he attributed the majority of appellant's permanent impairment to her abnormal sensory response due to what he characterized as complex regional pain syndrome. Dr. Hochwald reported sensory deficits involving both the ulnar and median nerves. He also noted impairments due to motor deficits. When Dr. Hochwald examined appellant on May 1, 2002, he continued to report limitations to elbow extension and flexion. He also reported complaints of pain and difficulty attempting to grip items with repetitive motion. Dr. Hochwald stated that appellant still had a form of complex regional pain syndrome in the right arm and that her right hand was constantly cool.

The findings of Drs. Puglisi and Hochwald are relatively consistent with respect to appellant's impairment due to loss of range of motion in the elbow, however, the similarities end there. Whereas Dr. Hochwald found additional impairment due to sensory deficits, Dr. Puglisi effectively dismissed appellant's other symptoms as "somewhat of an exaggeration." As there was no conflict of opinion between Drs. Goodman and Hochwald, the Office medical adviser should not have accorded determinative weight to Dr. Puglisi's findings based on his presumed status as an impartial medical examiner. Moreover, there is no apparent justification for according Dr. Puglisi's findings any greater weight than Dr. Hochwald's findings. Dr. Hochwald has treated appellant for several years and he performed a more recent physical examination on May 1, 2002. Accordingly, the Board finds that a conflict of medical opinion exists between Drs. Hochwald and Puglisi regarding the extent of appellant's permanent impairment due to her August 9, 1999 employment injury.

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹⁰ In view of the unresolved conflict of medical opinion, the Office's September 24, 2003 schedule award is set aside and the case is remanded to the Office for referral to an impartial medical examiner. After such further development of the record, the Office shall issue a *de novo* decision regarding appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in terminating appellant's wage-loss compensation effective May 19, 2002. The Board also finds that the case is not in posture for a decision regarding appellant's entitlement to a schedule award.

¹⁰ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2003 decision of the Office of Workers' Compensation Programs affirming the May 20, 2002 termination of wage-loss compensation is reversed. Furthermore, the Office's September 24, 2003 schedule award for a four percent impairment of the right upper extremity is set aside and the case is remanded for further consideration consistent with this decision.

Issued: April 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member