United States Department of Labor
Employees' Compensation Appeals Board

SALVATORE MINNECI, Appellant	)	
and	)	**Docket No. 04-1202**
	)	**Issued: October 15, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Great Neck, NY, Employer	)	

Appearances:
Melissa Cicalo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 5, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 8, 2004, which determined that he was entitled to a schedule award for a four percent permanent impairment of his right arm. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a four percent permanent impairment of his right arm for which he received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision[1] on November 4, 2003 which set aside the March 31, 2003 decision of the Office and remanded the case to the Office for

[1] Docket No. 03-1372 (issued November 4, 2003).

further development.[2] The Board found that an Office hearing representative improperly determined in his November 25, 2002 decision, that there was a conflict in the medical evidence between Dr. Steven M. Erlanger,[3] an attending Board-certified orthopedic surgeon, and Dr. Richard S. Goodman,[4] a Board-certified orthopedic surgeon, who served as an Office referral physician, regarding the extent of the permanent impairment of appellant's right arm. The Board found that, although the case was referred to Dr. Donald I. Goldman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on this matter, he actually served as an Office referral physician. It further determined that because Dr. Goldman did not provide an opinion on the extent of appellant's right arm impairment[5] and the case was not referred to an Office medical adviser, the Office had no basis to grant appellant a schedule award on March 31, 2003 for a three percent permanent impairment of his right arm. The Board remanded the case to the Office for referral to an appropriate Office referral physician who would evaluate appellant and render an opinion on the permanent impairment of his right arm. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand to the Office, the case was referred to Dr. Joseph I. Lopez, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion regarding the extent of the permanent impairment of appellant's right arm. In his report dated February 3, 2004, Dr. Lopez indicated that on examination appellant exhibited full, active range of motion in the right elbow, including full flexion and extension, but that he had weakness upon supination with resistance.[6] He noted that appellant's right shoulder had full forward flexion, abduction, internal rotation and external rotation. Dr. Lopez stated that appellant reported pain in his right elbow, including

[2] The Office accepted that on August 7, 1999 appellant, then a 25-year-old letter carrier, sustained a right biceps strain and rupture of the right biceps tendon. On August 12, 1999 a surgical repair was performed on the rupture of the right biceps tendon. Appellant claimed entitlement to a schedule award for his right arm.

[3] The Board determined that Dr. Erlanger's opinions on the extent of appellant's right arm impairment were of limited probative value. In a report dated November 28, 2001, he concluded that appellant had a 20 percent permanent impairment of his right arm due to his weakness and ruptured biceps tendon. In a report dated July 3, 2002, Dr. Erlanger determined that, based on the New York State Worker's Compensation Medical Guidelines, appellant had a 20 percent permanent impairment of his right arm due to a rupture at the distal insertion rupture of the biceps. In a report dated September 26, 2002, he suggested that, based on the New York State Worker's Compensation Medical Guidelines, appellant had up to a 33 1/3 percent permanent impairment of the right arm due to a rupture at the distal insertion rupture of the biceps, partial rerupture and persistent pain. The Board found that his impairment ratings were not derived in accordance with the relevant standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[4] In a report dated May 25, 2001, Dr. Goodman indicated that appellant had fully recovered from his August 7, 1999 employment injury and that he had reached maximum medical improvement. He did not provide any opinion on whether appellant sustained permanent impairment of his right arm.

[5] In a report dated March 5, 2003, Dr. Goldman indicated that appellant had a retear of his right distal biceps tendon which would account for the pain and weakness in his right elbow. He stated that appellant had a permanent impairment of his right arm due to his August 7, 1999 employment injury, but Dr. Goldman did not provide any opinion on the extent of the permanent impairment.

[6] Dr. Lopez stated that appellant was able to supinate his arm without resistance and that he was able to pronate his arm both with and without resisitance.

hypersensitivity in the five-inch surgical scar located in the anterior aspect and that there was some tenderness to palpation over the insertion point of the right biceps tendon. He indicated that he applied section 16.8c and Table 16.35 of the A.M.A., *Guides* to determine appellant's impairment rating. Dr. Lopez stated that the weakness to supination that appellant exhibited upon manual muscle testing of his right arm would be classified as "#4" and that this classification corresponded to a four percent permanent impairment of his right arm.

In a report dated March 3, 2004, a district medical adviser stated that Dr. Lopez' report was inadequate since it did not contain a final percentage of impairment. He indicated that, using section 15.8c and Table 16-35 of the A.M.A., *Guides,* appellant's "[G]rade IV" weakness of supination against weakness equaled a four percent permanent impairment of the right arm.[7]

By decisiion dated March 8, 2004, the Office granted appellant a schedule award for a one percent permanent impairment of his right arm in addition to the three percent permanent impairment previously awarded.[8]

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[9] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[10] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[11] The schedule award provision of the Act[12] and its implementing regulation[13] 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 the manner in which 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 so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (fifth edition 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[14]

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[7] Dr. Lopez suggested that appellant's "[G]rade IV" weakness was equal to a 20 percent strength deficit and that such a deficit, when evaluated under the 5 to 25 percent strength deficit column in Table 16-35, rendered a 4 percent permanent impairment of the right arm.

[8] On appeal appellant alleged that he did not receive the compensation for the three percent permanent impairment of his right arm which was granted in the Office's March 31, 2003 decision. It remains unclear from the record whether appellant actually received this compensation.

[9] 5 U.S.C. §§ 8101-8193.

[10] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[11] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404 (1999).

[14] *Id*.

ANALYSIS

In accordance with the Board's November 4, 2003 decision, the Office referred appellant and the case record to Dr. Lopez, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion regarding the extent of the permanent impairment of his right arm. The Board finds that he did not provide an adequate evaluation of appellant's right arm impairment in accordance with the relevant standards of the A.M.A., *Guides*.

In his February 3, 2004 report, Dr. Lopez indicated that on examination appellant had weakness of the right elbow upon supination with resistance. He indicated that section 16.8c and Table 16.35 of the A.M.A., *Guides* showed that the weakness to supination appellant exhibited upon manual muscle testing would be classified as "#4" and that this classification corresponded to a four percent permanent impairment of his right arm.[15] However, the A.M.A., *Guides* specifically provides that strength deficits measured by manual muscle testing should only rarely be included in the calculation of an upper extremity impairment and the facts do not support the inclusion of this form of strength impairment rating in the present case.[16] Dr. Lopez also noted that appellant exhibited full, active range of motion in the right elbow, including full flexion and extension and that his right shoulder had full forward flexion, abduction, internal rotation and external rotation. But he did not provide any actual measurements for range of motion and it remains unclear what standards he applied to determine that these motions were full. The A.M.A., *Guides* contain specific procedures for evaluating loss of motion and it does not appear that Dr. Lopez applied these procedures.[17] He stated that appellant reported pain in his right elbow, including hypersensitivity in the five-inch surgical scar located in the anterior aspect and that there was some tenderness to palpation over the insertion point of the right biceps tendon.

[15] *See* A.M.A., *Guides* 509-10, Table 16-35. It is unclear how Dr. Lopez derived the classification "#4" as Table 16.35 evaluates strength loss according to percentage ranges such 5 to 25 percent and 30 to 50 percent.

[16] The A.M.A., *Guides* provides that loss of strength may be rated separately if such a deficit has not been considered adequately by other rating methods. An example of this situation would be loss of strength caused by a severe muscle tear that healed leaving "a palpable muscle defect." If the rating physician determines that loss of strength should be rated separately in an extremity that presents other impairments, "the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.*" (Emphasis in the original.) The A.M.A., *Guides* further provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximum force. A.M.A., *Guides* 508, section 16.8a.

[17] *See* A.M.A., *Guides* 470-79.

However, Dr. Lopez did not indicate that he performed any evaluation of whether appellant had permanent impairment due to pain or sensory loss according to the specific tests and standards provided under the A.M.A., *Guides.*[18]

In a report dated March 3, 2004, a district medical adviser provided an analysis of appellant's permanent impairment that was similar to that contained in Dr. Lopez' report. Therefore, his impairment evaluation contains similar deficiencies. For a proper evaluation of appellant's permanent impairment, the case should be remanded to the Office for referral of appellant and the case record to an appropriate specialist and an opinion on the extent of impairment of his right arm, to be followed by an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding whether appellant has more than a four percent permanent impairment of his right arm for which he received a schedule award. The case should be remanded to the Office for further development.

[18] *Id.* at 480-97. The Board notes that the record contains November 28, 2001, July 3 and September 26, 2002 reports, in which Dr. Erlanger, an attending Board-certified orthopedic surgeon, indicated that appellant had between a 20 and 33 1/3 percent permanent impairment of his right arm. The Board found in its November 4, 2003 decision, that Dr. Erlanger's impairment ratings were of limited probative value because they were not derived in accordance with the relevant standards of the A.M.A., *Guides*. *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: October 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member