United States Department of Labor
Employees' Compensation Appeals Board

THOMAS J. ZERELLA, Appellant	)	
and	)	**Docket No. 04-700**
	)	**Issued: February 18, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Thomas J. Zerella, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 20, 2004 appellant filed a timely appeal from the December 9, 2003 merit decision of the Office of Workers' Compensation Programs denying modification of an Office hearing representative's June 16, 2003 decision. The hearing representative affirmed a July 2, 2002 decision granting a schedule award for a one percent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUE

The issue is whether appellant established that he has more than a one percent permanent impairment of the left upper extremity for which he received a schedule award.

FACTUAL HISTORY

On August 26, 1999 appellant, then a 43-year-old mailhandler, filed a traumatic injury claim alleging that on August 24, 1999 he sustained gashes and cuts to the left arm around his elbow and smaller cuts to the elbow itself when he slipped while leaving the breakroom.

Appellant stopped work on the date of injury and he returned to full-duty work effective September 28, 1999. The Office accepted his claim for left forearm lacerations by letter dated September 15, 1999.

On April 5, 2000 appellant filed a claim for a schedule award. In a June 1, 2000 letter, the Office advised appellant to submit a medical report from his treating physician addressing the extent of any permanent impairment caused by the August 24, 1999 employment injury based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

On December 4, 2000 Dr. Michael J. Moore, a neurologist and appellant's treating physician, provided his range of motion findings. He noted that appellant had an estimated 40 percent impairment due to weakness, atrophy, pain or loss of sensation. He recommended a 60 percent impairment rating for appellant's left forearm and indicated that appellant reached maximum medical improvement on December 4, 2000.

On February 5, 2001 an Office medical adviser reviewed appellant's case record, including Dr. Moore's report and the statement of accepted facts. He stated that it was impossible to determine the degree of impairment of the left upper extremity based on the available information. He noted that a second opinion medical examination may be necessary to document the correct range of motion of appellant's left elbow.

By letter dated September 14, 2001, the Office referred appellant, together with the case record, a list of specific questions and a statement of accepted facts, to Dr. Gordon F. Lupien, a Board-certified orthopedic surgeon, for a second opinion medical examination.

Dr. Lupien submitted a report dated October 18, 2001 providing a review of the August 24, 1999 employment injury and appellant's medical background. On physical examination, he found full range of trunk and extremity joint motions except for the left small finger which showed no active flexion at the metacarpophalangeal joint. Appellant's deep tendon reflexes, muscle power and sensation were intact except for a small area of diminished sensation extending distally from a four-inch long healed fine line scar over the left antecubital area. Dr. Lupien found no other sensory deficit and stated that appellant's muscle power and sensation were otherwise intact. On repeated observations, Dr. Lupien reported that appellant could extend his left elbow to within five degrees of full extension and he flexed the left elbow fully, which was comparable to his right elbow. He further reported that the remaining ranges of joint motions were full and no disuse atrophy of the upper extremity musculature was noted. Dr. Lupien stated that both arms measured 11 inches at mid-biceps and both forearms measured 10 inches. He concluded that forearm supination and pronation ranges of motion and power were full and symmetrical. He opined that appellant had made a full and satisfactory recovery from the employment injury. Dr. Lupien stated that the present examination revealed an area of subjectively diminished sensation over the proximal left volar forearm and appellant showed a possible five degree deficit in the left elbow extension which did not represent a loss of physical function. Dr. Lupien reported no other deficits attributable to the August 24, 1999 employment injury and concluded that appellant "probably" reached maximum medical improvement on September 28, 1999 when he resumed his regular work duties. In an accompanying work capacity evaluation dated October 18, 2001, Dr. Lupien did not report any physical limitations for appellant.

On March 25, 2002 the Office medical adviser utilized the fifth edition of the A.M.A., *Guides* to determine the extent of impairment of appellant's left upper extremity. In reviewing Dr. Lupien's report, the Office medical adviser utilized Figure 16-34 at page 472, he found a one percent impairment of the left upper extremity for loss of five degrees of elbow extension. Utilizing Table 16-15 at page 492, he found that the maximum upper extremity impairment due to sensory deficit in the left forearm was five percent. Under Table 16-10 at page 482, he assigned Grade 4 and allowed 6 percent for minimally abnormal sensation that did not interfere with activity. The Office medical adviser determined that 6 percent of 5 percent resulted in a 0.3 percent impairment due to pain. He combined the impairment due to loss of range of motion with the impairment due to abnormal sensation which resulted in a one percent impairment of the left upper extremity. The Office medical adviser concluded that appellant reached maximum medical improvement on September 28, 1999 when he returned to full-time work.

In a July 2, 2002 decision, the Office granted appellant a schedule award for a one percent impairment of the left upper extremity. The award was for 3.12 weeks for the period September 28 to October 19, 1999.

In a July 20, 2002 letter, appellant requested an oral hearing before an Office hearing representative.

Subsequent to the April 8, 2003 hearing, appellant submitted an undated medical report from Dr. Moore to Dr. Andrew C. Dilernia, a Board-certified internist, who noted that he treated appellant on December 4, 2000. Dr. Moore provided a history of appellant's August 24, 1999 employment injury and medical and family background. He noted findings on physical examination, which included a left claw deformity of appellant's left hand. He reported his range of motion findings for the left upper extremity, which included extension of 170 degrees out of 180 degrees and flexion of 45 degrees out of 95 degrees. Dr. Moore diagnosed a partial sensory left ulnar neuropathy from the trauma over the medial left elbow. He stated that fortunately the strength had returned to a significant degree that impaired appellant's work activities only to the extent that he could not lift more than 20 pounds with his left arm. Dr. Moore discussed the possibility of further neurologic evaluation with a view towards surgical reexploration of the left ulnar nerve with appellant who rejected this recommendation as he stated: "I could live with it."

In an undated consultative report to Dr. Elliot F. Steger, a Board-certified internist, Dr. Moore indicated that he conducted a follow-up examination of appellant on March 27, 2003. Dr. Moore provided a history of appellant's employment injury and medical treatment. He noted that, at the time of his examination, pain had not been a problem for appellant and he had no weakness or numbness of the left hand. Dr. Moore noted his findings on physical examination, which included, among other things, that a pinprick remained slightly diminished in the left ulnar nerve distribution dividing the ring finger. He reported that he was pleased with improvement in appellant's ulnar nerve function. Dr. Moore further noted that appellant rejected his recommendation to undergo an electromyogram (EMG).

An April 24, 2003 EMG report by Dr. Gary L. Stanton, a Board-certified neurologist, noted appellant's complaint of numbness and throbbing in the left medial forearm. He stated that appellant sustained a traumatic injury in 1999 to the left elbow region. Dr. Stanton further noted

appellant's complaint of chronic dysfunction of the left small finger, but no numbness of the left hand or fingers. Dr. Stanton's examination findings revealed a left medial antebrachial sensory nerve response absent while a response was present and normal on the right. He stated that these findings indicated a probable traumatic injury to this sensory nerve in the left forearm. Dr. Stanton found that the left median distal motor latency was at the upper limit of normal and the left median sensory velocity was slow at the wrist and slower distally. He stated that these findings were suspicious for the possibility of a left median neuropathy at the carpal tunnel. He also found mild slowing of conduction velocity at the elbow and that the left ulnar sensory response was slow in conduction velocity distally. Dr. Stanton stated that these findings indicated left ulnar entrapment neuropathy at the elbow. He further stated that the left median and ulnar findings raised a question of an underlying polyneuropathy and less likely a brachial neuropathy. As the left ulnar sensory response was present and the left medial antebrachial sensory response was absent, Dr. Stanton noted that an inferior left brachial neuropathy was less likely to explain appellant's numbness in the medial left forearm than direct trauma to the left medial antebrachial sensory branch in the forearm. He concluded that, if necessary, magnetic resonance imaging scan of the cervical spine and brachial plexus could be considered.

By decision dated June 16, 2003, the hearing representative affirmed the July 2, 2002 schedule award finding that the medical evidence did not establish that appellant had more than a one percent impairment of the left upper extremity.

Appellant requested reconsideration in an undated letter received by the Office on September 19, 2003.

On December 2, 2003 the Office medical adviser again reviewed the record and statement of accepted facts. He noted the history of appellant's August 24, 1999 employment injury and his return to full-time work in September 1999. The Office medical adviser reviewed Dr. Moore's March 27, 2003 findings regarding appellant's lack of pain, weakness or numbness of the left hand and his statement that a pinprick remained slightly diminished in the left ulnar nerve distribution dividing the ring finger. He noted Dr. Moore's findings that appellant's left elbow flexed to 45 degrees and extended to 170 degrees. Based on the A.M.A., *Guides*, Table 16-15 at page 492 and Table 16-10 at page 482, Grade 4, the Office medical adviser determined that there was no impairment for minimally abnormal sensation in the left forearm which did not interfere with activity. Utilizing the A.M.A., *Guides*, Figure 16-34 at page 472, the Office medical adviser determined that there was a one percent impairment for 10 degrees loss of extension. He stated that the finding of 45 degrees of flexion of the left elbow was very different from previous reports such as the October 18, 2001 report of Dr. Lupien where no loss of elbow flexion was noted. He further stated that an orthopedist would be considered more experienced in measuring joint motion than a neurologist. The Office medical adviser concluded that appellant had a one percent impairment of the left upper extremity.

On December 9, 2003 the Office denied modification of the June 16, 2003 decision. The Office found that the weight of the medical evidence established that appellant had a one percent impairment of the left upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees who sustain 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 of the Act[3] provides that, if there is a 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.[4]

ANALYSIS

Dr. Moore, appellant's treating neurologist, found that appellant reached maximum medical improvement on December 4, 2000 and he had a 60 percent impairment of his left forearm. By contrast, Dr. Lupien, the Office second opinion specialist, found that appellant "probably" reached maximum medical improvement on September 28, 1999 and upon whose report the Office medical adviser based the schedule award of one percent impairment of the left upper extremity.

The Board finds that a conflict exists in the medical opinion evidence between Dr. Moore and Dr. Lupien as to when appellant reached maximum medical improvement and the extent and degree of any permanent impairment of his left upper extremity resulting from the August 24, 1999 employment injury. In view of this conflict in medical evidence, the case should be remanded to the Office for referral of appellant together with a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to determine if he has reached maximum medical improvement and, if so, whether he has any permanent impairment as a result of his accepted employment injury entitling him to a schedule award. After this and such other development as the Office deems necessary, the Office should issue a *de novo* decision on appellant's entitlement to a schedule award.

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (2003).

[3] 5 U.S.C. § 8123(a).

[4] *Brenda C. McQuiston*, 54 ECAB ___ (Docket No. 03-1725, issued September 22, 2003); *Shirley L. Steib*, 46 ECAB 39 (1994).

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant has established that he has more than a one percent permanent impairment of the left upper extremity for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 9 and June 16, 2003 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further consideration consistent with this decision.

Issued: February 18, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member