United States Department of Labor
Employees' Compensation Appeals Board

SANTIAGO PERALES, Appellant	)	
	)	**Docket No. 05-209**
and	)	**Issued: March 24, 2005**
U.S. BORDER PATROL, El Paso, TX, Employer	)	

Appearances:
Santiago Perales, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 8, 2003 appellant filed a timely appeal from the March 18, 2003 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUES

The issues are: (1) whether appellant's accepted employment injuries caused any permanent impairment to his left upper extremity, entitling him to a schedule award; and (2) whether the Office properly denied his request for reconsideration.

FACTUAL HISTORY

On September 28, 2000 appellant, then a 54-year-old special agent, sustained an injury in the performance of duty while participating in pistol qualifications: "During qualifications (Pistol), shooting unsupported left handed, I felt a sharp shocking pain from my wrist up to my elbow." The Office accepted his claim for left elbow lateral epicondylitis. Appellant sustained another injury on December 19, 2000. Again during pistol qualifications, he felt sharp shocking

pains to his left hand, through his arm and up to his neck. He noted: "I have no strength to my left hand. I can't make a tight fist with my left hand. I have a tighting [sic] and aggravating pain to my neck. I have a constant pain to my left hand and fingers and neck." The Office accepted his claim for left elbow lateral epicondylitis and cervical strain. The record indicates that the Office also accepted appellant's claim for left trigger finger (acquired).

On May 16, 2002 appellant filed a claim for a schedule award. On May 12, 2002 Dr. Barry L. Cromer, an attending Board-certified orthopedic surgeon who performed an authorized trigger release on the left little and ring fingers, evaluated appellant's impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). For the wrist, he reported 40 degrees flexion, 65 degrees extension, 15 degrees radial deviation and 35 degrees ulnar deviation, for a total 4 percent impairment of the upper extremity.

For the ring finger, he reported 50 degrees distal interphalangeal (DIP) flexion, 90 degrees proximal interphalangeal (PIP) flexion and 80 degrees metacarpophalangeal (MP) flexion, for a total 22 percent impairment of that digit. For the little finger, he reported 40 degrees DIP flexion, 75 degrees PIP flexion and 80 degrees MP flexion, for a total 33 percent impairment of that digit. Dr. Cromer converted the finger impairments to a five percent impairment of the hand, or a five percent impairment of the upper extremity.[1]

Dr. Cromer reported grip strength of 40 pounds on the right and 30 pounds on the left, or a 10 percent impairment of the upper extremity according to Table 16-34, page 590, of the A.M.A., *Guides*.

In a supplemental report dated May 14, 2002, Dr. Cromer added that, for the elbow, appellant had 105 degrees flexion, 20 degrees extension, 40 degrees pronation and 60 degrees supination, or a 12 percent impairment due to loss of elbow motion. Combining this 12 percent with the 10 percent impairment for grip strength, the 5 percent impairment for loss of finger motion and the 4 percent impairment for loss of wrist motion, Dr. Cromer concluded that appellant had a total upper extremity impairment of 26 percent.

An Office medical adviser reported that there was no provision under the A.M.A., *Guides* for an impairment award due to decreased elbow motion. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Randy J. Pollet, a Board-certified orthopedic surgeon, for a second opinion.

On October 23, 2002 Dr. Pollet reported that appellant's left elbow motion was complete: flexion 0 to 145 degrees, pronation 90 degrees and supination 90 degrees. Left hand/wrist motion was also complete: wrist flexion 60 degrees, wrist extension 60 degrees, radial deviation 20 degrees and ulnar deviation 30 degrees. MP was 90 degrees and 30 degrees hyperextension. PIP was 100 degrees and 30 degrees extension. DIP joints were 70 degrees flexion and 30 degrees extension. He reported that appellant was neurologically intact. Dr. Pollet concluded:

[1] Although Dr. Cromer reported that he was rating the impairment of appellant's left elbow, wrist, hand and fingers, his findings for the wrist and ring finger were identified as being on the right.

"The patient has no physical impairment. There was no atrophy and no limitation of motion. The surgery was successful."

An Office medical adviser reported that Dr. Pollet's report contained no medical evidence to support a permanent partial impairment of the left upper extremity.

In a decision dated March 18, 2003, the Office denied appellant's claim for a schedule award. The Office found that the medical evidence did not establish any impairment.

Appellant requested reconsideration contending that Dr. Pollet did not properly examine him or perform proper measurements of his range of motion.

In a decision dated July 3, 2003, the Office denied his request for reconsideration.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3]

ANALYSIS

Dr. Cromer, the attending orthopedic surgeon, reported that appellant had a 26 percent impairment of the left upper extremity under the fifth edition of the A.M.A., *Guides*. His findings support a three percent impairment due to loss of wrist flexion[4] and a one percent impairment due to loss of radial deviation, or a four percent impairment of left upper extremity.[5]

Losses reported in ring finger combine for a 20 percent impairment of that digit.[6] Losses reported in the little finger combine for a 32 percent impairment of that digit.[7] These combine

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). FECA Bulletin No. 01-05 (issued January 29, 2001).

[4] Figure 16-28, page 467.

[5] Figure 16-31, page 469.

[6] Figure 16-21, page 461; Figure 16-23, page 463; Figure 16-25, page 464; *see* Combined Values Chart, page 604.

[7] *Id*.

for a 46 percent total digit impairment, or a 5 percent impairment of the hand,[8] or a 5 percent impairment of the upper extremity.[9]

Dr. Cromer's findings support a five percent impairment due to loss of elbow flexion, a two percent impairment due to loss of elbow extension,[10] a three percent impairment due to loss of pronation and a one percent impairment due to loss of supination.[11] These add to an 11 percent upper extremity impairment due to loss of elbow motion.

Finally, using the procedure set forth on page 509 of the A.M.A., *Guides*, normal grip strength of 40 pounds on the right and 30 pounds on the left produces a strength loss index of 25 percent, which under Table 16-34 amounts to a 10 percent impairment of the upper extremity due to loss of grip strength.

With the 11 percent impairment for loss of elbow motion, the 10 percent impairment for loss of strength, the 5 percent impairment for loss of finger motion and the 4 percent impairment for loss of wrist motion, Dr. Cromer's findings in May 2002 support a total upper extremity impairment of 27 percent.

Five months later, Dr. Pollet, the Office referral orthopedic surgeon, disagreed. He reported no physical impairment. His reported findings on physical examination showed full range of motion in all joints. He reported that appellant was neurologically intact and had no atrophy.

The Board finds that a conflict in medical opinion exists between the physician making the examination for the Office and appellant's physician. This conflict is based on the contrasting clinical findings reported by the physicians. Two physicians, following the methods of the A.M.A., *Guides* to evaluate the same patient, should report similar results and reach similar conclusions.[12] Here, the findings of one physician support a 27 percent permanent impairment of the left upper extremity; the findings of the other found no impairment whatsoever.

Section 8123(a) of the Act provides: "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."[13]

The Board will set aside the Office's March 18, 2003 decision and remand the case for referral to an impartial medical specialist to resolve the conflict under section 8123(a) of the Act.

[8] Table 16-1, page 438.

[9] Table 16-2, page 439.

[10] Figure 16-34, page 472.

[11] Figure 16-37, page 474.

[12] A.M.A., *Guides* 17.

[13] 5 U.S.C. § 8123(a).

The Office should advise the impartial medical specialist to follow the protocols of the A.M.A., *Guides*, including the use of a goniometer to measure the range of motion from the prescribed neutral position.[14] After such further development of the evidence as may become necessary, the Office shall issue an appropriate final decision on appellant's claim for a schedule award.

CONCLUSION

This case is not in posture for a decision on whether appellant's accepted employment injuries caused permanent impairment to his left upper extremity, entitling him to a schedule award. Further development of the medical evidence is required. Because the Office must issue a decision on the merits of appellant's claim for a schedule award, the July 3, 2003 decision denying appellant's request for reconsideration is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: March 24, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *See also* 20 C.F.R. § 10.815(g).