



## **FACTUAL HISTORY**

This is appellant's second appeal before the Board in this case. By decision and order dated September 13, 2001,<sup>1</sup> the Board affirmed the Office's February 5, 2001 decision terminating his compensation benefits effective March 13, 2000, as he no longer had work-related residuals of an accepted August 19, 1997 head contusion and shoulder abrasions. The Board found that the weight of the medical evidence rested with Dr. Easwaran Balasubramanian, a Board-certified orthopedic surgeon and impartial medical examiner. The Office appointed Dr. Balasubramanian on January 10, 2000 to resolve a conflict between Dr. Enrico Marcelli, an attending osteopath, and Dr. Steven Valentino, an osteopath and second opinion physician, regarding the presence of continued injury-related residuals. Dr. Balasubramanian opined that appellant's cervical pathologies and rotator cuff tears were unrelated to the August 19, 1997 injuries. The law and the facts of the case as set forth in the Board's prior decision and order are hereby incorporated by reference.

On June 20, 2001 appellant claimed a schedule award.

In a March 17, 2000 report, Dr. David Weiss, an attending osteopath, provided a history of injury and treatment. On examination, Dr. Weiss noted paraspinal tenderness from C3 to C7 with restricted range of motion, diminished supraspinatus, biceps and triceps strength bilaterally, diminished grip strength bilaterally, a sensory deficit in the left upper extremity in the C6 and C7 dermatomes and tenderness in the right rotator cuff. He opined that appellant reached maximum medical improvement on February 24, 2000. Dr. Weiss diagnosed post-traumatic subacromial bursitis of the left shoulder, chronic right shoulder impingement and post-traumatic acromioclavicular arthropathy, a rotator cuff tear of the right shoulder, a post-traumatic cervical sprain and strain, cervical radiculopathy and spinal stenosis. He opined that all diagnoses were related to the August 19, 1997 injuries.

Dr. Weiss performed a schedule award assessment. For the right shoulder, Dr. Weiss observed forward elevation of 130/180 degrees abduction of 90/180 degrees and adduction of 65/75 degrees. For the left shoulder, Dr. Weiss observed forward elevation of 140/180 degrees, abduction of 100/180 degrees, adduction of 55/75 degrees and external rotation of 75/90 degrees. He stated that internal rotation was "abnormal" bilaterally. Dr. Weiss opined that, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 32 percent permanent impairment of the right upper extremity as follows: 3 percent for limited shoulder flexion according to Figure 38, page 43; 3 percent for limited shoulder abduction according to Figure 41, page 44; 12 percent for C6 sensory nerve root impairment according to Table 13, page 51 and Table 11, page 48; 10 percent for supraspinatus

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<sup>1</sup> Docket No. 01-1492. Appellant also filed an appeal with the Board, docketed as No. 05-552, pertaining to a July 1, 1987 left elbow fracture accepted under File No. 03-124962. On January 18, 2006 the Board issued an order remanding case under Docket No. 05-552, pertaining to a September 21, 2004 decision affirming a July 17, 2003 schedule award pertaining to the July 1, 1987 injury. The Board notes that, on September 21, 2004, the Office's Branch of Hearings and Review issued decisions in File No. 03-124962 and in the present claim, File No. 03-0229270. Both decisions involved a schedule award issue but for different injuries. The appeal now before the Board pertains only to File No. 03-0229270, the August 19, 1997 head contusion and shoulder abrasions. The July 1, 1987 injury claim is not before the Board on the present appeal.

weakness according to Table 15, page 54 and Table 12, page 49; and 10 percent for diminished grip strength according to Table 34, page 65. Dr. Weiss calculated a 50 percent permanent impairment of the left upper extremity, as follows: 3 percent for limited shoulder flexion according to Figure 38, page 43; 3 percent for limited shoulder abduction according to Figure 41, page 44; 30 percent for left ulnar nerve entrapment at the elbow according to Table 16, page 57; 6 percent for sensory impairment of the left C6 nerve root according to Tables 11 and 13; 6 percent for impairment of the left C7 nerve root according to Tables 11 and 13; and 4 percent for 4/5 motor strength deficit of the supraspinatus and 4 percent for 4/5 motor strength deficit of the triceps according to Table 156, page 54 and Table 12, page 49.<sup>2</sup>

By decision dated March 6, 2002, the Office denied appellant's schedule award claim on the grounds that Dr. Balasubramanian found no work-related disability as of February 8, 2000. The Office found that Dr. Balasubramanian's opinion was entitled to the weight of the medical evidence as he was an impartial medical examiner.

In a March 8, 2002 letter, appellant requested an oral hearing, held June 22, 2004. At the hearing, appellant asserted that the Office could not accord Dr. Balasubramanian the weight of the medical evidence on the schedule award issue, as he was not appointed to resolve a conflict on that issue.

By decision dated and finalized September 21, 2004, the Office hearing representative affirmed the March 6, 2002 decision. The Office found that the weight of the medical evidence on the schedule award issue rested with Dr. Balasubramanian as he was an impartial medical examiner.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> provides for compensation to employees sustaining permanent loss, or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001), has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>4</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a head contusion and shoulder abrasions on August 19, 1997. Appellant claimed a schedule award on June 20, 2001. The Office denied the

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<sup>2</sup> In an undated note, Dr. Marcelli concurred with Dr. Weiss' schedule award evaluation.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

schedule award based on the opinion of Dr. Balasubramanian, a Board-certified orthopedic surgeon and impartial medical examiner. The Office appointed Dr. Balasubramanian on January 10, 2000. He was asked to resolve a conflict between an attending physician and a second opinion physician regarding the presence of injury-related residuals. There was no schedule award claim pending or any conflict regarding a schedule award issue at the time of the Office's January 10, 2000 referral to Dr. Balasubramanian. Therefore, Dr. Balasubramanian is not an impartial medical specialist on the schedule award issue.<sup>5</sup>

The Board finds that the case is not in posture for a decision as there is a conflict of medical opinion between Dr. Weiss, for appellant, and Dr. Balasubramanian, for the government, regarding the presence of ratable upper extremity impairments. Dr. Balasubramanian found various pathologies of the shoulders and cervical spine. He opined that these conditions were not related to the accepted August 17, 1997 injuries. As Dr. Balasubramanian found no work-related impairments, his opinion noted that there were no ratable impairments for schedule award purposes. In contrast, Dr. Weiss found that appellant had work-related ratable impairments of both upper extremities. The Act, at 5 U.S.C. § 8123, states that, 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 accordance with 5 U.S.C. § 8123, the case will be remanded for appointment of an impartial medical examiner to resolve the conflict of opinion regarding the schedule award issue. The Office shall provide the appointed specialist with a copy of the medical record and a statement of accepted facts. Following this and other development deemed necessary, the Office shall issue an appropriate decision in the case.

### **CONCLUSION**

The Board finds that the case is not in posture for a decision due to a conflict in the medical evidence. The case will be remanded to the Office for further development, to be followed by issuance of an appropriate decision.

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<sup>5</sup> *Joseph Roman*, 55 ECAB 233 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 21, 2004 is set aside, and the case remanded for further development consistent with this decision and order.

Issued: February 2, 2007  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board