

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

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**LARRY M. STAFFARONI, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Milwaukee, WI, Employer**

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**Docket No. 05-1726  
Issued: November 22, 2005**

*Appearances:*  
*Larry M. Staffaroni, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 16, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 5, 2004 granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

**ISSUE**

The issue is whether appellant has more than a nine percent permanent impairment of the right upper extremity for which he received a schedule award.

**FACTUAL HISTORY**

This case is before the Board for the second time. In the prior appeal, the Director moved that the Board set aside the Office's October 29, 2001 schedule award for a nine percent permanent impairment of the right upper extremity. The Director requested that the Board remand the case for further development as the Office medical adviser provided insufficient findings and rationale in reaching his determination of the degree of appellant's permanent impairment. The Director noted that the Office medical adviser based his findings on reports

from Dr. James Lloyd, appellant's attending Board-certified neurosurgeon, and Dr. Vijay Kulkarni, an Office referral physician and a Board-certified orthopedic surgeon.<sup>1</sup> The Director indicated, however, that both physicians computed appellant's impairment based on the whole person. He further noted that Dr. Kulkarni included a spinal injury in reaching his determination and Dr. Lloyd failed to explain his determination. In an order dated June 2, 2003, the Board granted the Director's motion, set aside the Office's October 29, 2001 decision and cancelled oral argument.<sup>2</sup> The Board noted:

“On remand, the Director stated that the Office will seek clarification from the Office medical adviser as to how he arrived at his percentage of impairment and also allow appellant an opportunity to submit additional evidence. Following any necessary further development, the Director stated that the Office will issue a *de novo* decision regarding appellant's entitlement to a schedule award.”<sup>3</sup>

By letter dated November 18, 2003, the Office informed appellant that he had 30 days within which to submit additional evidence supporting his claim for an increased schedule award. Appellant did not respond to the Office's request with evidence relevant to a schedule award determination.

On December 31, 2003 the Office requested that an Office medical adviser review the file and explain the prior nine percent impairment rating and address whether the medical evidence established that appellant had more than a nine percent impairment of the right upper extremity.<sup>4</sup>

In a report dated January 9, 2004, the Office medical adviser noted that the prior nine percent impairment rating “was based on the fact that the claimant only had neck

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<sup>1</sup> The Office referred appellant to Dr. Kulkarni for an opinion regarding his current condition, ability to work, causation and a finding regarding whether he had reached maximum medical improvement.

<sup>2</sup> Order Granting Remand and Canceling Oral Argument (Docket No. 02-1225, issued June 2, 2003).

<sup>3</sup> In a decision dated August 1, 2003, the Board reversed the Office's January 17, 2002 wage-earning capacity determination. *Larry M. Staffaroni*, Docket No. 02-1072 (issued August 1, 2003). The Board found that appellant's actual earnings at the time of his retirement on May 15, 2001 did not fairly and reasonably represent his wage-earning capacity as it was unclear from the record whether the position was appropriate. The Board noted that the issue of whether appellant had more than a nine percent permanent impairment of the right upper extremity was not before it at this time based on its action on a motion of the Director.

<sup>4</sup> The Office further requested an opinion regarding whether to authorize a C4-7 posterior cervical wiring and fusion.

pain radiating into the right shoulder, arm and hand.” He determined that he was unable to calculate appellant’s permanent impairment. The Office medical adviser stated:

“From February 13, 2002, the treating surgeon, Dr. Lloyd has failed to provide any meaningful subjective or objective criteria for review. His subjective criteria are vague without detailed descriptions of the distribution of the claimant’s neck pain (*i.e.*, in relationship to dermatomes) and without consistent reporting of which upper extremity is currently involved.”

The Office medical adviser noted that Dr. Lloyd had not performed a physical examination for two years. He recommended obtaining a comprehensive medical report from Dr. Lloyd “stating clearly the claimant’s symptoms, which arm is affected and how often, the severity of the pain, and the dermatomal distribution of the pain.” The Office medical adviser noted that Dr. Lloyd should be requested to provide detailed upper extremity findings including range of motion measurements and sensory and motor findings. He recommended that the Office refer appellant for another examination if Dr. Lloyd failed to provide the required information.

By letter dated February 4, 2004, the Office requested that appellant submit a report from Dr. Lloyd containing the information detailed by the Office medical adviser within 30 days.

In a decision dated February 4, 2004, the Office found that appellant had not established more than a nine percent permanent impairment of the right upper extremity.

On March 4, 2004 appellant requested an oral hearing, which was held on August 18, 2004.

By decision dated November 5, 2004, the hearing representative affirmed the Office’s February 4, 2004 decision.

### **LEGAL PRECEDENT**

Proceedings under the Federal Employees’ Compensation Act<sup>5</sup> are not adversarial in nature. The Office shares responsibility in the development of the evidence and has an obligation to see that justice is done.<sup>6</sup> Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>7</sup>

### **ANALYSIS**

In the prior appeal, the Board granted the Director’s motion to set aside the Office’s October 29, 2001 schedule award decision finding that appellant had a nine percent permanent impairment of the right upper extremity and remand the case for further development.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *William B. Webb*, 56 ECAB \_\_\_\_ (Docket No. 04-1413, issued November 23, 2004).

<sup>7</sup> *Melvin James*, 55 ECAB \_\_\_\_ (Docket No. 03-2140, issued March 25, 2004).

Specifically, the Director asserted that the medical evidence currently of record was insufficient to support an impairment rating and that the Office medical adviser's determination lacked findings and explanation.

On remand, the Office requested that appellant submit a detailed report regarding the degree of his permanent impairment from Dr. Lloyd, his attending physician. After receiving no response, the Office requested that an Office medical adviser explain the calculation of the previous nine percent impairment rating and determine whether appellant was entitled to an increased schedule award. The Office medical adviser opined that he was unable to determine the degree of appellant's permanent impairment from the medical evidence currently of record. He recommended that the Office obtain a supplemental report from Dr. Lloyd or, if such a report was not forthcoming, refer appellant for a second opinion examination. On February 4, 2004 the Office requested that appellant submit an additional report from Dr. Lloyd. The Office also issued a decision on that date finding that he had not established more than a nine percent permanent impairment of the right upper extremity.

It is well established that proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter.<sup>8</sup> While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>9</sup> It has the obligation to see that justice is done. Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>10</sup>

The Office disregarded the Office medical adviser's determination that additional medical evidence was required in order to determine the extent of appellant's permanent impairment of the right upper extremity. The Board previously remanded the case on the Director's motion for further development of the issue of the degree of appellant's permanent impairment. The case will be remanded to the Office for the referral of appellant to an appropriate medical specialist to determine whether he has a permanent impairment of the right upper extremity due to his accepted employment injury. Following any further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>8</sup> *Anthony P. Silva*, 55 ECAB \_\_\_ (Docket No. 03-2055, issued December 16, 2003).

<sup>9</sup> *Ann Buckmaster*, 53 ECAB 456 (2002).

<sup>10</sup> *See Melvin James*, *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 5 and February 4, 2004 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 22, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board