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

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| **DEBORAH M. CRYDERMAN, Appellant** | ) | |
| **and** | ) | **Docket No. 04-1475** |
| | ) | **Issued: October 13, 2004** |
| **U.S. POSTAL SERVICE, LINCOLN STATION POST OFFICE, Clearwater, FL, Employer** | ) | |

*Appearances:*
*Deborah M. Cryderman, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

### ***JURISDICTION***

On May 14, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated April 26, 2004, finding that she had sustained a three percent permanent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue in this case.

### ***ISSUE***

The issue on appeal is whether appellant has established that she sustained greater than a three percent permanent impairment of the right upper extremity, for which she received a schedule award.

### ***FACTUAL HISTORY***

The Office accepted that on April 4, 2001 appellant, then a 48-year-old letter carrier, sustained a neck sprain/strain, concussion, multiple contusions and right shoulder tendinitis when the postal truck she was driving was rearended by another postal truck. Appellant was off work from approximately April 6 through June 2001 and then performed part-time, restricted duty.

Following emergency treatment, appellant was under the care of Dr. Thomas H. Harrison, a Board-certified neurologist, who submitted reports from April 10 to July 20, 2001, noting appellant's continuing severe cervical spine symptoms with emergence of right shoulder complaints. Beginning on July 26, 2001 appellant was treated by Dr. Chet Janecki, a Board-certified orthopedic surgeon, who diagnosed a post-traumatic chronic cervical sprain, cervical spondylosis with C5-6 with aggravation and post-traumatic subacromial bursitis and tendinitis with a possible labral tear. He submitted periodic reports through November 21, 2001. On December 17, 2001 Dr. Janecki performed a right shoulder bursectomy, debridement of the glenoid labrum to repair a lesion and complex tear and coracoacromial ligament release.[1] Dr. Janecki submitted progress notes through April 2002.

On June 20, 2002 appellant claimed a schedule award. In support of her claim, appellant submitted a May 3, 2002 report from Dr. Janecki. On examination Dr. Janecki observed 120 degrees forward elevation and abduction, 45 degrees external rotation and 30 degrees internal rotation and extension. He noted a positive impingement maneuver. Dr. Janecki opined that appellant's restricted range of right shoulder motion equaled a 20 percent permanent impairment of the right upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a February 14, 2003 report, Dr. Harry J. Collins Jr., an Office medical adviser, reviewed Dr. Janecki's May 3, 2002 findings to determine a permanent impairment rating. The medical adviser found that according to Figure 16-40 of the A.M.A., *Guides*, 120 degrees of forward elevation equaled a 4 percent impairment and 30 degrees of backward elevation equaled a 1 percent impairment. He also found that shoulder abduction limited to 120 degrees equaled a 3 percent impairment according to Figure 16-43 of the A.M.A., *Guides*. According to Figure 16-26, internal rotation of 30 degrees equaled a 4 percent impairment and internal rotation of 45 degrees equaled a 1 percent impairment. The medical adviser then totaled the percentages to arrive at a 13 percent permanent impairment of the right upper extremity.

In an April 18, 2003 report, Dr. Janecki found 150 degrees of forward elevation and abduction of the right shoulder, external rotation of 45 degrees, and internal rotation and extension of 30 degrees. He noted an additional 10 percent impairment due to weakness, pain or loss of sensation. He opined that appellant had reached maximum medical improvement and was permanently restricted in activities of daily living. Dr. Janecki opined that according to the A.M.A., *Guides*, appellant had a 20 percent impairment of the right upper extremity based on chronic pain as explained at page 343 of the A.M.A., *Guides* and restricted motion as set forth on pages 476 to 479 of the A.M.A., *Guides*.[2]

The Office then found a conflict of medical opinion between Dr. Janecki, for appellant and the Office medical adviser, for the government, regarding the percentage of permanent impairment of appellant's right upper extremity. To resolve this conflict, on July 30, 2003 the

[1] Following surgery, appellant was off work through March 1, 2002. She was placed on permanent light duty in April 2002.

[2] In a July 22, 2003 report, Dr. Edward N. Feldman, an attending Board-certified orthopedic surgeon, obtained right shoulder x-rays showing slight narrowing of the acromioclavicular joint.

Office appointed Dr. Vincent E.C. Kiesel, a Board-certified orthopedic surgeon, an impartial medical examiner.

In a September 9, 2003 report, Dr. Kiesel provided a history of injury and treatment and reviewed the medical record. On examination, Dr. Kiesel observed no weakness or atrophy of any shoulder or upper extremity muscle groups. He diagnosed a repaired right rotator cuff tear. Dr. Kiesel found that appellant had reached maximum medical improvement. He then performed a schedule award evaluation of the right upper extremity. On maneuvers of the right shoulder, Dr. Kiesel observed 95 degrees internal rotation, 50 degrees external rotation, 165 degrees forward elevation, 70 degrees backward elevation, 170 degrees abduction and 25 degrees abduction. Dr. Kiesel noted a 25 percent additional impairment due to weakness, atrophy, pain or loss of sensation as appellant's right shoulder symptoms interfered with activities of daily living and she required anti-inflammatory and pain medications. He recommended an impairment rating of 20 to 25 percent of the right upper extremity.

In a November 20, 2003 report, an Office medical adviser reviewed Dr. Kiesel's report and found that he did not apply the fifth edition of the A.M.A., *Guides* correctly as he did not explain why he found a 25 percent impairment of the right upper extremity. By November 24, 2003 letter, the Office requested that Dr. Kiesel submit a supplemental report explaining and clarifying the basis of his schedule award evaluation. In a December 4, 2003 letter, Dr. Kiesel noted that he reviewed Chapter 5, Chapter 16 pages 433 and 521 of the A.M.A., *Guides*, "a needlessly tedious exercise and unless [the Office] can do better, [his] rating [was] 25 percent based on many things in 40 years of experience."

In a March 10, 2004 report, Dr. Collins the Office medical adviser, reviewed Dr. Kiesel's reports and performed a schedule award evaluation using Dr. Kiesel's September 9, 2003 findings. He noted September 9, 2003 as the date of maximum medical improvement. According to Table 16-40 of the A.M.A., *Guides*, forward elevation of 165 degrees equaled a 1 percent impairment and backward elevation of 70 degrees a 0 percent impairment. According to Table 16-43, 170 degrees of abduction equaled a 0 percent impairment and retention of 25 degrees adduction equaled 1 percent impairment. According to Table 16-46, 95 degrees internal rotation equaled a 0 percent impairment and 50 degrees external rotation equaled 1 percent impairment. He noted no impairment for discomfort, pain, weakness or atrophy. The medical adviser then totaled the three separate one percent impairments to equal a three percent permanent impairment of the right upper extremity. He explained that the "alleged weakness [was] not documented. No muscle wasting was reported."[3]

By decision dated April 26, 2004, the Office awarded appellant a schedule award for a three percent permanent impairment of the right upper extremity. The Office found that, although Dr. Kiesel was an impartial medial examiner, his opinion was not entitled to special weight as he did not properly apply the A.M.A., *Guides* and did not provide sufficient clarifying information as requested. The Office found that the weight of the medical evidence rested with

[3] In an April 14, 2004 report, Dr. Joseph M. Sena, an attending Board-certified orthopedic surgeon, noted a positive impingement test of the right shoulder and 5/5 strength of all muscle groups in the upper extremities bilaterally.

the March 10, 2004 report of the Office medical adviser, who properly applied the A.M.A., *Guides*.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[7] If sufficiently rationalized and based upon a proper factual background, the opinion of an impartial medical examiner is entitled to special weight.[8] But when the opinion of the impartial medical specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[9] If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.[10] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act[11] will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[12]

## ***ANALYSIS***

In this case, appellant claimed a schedule award for permanent impairment of the right upper extremity caused by the accepted April 24, 2001 motor vehicle accident. Dr. Janecki,

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.; *Jacqueline S. Harris*, 54 ECAB ____ (Docket No. 02-303, issued October 4, 2002).

[7] 5 U.S.C. § 8123(a); *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

[8] *Mary A. Moultry*, 48 ECAB 566 (1997).

[9] *Harry T. Mosier*, 49 ECAB 688 (1998).

[10] *Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003).

[11] 5 U.S.C. § 8123(a).

[12] *Roger W. Griffith*, 51 ECAB 491 (2000).

appellant's Board-certified orthopedic surgeon, opined that appellant sustained a 20 percent permanent impairment of the right upper extremity. Dr. Collins, an Office medical adviser, found only a 13 percent impairment. To resolve this conflict of medical opinion, the Office appointed Dr. Kiesel, a Board-certified orthopedic surgeon, as impartial medical examiner.

Dr. Kiesel submitted a September 9, 2003 report finding a 20 to 25 percent permanent impairment based in large part on unspecified pain or weakness. An Office medical adviser reviewed Dr. Kiesel's report and found it insufficiently rationalized. Thus, the Office requested that Dr. Kiesel submit a supplemental, clarifying report. In response, Dr. Kiesel submitted a December 4, 2003 letter referring to various portions of the A.M.A., *Guides*. But he still did not explain how he arrived at the offered 20 to 25 percent impairment. The Office then referred Dr. Kiesel's reports to Dr. Collins, the Office medical adviser whose opinion first created the conflict of medical opinion. Dr. Collins opined in a March 10, 2004 report that appellant had a three percent impairment of the right upper extremity. Based on Dr. Collins' opinion as the weight of the medical evidence, the Office awarded appellant a schedule award for a three percent impairment of the right upper extremity.

The Office's procedures indicate that a referral to an Office medical adviser is appropriate after the claimant's attending physician provides a detailed description of the impairment on which a schedule award calculation can be based.[13] But in this case there was a conflict of medical opinion under section 8123(a) of the Act. To properly resolve the conflict, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides.* While an Office medical adviser may review the opinion of the impartial medical examiner, the resolution of the conflict is the responsibility of the impartial medical specialist.[14]

Therefore, the Office erred in its April 26, 2004 decision, by according the weight of the medical evidence on the schedule award issue to Dr. Collins. This circumvented the intent of section 8123(a) of the Act[15] and Board precedent, noted above, which provides that if the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist. Also, as Dr. Collins was on one side of the conflict Dr. Kiesel was appointed to resolve, the Office should have referred Dr. Kiesel's report to another Office medical adviser for review, not to Dr. Collins.[16]

As Dr. Kiesel's opinion is insufficiently rationalized to represent the weight of the medical evidence, the conflict of medical opinion between Drs. Janecki and Collins, the Office medical adviser, remains unresolved. The case must be remanded to the Office for referral of

[13] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

[14] *See Guiseppe Aversa*, *supra* note 10.

[15] *Roger W. Griffith*, *supra* note 12.

[16] *See John W. Slonaker*, 35 ECAB 997 (1984) (the Board found that the Office acted inappropriately, in a schedule award situation, in referring an impartial medical specialist's report for review to an Office medical consultant who was on one side of the medical conflict in question).

appellant to another impartial specialist for an appropriate examination and medical opinion that resolves the outstanding conflict of medical opinion. Following this and any other development deemed necessary, the Office shall issue an appropriate merit decision in the case.

## ***CONCLUSION***

The Board finds that the case is not in posture for a decision as there is an outstanding conflict of medical opinion regarding the percentage of permanent impairment. The case will be remanded to the Office to obtain an appropriate report from an impartial medical specialist, followed by issuance of an appropriate merit decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 26, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this opinion.

Issued: October 13, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member