

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

KENNETH BLACKSHEAR, Appellant)	
)	
and)	Docket No. 05-1470
)	Issued: March 6, 2006
)	
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer)	
)	

Appearances:
Kenneth Blackshear, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 5, 2005 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated July 23, November 12 and December 6, 2004 and May 19, 2005, denying modification of a finding that he was not entitled to a schedule award.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he is entitled to a schedule award for the left upper extremity.

¹ By decision dated August 16, 2004, the Office found that appellant's actual earnings as a part-time modified expediter effective September 2, 2003 fairly and reasonably represented his wage-earning capacity. He has not appealed this decision and thus, it is not before the Board at this time.

FACTUAL HISTORY

On June 13, 2002 appellant, then a 42-year-old truck driver, filed a claim for an injury occurring on that date in the performance of duty. The Office accepted his claim for a cervical herniated nucleus pulposus (HNP) at C4-5.² Dr. Thomas J. Mims, a Board-certified neurosurgeon, performed a C4-5 anterior cervical discectomy and fusion on January 28, 2003. Appellant returned to limited-duty work for four hours per day on September 2, 2003.

In an evaluation dated October 2, 2003, Dr. Mims found that appellant reached maximum medical improvement on August 21, 2003. He opined that he had a 15 percent whole body impairment.³

On December 1, 2003 an Office medical adviser reviewed Dr. Mims' October 2, 2003 report and determined that it showed no impairment to the right or left upper extremity. He noted that the 15 percent impairment found by Dr. Mims was based on the cervical spine and did not reveal radiculopathy of the upper extremities.

By decision dated December 24, 2003, the Office denied appellant's claim for a schedule award on the grounds that the evidence did not establish that he had an impairment of a scheduled member or function of the body.

Appellant requested reconsideration on January 24, 2004. He submitted a report dated January 12, 2004 from Dr. Mims, who addressed appellant's left arm numbness, tingling and occasional loss of grip and arm strength due to his June 13, 2002 employment injury. He opined that his symptoms were "totally compatible with C6-7 radiculopathy." Dr. Mims noted that he received "an additional impairment rating that was carried out recently at the Work Ready facility a couple of days ago" which revealed a 14 percent whole person impairment.⁴

In a report dated April 19, 2004, an Office medical adviser noted that Dr. Mims provided a whole person impairment based on findings of a physical therapist. He could not determine the relationship between the loss of range of motion of the left arm and the accepted cervical HNP and recommended that the Office refer appellant for an impairment evaluation.

By letter dated May 3, 2004, the Office referred appellant to Dr. David G. Vanderweide, a Board-certified orthopedic surgeon, for an impairment evaluation. In an evaluation dated May 25, 2004, he found that appellant reached maximum medical improvement on October 2, 2003 in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. Vanderweide discussed his complaints of numbness

² The Office initially denied appellant's claim in a decision dated August 1, 2002. By decision dated November 18, 2002, the Office reversed its August 1, 2002 decision and accepted the claim for a cervical HNP.

³ A physical therapist evaluated appellant's range of motion of the cervical spine and performed manual muscle testing in a report dated August 21, 2003.

⁴ In a report dated January 8, 2004, an unidentified evaluator listed range of motion findings of the left upper extremity and indicated that appellant had a 24 percent upper extremity impairment for a total impairment of 14 percent of the whole person.

in the left shoulder and arm and diagnosed cervical HNP, “status post surgery with resolution of his symptoms.” He concluded: “As there currently exists no evidence of radiculopathy or neurological impairment of the upper extremities, there is no impairable condition involving the upper extremities.”

An Office medical adviser reviewed Dr. Vanderweide’s report on May 25, 2004 and concurred that appellant had no impairment of the upper extremities.

In a decision dated July 23, 2004, the Office denied modification of its December 24, 2003 decision.

Appellant requested reconsideration on August 6, 2004 and submitted a report dated July 26, 2004 from Dr. Mims, who opined that the report of Dr. Vanderweide was inaccurate. Dr. Mims noted that he “continues to have a lot of radiating numbness down into his left arm...” In an impairment evaluation dated August 16, 2004, an evaluator found that appellant had 17 percent whole person impairment and a 15 percent left upper extremity impairment. Dr. Mims reviewed the evaluation and indicated that he had a “left upper extremity whole person impairment of 17 [percent] and a combined cervical whole person impairment of 15 [percent]...” The Office medical adviser, in a report dated November 1, 2004, found that appellant had no left upper extremity impairment. He noted that “the information in the record does no[t] provide a causal relationship between loss of motion in the upper extremity and the accepted work condition.”

By decision dated November 12, 2004, the Office denied modification of its July 23, 2004 decision.

On November 19, 2004 appellant requested reconsideration of his claim. He submitted a report dated November 16, 2004 from Dr. Mims, who opined that his left arm problems were due to the injury to his cervical spine.

By decision dated December 6, 2004, the Office denied modification of its November 12, 2004 decision.

Appellant again requested reconsideration on December 22, 2004. He submitted a letter dated December 22, 2004 from Dr. Mims correcting a typographical error in his November 16, 2004 report.

An Office medical adviser reviewed the evidence on February 7, 2005 and recommended an impartial medical examination to resolve the conflict between Dr. Mims and Dr. Vanderweide regarding whether appellant had any upper extremity impairment.

By letter dated March 10, 2005, the Office referred appellant to Dr. Martin L. Bloom, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated April 12, 2005, Dr. Bloom discussed appellant's complaints of pain in the left arm and occasional numbness of the fingers. He stated:

"Motor and sensory examination to the upper extremities is intact. No atrophy is noted. Upper arm circumference as measured 10 centimeters above the tip of the olecranon is 44 centimeters bilaterally. Forearm circumference, as measured 10 centimeters below the tip of the olecranon is 36½ centimeters bilaterally. Deep tendon reflexes are 2+ symmetrically at the biceps, triceps and brachioradialis."

Dr. Bloom obtained range of motion measurements of the cervical spine and left upper extremity on April 8, 2005. For the left wrist, appellant had full range of motion with 80 degrees of flexion and extension, 30 degrees radial deviation and 45 degrees of ulnar deviation.⁵ For the left elbow, Dr. Bloom found that he had full range of motion with 130 degrees of flexion, 0 degrees of extension, 90 degrees of pronation and 90 degrees of supination.⁶ For the left shoulder, appellant had 140 degrees of flexion, 20 degrees of extension, 70 degrees of adduction, 90 degrees of abduction, 40 degrees internal rotation and 60 degrees external rotation, but the measurements were found invalid. Dr. Bloom stated:

"It is my opinion that range of motion measurements of [appellant's] shoulder do not represent his actual abilities. There is no physiological reason why he should have stiffness of his right shoulder. [Appellant] actively resisted range of motion of the shoulder and there was no firm end point to the range of motion measurements. I, therefore, do not believe that these measurements should be utilized to provide impairment for loss of motion of the shoulder."

Dr. Bloom diagnosed cervical spondylosis and post anterior cervical discectomy and fusion at C4-5. He opined that appellant reached maximum medical improvement on September 3, 2003. Dr. Bloom found "no other pertinent objective findings other than the fact that [he] had an anterior cervical discectomy and fusion at the C4-5 level." He opined that [appellant] had an 11 percent whole person impairment of the cervical spine. Dr. Bloom stated:

"It is my opinion that no impairment should be awarded for [his] left upper extremity, as it is my opinion that there is no restriction of range of motion. The limited motion noted when shoulder measurements were obtained, in my opinion was voluntary rather than actually indicate[ing] physiologic limitations."

By decision dated May 19, 2005, the Office denied modification of its December 6, 2004 decision. The Office determined that appellant was not entitled to a schedule award as the report from Dr. Bloom did not show an impairment of a scheduled member.

⁵ A.M.A., *Guides* at 467, 469, Figures 16-28, 16-31.

⁶ *Id.* at 472, 474, Figures 16-34, 16-37.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing regulation,⁸ sets 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.⁹ The Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.¹⁰

A schedule award cannot be issued for the back. Section 8101(19) of the Act specifically excludes the back from the definition of "organ" and, therefore, the back does not come under the provisions for payment of a schedule award.¹¹ The 1960 amendments to the Act modified the schedule award provisions to provide for an award of permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an arm or leg even though the cause of the impairment originated in the neck, shoulders or spine.¹²

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.¹³

ANALYSIS

The Office properly determined that a conflict existed between appellant's physician, Dr. Mims, who found that he had an impairment of the left upper extremity due to his accepted condition of a cervical HNP and the Office referral physician, Dr. Vanderweide, who opined that appellant had no impairment of the upper extremities. The Office referred him to an impartial medical examiner, Dr. Bloom, for resolution of the conflict regarding whether he had a permanent impairment of the left upper extremity. In a report dated April 12, 2005, he found normal motor and sensory findings for the upper extremities on physical examination. Dr. Bloom measured appellant's arms as equal in circumference. Regarding range of motion of

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ 20 C.F.R. § 10.404(a).

¹⁰ See FECA Bulletin No. 01-05 (issued January 20, 2001).

¹¹ See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572, 574 (1997).

¹² *Thomas J. Englehart*, 50 ECAB 319 (1999).

¹³ *Solomon Polen*, 51 ECAB 341 (2000).

the left wrist, he found that appellant had full range of motion with 80 degrees of flexion and extension, 30 degrees radial deviation and 45 degrees of ulnar deviation.¹⁴ For the left elbow, Dr. Bloom found that he had full range of motion with 130 degrees of flexion, 0 degrees extension, 90 degrees of pronation and 90 degrees of supination.¹⁵ For the left shoulder, appellant had 140 degrees of flexion, 20 degrees of extension, 70 degrees of adduction, 90 degrees of abduction, 40 degrees internal rotation and 60 degrees external rotation. Dr. Bloom opined, however, that his shoulder measurements “do not represent his actual abilities” as he “actively resisted range of motion of the shoulder and there was no firm end point to the range of motion measurements.” He found that appellant reached maximum medical improvement on September 3, 2003. He concluded that he had a permanent impairment of his cervical spine, but no impairment of the left upper extremity as he had no loss of range of motion except for a voluntary limitation.

When there exist 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 upon a proper factual background, must be given special weight.¹⁶ The Board has carefully reviewed the opinion of Dr. Bloom and finds that as it was based on a proper factual and medical background and is well rationalized, his opinion as the impartial medical specialist is entitled to special weight. While Dr. Bloom found that appellant had a permanent impairment of the cervical spine, the Act specifically excludes the back from the definition of “organ” and, therefore, the back does not come under the provisions for payment of a schedule award.¹⁷ He concluded that appellant had no motor or sensory loss of the left upper extremity and opined that any restriction based on loss of range of motion was voluntary as he resisted the movement and as there was no definite end point to the measurements. Accordingly, appellant has not met his burden of proof to establish that he sustained a permanent impairment of the left upper extremity.

CONCLUSION

The Board finds that appellant failed to establish that he is entitled to a schedule award for the left upper extremity.

¹⁴ A.M.A., *Guides* at 467, 469, Figures 16-28, 16-31.

¹⁵ *Id.* at 472, 474, Figures 16-34, 16-37. According to the A.M.A., *Guides* at Figure 16-34 on page 472, 130 degrees of elbow flexion constitutes a 1 percent impairment. Dr. Bloom, however, specifically found that appellant had no loss of range of motion that did not result from voluntary restriction of movement and no left upper extremity impairment.

¹⁶ *Sharyn D. Bannick*, 54 ECAB 537 (2003).

¹⁷ See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 19, 2005 and December 6, November 12 and July 23, 2004 are affirmed.

Issued: March 6, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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