

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

L.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Akron, OH, Employer**

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**Docket No. 07-1188
Issued: November 16, 2007**

Appearances:

*Alan J. Shapiro, 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 March 23, 2007 appellant filed a timely appeal from a merit decision of an Office of Workers' Compensation Programs' hearing representative dated March 1, 2007. Under 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 sustained any permanent impairment to a schedule member of her body causally related to her accepted right shoulder condition, thereby entitling her to a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

Appellant, a 54-year-old mail processor, filed a Form CA-2 claim for benefits on March 12, 2003, alleging that she developed a right shoulder condition causally related to factors

of her federal employment. The Office accepted the claim for right supraspinatous tendon tear¹ and rotator cuff syndrome of the right shoulder.

Dr. Marcy L. Dickey, an osteopath and appellant's treating physician, performed ameliorative surgery for right shoulder rotator cuff tear, impingement syndrome and acromioclavicular osteoarthritis on September 8, 2003.

On November 18, 2004 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her right upper extremity.

In order to determine appellant's current condition, the Office referred appellant for an examination with Dr. Michael J. Jurenevich, an osteopath. In an August 24, 2005 report, Dr. Jurenevich noted no signs of impingement in the right shoulder and found that appellant had fairly good range of motion with abduction and adduction of the shoulder. He stated that internal and external motions were essentially normal as well. Dr. Jurenevich advised that appellant had no residuals from her accepted right shoulder condition, with an essentially unremarkable examination. He recommended that she be released to full duty.

In a report dated November 10, 2005, Dr. Dickey stated that she agreed with Dr. Jurenevich's opinion, finding that appellant could return to her full level of activity with no restrictions. She stated that appellant had full range of motion in both shoulders with no evidence of instability, focal weakness or impingement syndrome. Dr. Dickey recommended a gradual return to full activity; she noted that, although she had previously recommended full duty for four hours per day, including use of the OCR-BCS machine, appellant had not yet returned to using that equipment. She stated:

"I do recommend that [appellant] return to full duty four hours a day times two weeks to include work with the OCR-BCS machine. She then would return six hours a day times two weeks to full duty including the OCR-BCS machine. During these periods of some limitations of her activities, the remainder of the day should include less aggressive activity. After gradual return to full activity, I recommend that she work full duty with no restrictions.

"I believe that her gradual return to her full work activity with no limitations would provide the safest means to full time full-duty gainful employment. I believe with this type of schedule [appellant] will be considered at maximum medical improvement with her level of maximum medical improvement reached with this gradual return to activities."

In a letter dated November 29, 2005, the Office found that there was a conflict in the medical evidence between Dr. Dickey and Dr. Jurenevich regarding whether appellant had

¹ The Office initially stated that the claim was accepted for left shoulder supraspinatous tendon tear. The Office acknowledged and corrected this mistake on April 14, 2003, when it approved right shoulder decompression surgery.

recovered from her work injury and whether she was able to return to work with restrictions.² The Office referred appellant to Dr. Paul A. Steurer, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated January 9, 2006, Dr. Steurer reviewed the medical history and statement of accepted facts and stated findings on examination. He noted some tenderness and soreness in the right shoulder and stated that appellant had full range of motion in the shoulder with pain at the extremes of motion. Dr. Steurer also advised that he could not detect any gross motor weakness to manual muscle testing of the right shoulder. He found based on his examination and reasonable medical probability that appellant continued to have symptoms related to her work injury and accepted conditions. Dr. Steurer stated that these conditions had not completely resolved. He concluded:

“Currently, her condition does preclude her to perform her normal duties as a mail processor. She is capable of working and in fact is currently working at this time. Her only limitations would be ... doing repetitive overhead use more than two hours per day. I would certainly keep her weight limitations at 30 [to] 40 pounds, which she currently is at. I believe these restrictions are in all probability going to be permanent in nature. Other than routine follow-up I do not think any other, medical treatment is needed at this time.”

In a supplemental report dated January 26, 2006, Dr. Steurer stated:

“On my examination [appellant] had a normal range of motion and normal strength in [her right upper extremity]. As a result of this, her impairment rating would be zero percent. [Appellant] has reached maximum medical improvement for this condition, the exact date I cannot determine.”

By decision dated March 8, 2006, the Office denied appellant’s schedule award claim. The Office found that Dr. Steurer’s opinion represented the weight of the medical evidence.

By letter dated March 27, 2006, appellant’s attorney requested an oral hearing, which was held on January 23, 2007. She submitted an April 18, 2006 report from Dr. Timothy Morley, an osteopath, who found that appellant had 13 percent permanent impairment of the right upper extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (the A.M.A., *Guides*). Dr. Morley stated:

“Examination of the right shoulder reveals some well-healed scars over the right shoulder. There is some tenderness to the acromioclavicular joint as well as superior shoulder joint on the right. Flexion is limited to 120 degrees and abduction is at 110 degrees. Internal rotation is limited to 40 degrees and external rotation is at 50 degrees. Extension is to 30 degrees as is adduction. Referring to Figures 16-40, 16-43 and 16-46, there is a four percent upper extremity impairment for limitation in flexion, one percent impairment upper extremity impairment for extension, three percent upper extremity impairment for

² The Board notes that the Office found a conflict regarding these issues despite the fact that Dr. Dickey stated her agreement with Dr. Jurenevich’s findings and irrespective of the fact that appellant had filed a claim for a schedule award.

abduction, one percent upper extremity impairment for adduction, three percent upper extremity impairment for internal rotation and one percent for external rotation. There is decreased strength with resistance to abduction which is 4/5. Distal pulses are maintained. There is no atrophy. There is no sensory deficit.”

By decision dated March 1, 2007, an Office hearing representative affirmed the March 8, 2006 Office decision. The hearing representative stated in a footnote that it was unclear how the Office determined that there was a conflict between Drs. Dickey and Jurenevich given the fact that Dr. Dickey stated her agreement with Dr. Jurenevich’s findings. He found, however, that Dr. Steurer’s opinion that appellant had a zero percent impairment stemming from her accepted right shoulder condition was entitled to the special weight of an impartial medical examiner and represented the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.⁵

ANALYSIS

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

The Board initially finds that the Office erred in finding a conflict in the medical evidence, regarding the issue of permanent impairment, prior to its March 8, 2006 decision. The Board notes that, in his March 1, 2007 decision, the hearing representative expressed disagreement with the Office’s finding that a conflict existed between Drs. Jurenevich and Dickey. The hearing representative correctly stated in a footnote that Dr. Dickey had agreed with Dr. Jurenevich’s findings. Both physicians agreed that appellant could return to full duty without restrictions; they differed in their opinions only to the extent that Dr. Dickey recommended a gradual return to full duty. Further, although appellant had filed a claim for a schedule award, neither Dr. Dickey nor Dr. Jurenevich submitted an impairment evaluation pursuant to the A.M.A., *Guides* to determine whether appellant has any permanent impairment stemming from her accepted right shoulder condition. Therefore, the hearing representative erred in finding that Dr. Steurer’s opinion merited the special weight of an impartial examiner

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁴ 5 U.S.C. § 8107(c)(19).

⁵ 20 C.F.R. § 10.404.

regarding the issue of permanent impairment.⁶ Nevertheless, as Dr. Steurer's finding that appellant had a zero percent impairment was the only medical opinion in the record bearing on the issue of whether appellant has any permanent impairment stemming from her accepted right shoulder condition, the Office's March 8, 2006 decision was proper and based on the medical evidence of record.

Following the March 8, 2006 decision, appellant requested an oral hearing and submitted Dr. Morley's April 18, 2006 report. Dr. Morley had appellant undergo an impairment evaluation and applied the applicable standards, figures and tables of the A.M.A., *Guides*. Based on this evaluation, he determined that appellant had a 13 percent permanent impairment of the right upper extremity. The Board finds that Dr. Morley's report created a conflict in the medical evidence. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."⁷ Accordingly, the Board will set aside the Office's March 1, 2007 decision and remand the case to the Office for referral to an impartial medical specialist to resolve the conflict in medical evidence regarding whether appellant has any permanent impairment stemming from her accepted right shoulder condition. After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Board finds that the Office's decision must be set aside and remanded to resolve the conflict in medical evidence.

CONCLUSION

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

⁶ The Board notes that Dr. Steurer did not render any findings with any of the tables or figures in accordance with the fifth edition of the A.M.A., *Guides*, which is the current, applicable standard for rating impairments on which schedule awards are based.

⁷ Section 8123(a) of the Act provides in pertinent part, "(i)f there is a 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." See *Dallas E. Mopps*, 44 ECAB 454 (1993).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2007 decision of the Office of Workers' Compensation Programs be set aside consistent with this decision.

Issued: November 16, 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