

FACTUAL HISTORY

The Office accepted that, on or before October 6, 1998, appellant, then a 50-year-old general equipment examiner leader, sustained bilateral carpal tunnel syndrome requiring a right median nerve release on June 9, 1999, a left median nerve release in October 1999 and a repeat left median nerve release on January 16, 2001 performed by Dr. Longnecker. On March 24, 2000 appellant claimed a schedule award.

By decisions dated June 8, 2000, May 31 and September 28, 2001, the Office issued appellant schedule awards for a 10 percent permanent impairment of the left upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), for a total of 30 percent impairment. By decision dated January 20, 2001, the Office issued appellant a schedule award for a 10 percent permanent impairment of the right upper extremity.

On October 10, 2001 appellant claimed an additional schedule award. In a January 31, 2002 report, an Office medical adviser found no more than a 45 percent impairment of the left upper extremity and a 15 percent impairment of the right upper extremity. Another medical adviser recommended a second opinion evaluation, as Dr. Longnecker's reports were inconsistent. By decision dated April 5, 2002, the Office issued a schedule award for an additional 15 percent permanent impairment of the left upper extremity, for a total of 45 percent, and an additional 5 percent permanent impairment of the right upper extremity, for a total of 15 percent. Appellant then requested reconsideration.

The Office found a conflict of medical opinion between Dr. Longnecker, for appellant, and the Office medical advisers, for the government. The Office referred appellant to Dr. Jackson to perform a "second opinion evaluation." File worksheets and a list of questions also refer to Dr. Jackson as a second opinion physician, who submitted August 23 and October 3, 2002 reports finding a 45 percent permanent impairment of the left upper extremity due to a near total motor and sensory deficit, based in part on the September 10, 2002 findings of Mr. Church performing functional testing.¹

By decision dated November 6, 2002, the Office denied appellant's request for reconsideration on the grounds that the medical evidence submitted did not substantiate greater than a 45 percent impairment of the left upper extremity and a 15 percent impairment of the right upper extremity previously awarded.

In a January 29, 2003 report, Dr. Longnecker stated that the 45 percent impairment rating was fair. However, appellant requested reconsideration, submitting a February 24, 2003 report from Dr. Longnecker finding a 91 percent impairment of the left hand due to contraction of the thumb and fingers. By decision dated March 25, 2003 and reissued August 4, 2003, the Office denied modification on the grounds of insufficient evidence.²

¹ In an October 31, 2002 report, an Office medical adviser reviewed Dr. Jackson's reports and concurred with the impairment rating of 45 percent.

² In June 7 and 25, 2003 letters, appellant requested reconsideration. The Office discovered that it had mailed the March 25, 2003 decision to an incorrect address and thus reissued the decision on August 4, 2003.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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. 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.⁵

ANALYSIS

In the present case, the Office found a conflict of medical opinion between appellant's treating physician, Dr. Longnecker, and two Office medical advisers, as to the extent of appellant's permanent impairment. Should there be a disagreement between the claimant's physician and an examiner for the United States, section 8123 of the Act provides that the Office shall appoint a third physician who shall make an examination.⁶ Accordingly, the Office referred appellant to Dr. Jackson, a Board-certified orthopedic surgeon, to resolve the conflict. The Office gave the opinion of Dr. Jackson the special weight accorded to an impartial medical examiner. However, this was inappropriate.

In the case of *Henry J. Smith, Jr.*,⁷ the Board held that when the Office does not notify a claimant of a physician's status as impartial medical examiner, that physician may not serve as the impartial medical examiner in that case. These procedures are intended to assure a claimant's knowledge that a physician is an impartial medical examiner, so that he or she may then choose to exercise the procedural right to participate in the selection of the impartial medical examiner.⁸ In the instant case, the letter notifying appellant of the examination scheduled with Dr. Jackson referred to him as a second opinion physician. These conflicting statements did not properly advise appellant that Dr. Jackson was to serve as an impartial medical examiner. As appellant was not properly informed that Dr. Jackson's function was to serve as an impartial medical examiner and as appellant was not able to participate in his

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ 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).

⁶ 5 U.S.C. § 8123(a).

⁷ 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

⁸ *David Alan Patrick*, 46 ECAB 1020, 1024 (1995).

selection, Dr. Jackson's opinion was not entitled to the special weight typically accorded to impartial medical examiners.⁹

Accordingly, there is an unresolved conflict between the physicians for the Office and appellant regarding the percentage of permanent impairment of the upper extremities. The case will be remanded to the Office for further development, including the appointment of an impartial medical examiner to resolve the conflict. Following this and any other necessary development, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision due to a conflict of medical opinion between Dr. Longnecker, for appellant, and two Office medical advisers, for the government.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 25, 2003 and reissued August 4, 2003, and November 6, 2002, are hereby set aside, and the case remanded to the Office for further development consistent with this decision.

Issued: February 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ *Leanne E. Maynard*, 43 ECAB 482 (1992).