United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 07-539**
	)	**Issued: June 14, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Lancaster, PA, Employer	)	

Appearances:
Thomas Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 19, 2006 appellant filed a timely appeal from a July 17, 2006 Office of Workers' Compensation Programs' hearing representative's decision, which affirmed the Office's January 26, 2006 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a seven percent permanent impairment of his left upper extremity for which he received a schedule award.

FACTUAL HISTORY

On May 4, 2000 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that he carried his mailbag weighing 35 pounds on one side of his body and it caused him to have radiculopathy of the left arm. He alleged that he realized the disease was caused or aggravated by his employment on February 24, 2000. Appellant did not initially stop

work. The Office accepted his claim for aggravation of cervical radiculopathy and appropriate compensation was provided.[1]

The Office received several diagnostic reports which included electrodiagnostic studies dated October 31, 2000 read by Dr. Ernest M. Baran, a Board-certified physiatrist, who noted that appellant had diffuse left brachial plexopathy and left cervical plexopathy. A March 23, 2000 electromyography (EMG) scan read by Dr. Donald M. McCarren, a Board-certified neurologist, revealed left C7-8 radiculopathy and no electrical evidence of brachial plexopathy. A magnetic resonance imaging (MRI) scan dated March 31, 2000, read by Dr. F. Joshua Barnett, a Board-certified diagnostic radiologist, revealed degenerative changes of the cervical spine at C3-4 and a disc protrusion at C3-4.

In a report dated July 29, 2004, Dr. Nicholas Diamond, an osteopath, noted appellant's history of injury and treatment and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (5th ed. 2001) (A.M.A., *Guides*). He provided examination findings for loss of range of motion, grip strength deficit and sensory deficit involving the C6, C7 and C8 nerve roots and pain. Dr. Diamond's findings for range of motion included a 1 percent impairment for left shoulder flexion and abduction,[2] left grip strength deficit of 10 percent,[3] sensory deficit of 6 percent for the left C6 nerve root,[4] sensory deficit of 6 percent for the left C7 nerve root[5] and a sensory deficit of 6 percent for the left C8 nerve root.[6] He determined that appellant had an impairment of 26 percent of the left upper extremity.

In a report dated November 8, 2004, an Office medical adviser noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. He provided findings for range of motion and sensory deficit/pain. They included two percent for range of motion for shoulder flexion and abduction.[7] The Office medical adviser noted that the C6 nerve root was not involved and referred to the EMG findings which revealed radiculopathy at C7 and C8 but not C6. He also referred to section 16.8a of the A.M.A., *Guides* and noted that impairments due to decreased strength could not be rated in the presence of decreased motion.[8] The Office medical adviser determined that appellant had a seven percent impairment of the left upper extremity.

On November 18, 2004 appellant claimed a schedule award.

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[1] The record reflects that appellant stopped his federal employment in July 2002.

[2] A.M.A., *Guides* 476, Figure 16-40 and 477, Figure 16-43.

[3] *Id*. at 509, Figure 16-34.

[4] *Id*. at 476, Figure 16-40.

[5] *Id.*

[6] *Id.*

[7] *See supra* note 1.

[8] A.M.A., *Guides* 424, Table 15-15 and 15-17.

On December 7, 2004 the Office granted appellant a schedule award for a seven percent impairment of the left upper extremity. The award covered a period of 21.84 weeks from July 29 to December 28, 2004.

By letter dated December 9, 2004, appellant's representative requested a hearing.

On September 13, 2005 the Office hearing representative determined that the case was not in posture for hearing. The Office hearing representative determined that an unresolved conflict remained between Dr. Diamond and the Office medical adviser regarding the nature and extent of appellant's left upper extremity impairment. In particular she noted that the physicians disagreed with regard to whether the evidence supported the presence of sensory deficit or pain involving the nerve root at C6. The Office hearing representative remanded the case, for referral to an appropriate Board-certified specialist for an impartial medical evaluation to resolve the conflict.

By letter dated September 22, 2005, appellant's representative requested that appellant be allowed the opportunity to participate in the selection of the impartial medical adviser.

In a September 30, 2005 letter, the Office advised appellant's representative that selection of the impartial medical specialist was made on a strict rotational basis using appropriate medical directories. The Office informed appellant and his representative that, once the selection was made, they would be advised of the time, date and place of the examination and allowed the opportunity to inform the Office of any disagreement and to provide any evidence in support thereof.

On December 12, 2005 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Edward Resnick, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Diamond and the Office medical adviser regarding the resolution of appellant's accepted condition and work restrictions.

On December 20, 2005 appellant's representative requested a copy of the letter and the statement of accepted facts sent to Dr. Resnick and the reports which were referred to him.

In a January 3, 2006 report, Dr. Resnick noted appellant's history of injury and treatment and conducted an examination. He noted that all cervical motions were smooth and painless and that appellant did not have any tenderness in the cervical, trapezius, thoracic or shoulder area. Dr. Resnick also found that appellant had full range of motion of the thoracic and lumbar spine in all directions. He stated that examination of appellant's arms was negative with full motion of all joints and with negative neurological testing including deep tendon reflexes, motor power and pinprick sensation throughout both upper extremities. Dr. Resnick explained that appellant had full, unrestricted, symmetrical range of motion of all joints of both arms, particularly including all ranges of motion of both shoulders. He noted that appellant's motions were painless. Appellant's pinprick sensation, deep tendon reflexes and motor power were all normal, symmetrical and equal in both arms. Dr. Resnick also noted that he had reviewed diagnostic reports which included an EMG/NCV on October 31, 2000 which contained findings consistent

with incomplete sensory involvement of the left brachial plexus and suggestion of possible cervical sensory radiculopathy. He also advised that an MRI scan of the cervical spine revealed degenerative changes at C3-4 and C4-5. Dr. Resnick noted that there did not appear to be any significant cord or root impingement and determined that appellant had a negative objective orthopedic examination. He noted that appellant had probable cervical disc degenerative syndrome with left cervical radiculopathy which was inactive. Dr. Resnick noted that appellant complained of a "constant discomfort" but that he was not under active treatment and self-medicated. He also noted that appellant currently worked as a security guard and worked as a bus driver in 2004. Dr. Resnick explained that appellant's physical examination did not reveal any significant physical impairment and noted that appellant's complaints were purely subjective. He added that appellant's symptoms "may be compatible with an underlying disc degenerative syndrome." Dr. Resnick added that, "[i]f there was any exacerbation or aggravation of such a syndrome in connection with this man's prior occupation of later carrier, in my opinion this has cleared by this time and I see no present evidence of either aggravation or exacerbation." He opined that appellant reached maximum medical improvement in 2004 and was capable of full-time work. Dr. Resnick concluded that, "in the absence of objective physical findings," appellant had no physical impairment of the left arm.

By decision dated January 26, 2006, the Office found that appellant was not entitled to an increased schedule award as the weight of the medical evidence rested with Dr. Resnick, who found that appellant did not have objective findings supporting physical impairment.

By letter dated January 30, 2006, appellant's representative requested a hearing, which was held on May 26, 2006.[9]

By decision dated July 17, 2006, the Office hearing representative affirmed the Office's January 26, 2006 decision. The Office hearing representative noted that Dr. Resnick's opinion constituted the weight of the evidence. The hearing representative also noted that the evidence supported that Dr. Resnick was properly selected as an impartial medical examiner in accordance with the Office selection process.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[10] set forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[11] The Act, however, does not specify the manner by which the

[9] During the hearing appellant's representative alleged that he could not determine whether the impartial medical examiner was properly selected. He also alleged that his report should not carry the weight because he did not show any measurements for range of motion. Appellant's representative also alleged that the physician relied upon a report which he described as an "EMG/NCV" study of October 31, 2000. However, he noted that it was in fact a "somoto sensory evoked potential testing" report dated October 31, 2000. Appellant's representative also noted that there was an EMG study which was done on March 23, 2000, which reflected abnormal results and evidence of C7-8 radiculopathy on the left side.

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8107.

percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[12] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[13]

Furthermore, the Federal Employees' Compensation Act[14] provides that, if there is 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.[15] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

ANALYSIS

Appellant's claim was accepted for aggravation of cervical radiculopathy. After the Office paid appellant a schedule award for seven percent impairment of the left arm, based on the report of an Office medical adviser, the Office determined that a conflict of medical opinion existed between Dr. Diamond, appellant's treating physician, who opined that appellant had an impairment of 26 percent to the left upper extremity and the Office medical adviser. Therefore, the Office properly referred appellant to an impartial medical examiner, Dr. Resnick, a Board-certified orthopedic surgeon.

In a January 3, 2006 report, Dr. Resnick determined that all cervical motions were smooth and painless, that appellant did not have any tenderness in the cervical, trapezius, thoracic or shoulder area and that appellant had painless and full unrestricted range of motion of the thoracic and lumbar spine and all joints of both upper extremities and both shoulders in all directions. He also found that neurological testing was negative, which included deep tendon reflexes, motor power and pinprick sensation throughout both arms. Dr. Resnick also noted that he had reviewed diagnostic reports including an EMG/NCV on October 31, 2000, which showed an incomplete sensory involvement of the left brachial plexus and possible cervical sensory radiculopathy as well as an MRI scan of the cervical spine which showed degenerative changes at C3-4 and C4-5 with significant cord or root impingement. He concluded that appellant's orthopedic examination was negative and that he had probable cervical disc degenerative syndrome with left cervical radiculopathy which was inactive. Dr. Resnick noted that appellant complained only of a "constant discomfort" but that he was not under active treatment and self-medicated and that appellant's physical examination did not reveal any significant physical impairment and noted that appellant's complaints were purely subjective. He noted that appellant's symptoms "may be compatible with an underlying disc degenerative syndrome."

[12] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

[14] 5 U.S.C. §§ 8101-8193, 8123(a).

[15] 5 U.S.C. § 8123(a); *Shirley L. Steib,* 46 ECAB 309, 317 (1994).

[16] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber,* 46 ECAB 215, 225 (1994).

Dr. Resnick opined "in the absence of objective physical findings," appellant had no physical impairment of the left arm.

The Board finds that Dr. Resnick's January 3, 2006 report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that appellant did not have any greater impairment. He provided an extensive review of appellant's medical history, reported his examination findings and determined that there were no objective findings to correspond with appellant's subjective complaints. Dr. Resnick found no objective evidence of any work-related impairment. He gave a reasoned opinion that despite a myriad of subjective complaints there were no current objective findings of residuals of the accepted work injury. Dr. Resnick answered questions posed by the Office and reiterated that his examination and review of the medical records provided no objective basis on which to reveal any significant physical impairment and advised that appellant's complaints were purely subjective. In these circumstances, the Office properly accorded special weight to the impartial medical examiner's January 3, 2006 findings.

When an impartial medical examiner is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[17] The Board finds that Dr. Resnick's report represents the weight of the medical evidence and established that appellant did not have any objective findings and he was not entitled to a greater impairment.

Accordingly, the Board finds that the evidence supports that appellant has no more than seven percent permanent impairment of the left upper extremity.

On appeal, appellant's representative asserted that Dr. Resnick's report was insufficient to be entitled to carry the special weight of the evidence as his report incorrectly referred to an EMG as being performed on October 31, 2000 when it was actually performed on March 23, 2000 and failed to note the report. However, the record does not reflect that Dr. Resnick's report was incorrect. While he may have inadvertently referred to the date or title of the diagnostic report, he properly referred to and noted the findings contained therein. The Board finds that this argument is without merit. Likewise, appellant's argument that Dr. Resnick's report was flawed because he did not reference the A.M.A., *Guides*, is also without merit since Dr. Resnick opined that appellant had no objective physical findings on which to base any permanent impairment. As appellant's physical examination was normal, there would be no need to apply specific provisions of the A.M.A., *Guides*.

Appellant's representative also asserted that the Office failed to select a referee physician in accordance with the independent rotational selection process. However, he submitted no evidence to support his assertion that any particular aspect of the selection created bias. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias.[18] Appellant's

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[17] *See* footnote 13 *supra.*

[18] *See William Fidurski*, 54 ECAB 146 (2002).

mere allegation that Dr. Resnick was not properly selected does not establish the fact. Therefore, the Board finds this argument to be without merit.

CONCLUSION

The Board finds that appellant has no more than a seven percent impairment of the left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 17, 2006 is hereby affirmed.

Issued: June 14, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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