United States Department of Labor
Employees' Compensation Appeals Board

JOHN S. DYRCON, Appellant	)	
and	)	**Docket No. 04-1153**
	)	**Issued: April 4, 2005**
U.S. POSTAL SERVICE, BEACH STATION, Clearwater, FL, Employer	)	

Appearances:
John S. Dyrcon, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 29, 2204 appellant filed a timely appeal of a February 18, 2004 schedule award of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this schedule award.

ISSUE

The issue is whether appellant has greater than an 18 percent permanent impairment of each arm.

FACTUAL HISTORY

On June 1, 2001 appellant, then a 54-year-old letter carrier, filed an occupational disease claim for pain in both his shoulders, and weakness of his right hand and the fingers of his left hand. He submitted an April 19, 2001 report from Dr. Edward N. Feldman, an orthopedic surgeon, diagnosing bilateral carpal tunnel syndrome and bilateral impingement syndrome of the shoulders.

On June 21, 2001 the Office accepted that appellant sustained bilateral carpal tunnel syndrome and bilateral shoulder tendinitis. The Office authorized bilateral carpal tunnel releases and bilateral shoulder arthroscopic surgery.

On April 8, 2002 appellant underwent surgery on his left shoulder.[1] On June 3, 2002 Dr. Chet J. Janecki, a Board-certified orthopedic surgeon, performed a right carpal tunnel release. In a July 29, 2002 report, Dr. Janecki stated that appellant had reached maximum medical improvement from these surgeries, and that he had 60 degrees of wrist extension, 45 degrees of extension, and grip strength of 35 kilograms (kg), as opposed to 50 kg on the left. Dr. Janecki concluded that appellant had a 10 percent permanent impairment of his right arm based on his carpal tunnel. On August 19, 2002 Dr. Janecki performed a left carpal tunnel release. On September 30, 2002 Dr. Janecki performed surgery on appellant's right shoulder, including a complete rotator cuff repair, partial acromioplasty and clavicular spur excision.

On April 9, 2003 appellant filed a claim for a schedule award. He submitted an April 8, 2003 report from Dr. Janecki stating that appellant had shoulder pain related to motion and on examination of the shoulders, 140 degrees of forward elevation of both, 90 degrees on the right and 110 degrees on the left of abduction, and 45 degrees of external rotation of both. Dr. Janecki stated that appellant had declined further surgery of both shoulders, and concluded, "In accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, the patient has an impairment of 30 percent of the right upper extremity based on the anatomic defect that he has regarding his rotator cuff and the pain and functional deficits of this shoulder." In a February 11, 2003 report, Dr. Janecki reported that appellant's ranges of motion of his wrists were 50 degrees of dorsiflexion, 40 degrees of flexion, and 80 degrees of pronation and supination, and that his grip strengths were unchanged. Dr. Janecki stated that appellant had a 30 percent impairment of the left arm based on a complete rotator cuff tear shown on his most recent magnetic resonance imaging (MRI) scan.

An Office medical adviser reviewed Dr. Janecki's April 8, 2003 report on July 23, 2003 and, applying the A.M.A., *Guides* to the ranges of shoulder motion reported therein, concluded that appellant had an eight percent impairment of the right arm and a seven percent impairment of the left arm. On August 28, 2003 the Office advised Dr. Janecki of the Office medical adviser's rating, and requested that he inform it of the basis for his rating. In a September 8, 2003 report, Dr. Janecki stated that his rating of 10 percent for each arm for the wrists was based on grip strength, and that his rating of 30 percent for each arm for the shoulders "was arrived at by combining the impairment ratings that were awarded to the patient based on loss of motion, chronic pain,[2] and chronic instability of both shoulders[3] secondary to the failure of his rotator cuff repairs, as well as weakness[4] of the movement of the glenohumeral joint."

[1] The operative report describing this surgery is not contained in the case record.

[2] The doctor indicated that he used Table 13-22.

[3] The doctor indicated that he used Table 16-26.

[4] The doctor indicated that he used Table 16-35.

On November 24, 2003 the Office referred appellant, the case record and a statement of accepted facts to Dr. Vincent C. Kiesel, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on the degree of permanent impairment of appellant's arms. In a December 11, 2003 report, Dr. Kiesel noted that the rotator cuff repairs done by Dr. Janecki were unsuccessful, that the persistent numbness and tingling of appellant's carpal tunnel resolved after surgery, that he had persistent tenderness overlying the carpal tunnel that prevented him from applying direct pressure or gripping objects, and that he had pain with shoulder motion. On examination appellant's motion of both shoulders was limited to 140 degrees of abduction, 0 degrees of external rotation, 15 degrees of internal rotation, considerable pain with resistance to holding his arm at 80 degrees forward flexion, a full range of motion of both hands, no demonstrable hypesthesia to light touch or pinprick in the median nerve distribution, and normal grip strength when squeezing a soft object but inability to develop any pressure when squeezing a hard object due to pain produced against the hamate area of his palm. Dr. Kiesel concluded:

> "Under [the] A.M.A., [*Guides*], specifically Table 16-35, range of motion relative value percentage, flexion 4 percent, extension 2 percent, abduction 2 percent, adduction 2 percent, internal rotation 2 percent, external rotation 1 percent. Under strength deficit, flexion 5 percent, extension 2 percent, abduction 2 percent, adduction 2 percent, internal rotation 2 percent, external rotation 2 percent, this is bilaterally. It is a total of 28 percent for each shoulder.
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> "For his carpal tunnel persistent pain in the palm, I would rate for loss of grip strength, according to Table 16-34, page 509. I would rate him as having at least a 10 percent loss of grip strength which corresponds to a 10 percent upper extremity impairment giving him a grand total of 38 percent upper extremity impairment of each arm.
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> "My opinion is also based upon the claimant's subjective complaints, the history obtained by the examinee, the medical records available, as well as the physical findings."

A second Office medical adviser reviewed Dr. Kiesel's report on January 15, 2004 and stated that this physician had not applied the A.M.A., *Guides* properly. The Office medical adviser continued:

> "In the shoulder ROMs [ranges of motion], he states abduction is 140 degrees but states flexion in terms of pain at 80 percent of flexion, not ROM. He does not give shoulder strength grading; Table 16-35. He does not use Table 16-15 for CTS [carpal tunnel syndrome] grading. Ten percent of 10 percent = 1 percent according to Table 16-15. The LOM [loss of motion] is in marked discrepancy to the [physical] findings. See [prior Office medical adviser] for motion calculation.
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> "If asked, I would suggest 8 percent for LOM + 5 percent for weakness + 5 percent for CTS. I would approve 18 percent PPI [permanent partial impairment] RUE [right upper extremity], 18 percent PPI LUE [left upper extremity]."

By decision dated February 18, 2004, the Office issued appellant a schedule award for an 18 percent permanent loss of use of each arm.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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.

Section 8123(a) of the Act[7] states in pertinent part "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In applying this section, the Board has stated, "In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight."[8]

ANALYSIS

The Office found that there was a conflict of medical opinion between Dr. Janecki, the Board-certified orthopedic surgeon who performed appellant's shoulder and wrist surgeries, and an Office medical adviser, on the degree of permanent impairment of appellant's arms. The Board finds that there was no such conflict.

All the Office medical adviser did in his July 23, 2003 note was assign percentages of impairment to the ranges of motion of appellant's shoulders reported in Dr. Janecki's April 8, 2003 report. This medical adviser did not address the ranges of motion of appellant's wrists reported in Dr. Janecki's February 11, 2003 report, even though carpal tunnel syndrome was an accepted condition. Moreover, when the Office medical adviser's July 23, 2003 note was sent to Dr. Janecki with a request to justify his higher percentage of impairment, Dr. Janecki's September 8, 2003 reply referred to specific tables of the A.M.A., *Guides* that he used to rate chronic pain, chronic instability of the shoulders and weakness. Though the report is not clear on how the tables were applied to reach the percentages listed, the tables Dr. Janecki cited were the appropriate tables to rate these impairments.

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] 5 U.S.C. § 8123(a)

[8] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

Dr. Janecki's September 8, 2003 report was never reviewed by an Office medical adviser. The Office medical adviser's failure to address the impairments other than shoulder motion reported by Dr. Janecki precludes his report from having weight equal to that of Dr. Janecki's reports. There therefore was no conflict of medical opinion at the time of the Office's referral to Dr. Kiesel.

The report of Dr. Kiesel, especially as interpreted by a second Office medical adviser, thus created, rather than resolved, a conflict of medical opinion. The reports of both Dr. Kiesel, an Office referral physician, and Dr. Janecki, appellant's attending physician, lack some of the measurements of shoulder and wrist motion listed in the A.M.A., *Guides*, but these reports do contain different findings on examination and different percentages of total arm impairment.

CONCLUSION

The Board finds that there currently is an unresolved conflict of medical opinion in this case, necessitating referral to an impartial medical specialist for resolution.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Issued: April 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member