United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 07-1722**
	)	**Issued: April 14, 2008**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. 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 June 14, 2007 appellant filed a timely appeal from decisions dated July 13, 2006, January 19 and March 28, 2007 of the Office of Workers' Compensation Programs, adjudicating his claim for a schedule award. 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 more than a 13 percent impairment of his right upper extremity, for which he has received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case.[1] By decision dated August 17, 2005, the Board remanded the case for further development of the medical evidence. The facts of this case, as set forth in the prior decisions, are incorporated herein by reference.

On May 8, 2001 appellant, then a 60-year-old maintenance technician, sustained a concussion and right elbow abrasion and right elbow ulnar nerve compression neuropathy on April 23, 2001 while he was rising from the seat of a lawn mower. His right foot slipped on "residue," sand, dirt and leaves and he fell backward, striking his head on the cement floor. Appellant filed a claim for a schedule award.

In order to resolve a conflict in the medical opinion evidence between Dr. Nicholas Diamond, an attending physician, and Dr. Gregory S. Maslow, a referral physician, regarding a diagnosis of appellant's condition and the degree of permanent impairment in his right upper extremity, the Office referred him, together with the case record, statement of accepted facts and a list of questions, to Dr. Howard Zeidman, a Board-certified orthopedic surgeon.

In an October 16, 2003 report, Dr. Zeidman provided a history of appellant's condition and physical findings on examination. He diagnosed right elbow ulnar nerve compression neuropathy. Dr. Zeidman provided an impairment rating based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[2] He stated:

> "I do not believe [appellant] has achieved maximum medical improvement; in fact, he appears to be slowly losing function in the hand. I would certainly agree with Dr. Maslow's comments that surgical decompression would be an appropriate consideration….
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> "Dr. Maslow's use of the Tables 16-10, 11 and 15 are appropriate. However, at this time, I find no sensory loss on examination, but with [appellant's] history and previous reports by Dr. Maslow, I would feel that [G]rade [4] is appropriate. The percentage of sensory deficit of 10 percent multiplied by the maximum percent upper impairment of 7 percent [for the ulnar nerve] would give a 1 percent loss on a sensory basis.
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> "In a similar manner, the [G]rade [4] loss of muscle function is appropriate, with a motor deficit of 25 percent related to this and a maximum according to Table 16-15 of 46 percent [for the ulnar nerve], which multiplied would come to 12 percent. A combined figure would then be 12 percent impairment for the right upper extremity.

[1] *See* Docket No. 05-1234 (issued August 17, 2005).

[2] A.M.A., *Guides* (5th ed. 2001).

> *"I do not feel [appellant] has reached the state of maximum medical improvement, but that additional treatment consisting of surgical decompression would be indicated."* (Emphasis added.)

By decision dated January 26, 2004, the Office denied appellant's schedule award claim on the grounds that the weight of the medical evidence, as represented by the report of Dr. Zeidman, the impartial medical specialist, did not establish that he had reached maximum medical improvement. Therefore, appellant was not eligible for a schedule award for permanent impairment.

Appellant requested a hearing that was held September 28, 2004. He testified that physical therapy had not improved his right elbow condition. However, appellant had decided not to undergo surgery because no physician had been able to assure him that his condition would improve.

By decision dated December 7, 2004, an Office hearing representative affirmed the January 26, 2004 decision.

On January 21, 2006 an Office medical adviser concurred with Dr. Zeidman's impairment rating of 12 percent for appellant's right upper extremity. He indicated that appellant's date of maximum medical improvement was October 16, 2003.

By decision dated February 2, 2006, the Office found that the weight of the medical evidence established that appellant's date of maximum medical improvement for his right upper extremity condition was October 16, 2003, the date of Dr. Zeidman's impairment rating. In a second decision dated February 2, 2006, the Office granted appellant a schedule award for 37.44 weeks[3] from October 16, 2003 to July 4, 2004 based on a 12 percent impairment of his right upper extremity.

On February 9, 2006 appellant requested an oral hearing. By decision dated April 20, 2006, an Office hearing representative remanded the case for further development of the medical evidence. He noted that the conflict in the medical opinion evidence remained unresolved as to appellant's date of maximum medical improvement and the extent of his impairment because the Office did not follow the Board's instructions in its August 17, 2005 decision. The hearing representative stated:

> "Upon return of the case file, the Office should prepare an updated [s]tatement of [a]ccepted [f]acts and questions for the impartial examiner and then refer [appellant], statement of accepted facts questions and case record to Dr. Zeidman for reexamination. The Office should ask Dr. Zeidman for a report which contains his rationalized opinion as to: (1) whether [appellant], who has declined to undergo surgery, has a stable right upper extremity condition and, if so; (2) whether [appellant] has reached maximum medical improvement and; if so,

[3] The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of an upper extremity. 5 U.S.C. § 8107(c)(1). Multiplying 312 weeks by 12 percent equals 37.44 weeks of compensation.

(3) the percentage of impairment of the right upper extremity in accord with the A.M.A., *Guides*, (5th edition). Upon receipt of Dr. Zeidman's supplemental report and any additional development deemed necessary, the Office should issue a *de novo* decision as to the award of compensation benefits."

On May 3, 2006 the Office referred appellant, together with the case record, statement of accepted facts and a list of questions, to Dr. Zeidman. It asked him to examine appellant and answer the specific questions provided. The Office advised Dr. Zeidman that his report must show that he examined appellant and reflect that he reviewed the medical record and the statement of accepted facts in replying to the Office's list of questions. He was asked to respond to each question and provide medical rationale in support of his opinion. The questions provided to Dr. Zeidman are as follows:

"1. The claimant has declined to undergo surgery to treat his ulnar compression neuropathy). Does he have a stable right upper extremity (RUE) condition? Please explain fully.

"2. If his RUE condition is stable, has he reached maximum medical improvement (MMI)? Please clarify.

"3. If he has reached MMI, what is the maximum percentage of impairment to the RUE in accordance with the A.M.A., *Guides* (5th ed[ition])? Please correlate your findings with specific tables and break down your calculations to show how you arrived at your figures.

"Please detail the reasoning that led you to the above conclusions."

In a May 25, 2006 report, Dr. Zeidman stated that, since he examined appellant on October 16, 2003, he had noticed that his decreased sensation and tingling in his right upper extremity was occurring more often. He noted that appellant had declined surgery. Dr. Zeidman stated:

"[Appellant] indicates that no other treatment or surgery has been done. He reports, in fact, that he has had no particular medical care with regard to this problem since his last visit. The statement of accepted facts which accompanies [his] records does not indicate any other treatment as well.

"*PHYSICAL EXAMINATION:* At the time of my examination on May 25, 2006, [appellant] presents with tenderness in the ulna groove, at the right elbow. Tinel's sign is positive in the ulna groove at the elbow. He does have some decreased grasp by manual testing, but there is no consistent evidence of any sensory loss. There is some diminishing of the first dorsal interosseus function and there is some atrophy in the region as well. Circumference in the forearms [as] symmetrical bilaterally. Deep tendon reflexes are intact. There is no evidence of hypothenar atrophy.

"*PRESENT:* At this time, there is no significant change in the physical examination as compared to that noted on October 16, 2003. [Appellant] also

> describes his problems as being essentially the same, although he does indicate that these episodes of decreased sensation and tingling are more common than previously described. His description, at the time of his previous visit on October 16, 2003, was of episodes 'many times during the week' and also indicating that they lasted for several minutes.
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> *SUMMARY:* "At this time, I would feel that [appellant's] level of disability is unchanged from that described in my report of October 16, 2003.
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> "Since [appellant] has refused decompressive surgery, no other treatment options appear to be appropriate and none are recommended.
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> "Finally, I would feel that the situation has remained stable for these past few years; and therefore, I would feel that, absent any surgical intervention, [appellant] has reached a level of maximum medical improvement. For record purposes, I would give as the date at the time of my last evaluation, October 16, 2003."

By decision dated July 13, 2006, the Office denied appellant's claim for more than a 12 percent impairment of his right upper extremity.

On July 20, 2006 appellant requested a hearing that was held on November 13, 2006.

By decision dated January 19, 2007, an Office hearing representative modified the July 13, 2006 decision to reflect that appellant had a 13 percent impairment of his right upper extremity. The hearing representative noted that Dr. Zeidman properly rounded his rating of .7 percent for sensory loss to 1 percent and his rating of 11.5 percent for motor loss to 12 percent.[4] Using the Combined Values Chart at page 604 of the fifth edition of the A.M.A., *Guides*, 1 percent combined with 12 percent yields a 13 percent total impairment of the right upper extremity. The hearing representative directed the Office to pay appellant compensation for an additional 3.12 weeks. On March 28, 2007 the Office granted appellant a schedule award for 3.12 weeks based on an additional one percent impairment of his right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Act[5] and its implementing regulations[6] set 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to

[4] *See* A.M.A., *Guides* 20, section 2.5d, "Interpolating, Measuring and Rounding Off."

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Section 8123(a) of the Act provides 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.[7] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[8]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[9] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[10] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[11]

ANALYSIS

The Board finds that the May 25, 2006 supplemental report of Dr. Zeidman is not sufficient to resolve the conflict in the medical opinion evidence as to appellant's right upper extremity impairment causally related to his accepted right elbow nerve compression neuropathy.

In its May 3, 2006 instructions to Dr. Zeidman regarding his reexamination of appellant, the Office advised him that his report must show that he reviewed the medical record and the statement of accepted facts in replying to the list of questions. However, he did not indicate that he had reviewed the medical record. With regard to appellant's sensory deficit in his right upper extremity, Dr. Zeidman noted that he was experiencing more frequent occurrences of decreased sensation and tingling since the 2003 examination. He indicated tenderness and a positive Tinel's sign regarding the ulna groove at the elbow but stated that there was no consistent evidence of sensory loss on physical examination. However, Dr. Zeidman did not indicate that he performed any other tests regarding sensory deficit, such as a two-point discrimination test, monofilament touch-pressure threshold test, nerve conduction study or

[7] 5 U.S.C. § 8123(a);s*ee also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[8] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

[9] *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[10] *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[11] *Roger W. Griffith*, *supra* note 10; *Harold Travis*, 30 ECAB 1071 (1979).

electromyogram (EMG).[12] Nor did he reference any applicable sections of the A.M.A., *Guides* regarding sensory loss as requested by the Office. Dr. Zeidman did not indicate that there was any change in appellant's motor function of his right upper extremity since the 2003 examination, although he noted diminishing of the first dorsal interosseus function and atrophy. However, he did not indicate that any other tests were performed such as an EMG.[13] Nor did Dr. Zeidman reference any applicable sections of the A.M.A., *Guides* regarding motor function as requested by the Office. Additionally, he did not provide any range of motion measurements of appellant's right upper extremity.[14] Due to these deficiencies, Dr. Zeidman's report is not sufficient to resolve the conflict in the medical opinion evidence.

CONCLUSION

The Board finds that Dr. Zeidman's report is not sufficient to resolve the conflict in the medical opinion evidence. This case must be remanded for further development. On remand, the Office should refer appellant to an appropriate Board-certified specialist for a thorough examination and a well-rationalized determination, based correct application of the fifth edition of the A.M.A., *Guides*, as to the permanent impairment of appellant's right upper extremity. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

[12] *See* A.M.A., *Guides* 481-83, 16.5b "Impairment Evaluation Methods," "Grading Sensory Deficits or Pain;" 445-46, 16.3a, "Clinical Evaluation;" 306-08, 13.1b, "Description of Clinical Studies," "Nerve conduction and needle EMG studies."

[13] *See id.* at 483-84, "Grading Motor Deficits and Loss of Power."

[14] *See id.* at 470-74, "Elbow Motion Impairment."

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 28 and January 19, 2007 and July 13, 2006 are set aside and the case is remanded for further development consistent with this decision.

Issued: April 14, 2008
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