United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 08-174**
	)	**Issued: April 25, 2008**
U.S. POSTAL SERVICE, BULK MAIL FACILITY, Jersey City, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 24, 2007 with respect to 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 16 percent permanent impairment to his left upper extremity.

FACTUAL HISTORY

On July 29, 2003 appellant sustained a left thumb injury in the performance of duty when his glove got caught in a timing belt pulley. Surgery was performed on July 29, 2003 that resulted in a partial amputation of the left thumb. The Office accepted the claim for partial left thumb amputation.

In a report dated October 11, 2004, Dr. David Weiss, an osteopath, opined that appellant had a 28 percent left upper extremity impairment. He based his impairment rating on sensory deficit, pain, loss of grip strength and loss of range of motion, as well as for the amputation itself. An Office medical adviser opined in a June 19, 2005 report that appellant had a 25 percent left arm impairment. The medical adviser indicated that a pain impairment of three percent was not appropriate as no pain questionnaire was provided.

The Office found a conflict in the medical evidence under 5 U.S.C. § 8123(a) and appellant was referred to Dr. Paul Jones, a Board-certified orthopedic surgeon. An Office memorandum dated June 29, 2005 indicated that Dr. Jones was not selected through use of the Physicians Directory System (PDS), but through another physician's listing. In a report dated July 29, 2005, Dr. Jones provided a history and results on examination. He indicated that the amputation was through the distal half of the distal phalanx, with the interphalangeal (IP) joint intact. Dr. Jones stated that the impairment for the amputation was 40 percent of the thumb or 10 percent of the left hand.[1] He reported that appellant had mild numbness without significant pain and he did not give an additional impairment.

By report dated August 12, 2005, an Office medical adviser opined that appellant had a 16 percent left upper extremity impairment. The medical adviser indicated that the thumb impairment for the amputation was 40 percent, with a 5 percent impairment for sensory loss. According to the medical adviser, a 45 percent thumb impairment was a 16 percent upper extremity impairment.

In a decision dated September 23, 2005, the Office issued a schedule award for a 16 percent permanent impairment to the left upper extremity. The period of the award was 49.92 weeks commencing October 11, 2004.

Appellant requested a hearing before an Office hearing representative, which was held on March 2, 2006. By decision dated June 5, 2006, the Office hearing representative set aside the schedule award. The hearing representative found that a conflict in the medical evidence had not existed, since Dr. Weiss and the Office medical adviser essentially agreed as to the impairment rating. The hearing representative further determined that Dr. Jones had not properly been selected as a referee physician, since the PDS system had not been used. The hearing representative, found a conflict in the evidence now existed between Dr. Weiss and Dr. Jones and the case was remanded for resolution of the conflict.

The Office referred appellant to Dr. Marc Appel, a Board-certified orthopedic surgeon, for a referee examination. In a report dated October 21, 2006, Dr. Appel provided a history and results on examination. He reported range of motion of the IP joint as 0 to 45 degrees, range of motion for the metaphaloangeal (MP) joint 0 to 40 degrees. Dr. Appel indicated that appellant was able to abduct to 70 degrees, adduct to the index finger area and oppose to the little finger. He also reported intact sensation to the skin. Dr. Appel stated that appellant reported pain when pressure was applied to the tip and denied numbness or tingling. With respect to the degree of

[1] A 40 percent thumb impairment is a 16 percent hand impairment or a 14 percent upper extremity impairment. American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), 438 Tables 16-1 and 16-2.

permanent impairment, he opined that the level of amputation was at 30 percent. As to range of motion, Dr. Appel indicated that the IP joint impairment was a one percent upper extremity impairment. He further stated:

> "In view of all date reviewed, I would concur with the previous examination performed by Dr. Jones of a 16 percent impairment of the left upper extremity. This 16 percent impairment of the upper extremity would be inclusive of Table 16.4, page 440. Impairment percentage of amputation of thumb at level of IP joint was listed at 11 percent. It is noted that the amputation level was distal to such. This would include loss of motion, which correlated to a [one to two] percent impairment. This would take into addition the sensory deficit and pain as described by the patient. There is a lack of documentation to support any impairment greater than the 16 percent."

In a report dated November 18, 2006, an Office medical adviser stated that he agreed with Dr. Appel.

By decision dated November 21, 2006, the Office determined that appellant did not have more than a 16 percent left upper extremity impairment.

Appellant requested a hearing before an Office hearing representative, which was held on March 20, 2007. He argued that Dr. Appel was not properly selected as a referee as other physicians were bypassed Appellant also argued that Dr. Jones' report should have been excluded from the record.

By decision dated May 24, 2007, the Office hearing representative affirmed the November 21, 2006 Office decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[2] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[3]

[2] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[3] *A. George Lampo*, 45 ECAB 441 (1994).

ANALYSIS

The Office found that a conflict under 5 U.S.C. § 8123(a) existed between attending physician, Dr. Weiss and Dr. Jones.[4] In this regard, appellant argued that Dr. Jones' report should have been excluded, as he was not properly selected in accord with Office procedures. The Board notes that the Office hearing representative, in the June 5, 2006 decision, found that the record did not establish a conflict at the time of the referral to Dr. Jones. There was, however, a "disagreement" as the Office medical adviser found that the pain impairment utilized by Dr. Weiss was not established. The Office did not properly select Dr. Jones as a referee physician, since he was not selected based on use of the PDS system in accord with Office procedures.[5] The opinion of Dr. Jones is not entitled to the special weight accorded to a referee physician, but that does not require that his report be excluded. The Board has not required exclusion of medical reports when there is a procedural violation in the selection that does not involve an issue of undue influence or impartiality.[6]

Dr. Jones is therefore considered as a second opinion physician.[7] The Board notes that, while Dr. Jones referred to a 40 percent thumb impairment as a 10 percent hand impairment; it is a 16 percent hand impairment or a 14 percent upper extremity impairment. There remained an unresolved conflict in the medical evidence as to the degree of permanent impairment resulting from the left thumb injury.

The Office referred appellant to Dr. Appel as a referee physician. Appellant argued at the March 20, 2007 hearing that Dr. Appel was not properly selected. He did not raise this argument prior to the examination by Dr. Appel, nor did he provide a reason other than a general allegation that other physicians were bypassed without sufficient explanation. Counsel did not raise a timely objection or provide a valid reason for this stated objection. Therefore the Board finds that the evidence does not establish an error in the selection of Dr. Appel as a referee physician.[8]

Dr. Appel provided an opinion that appellant had a 16 percent left arm impairment. He did not, however, provide a clear explanation of how he calculated the impairment. With respect to the amputation itself, Dr. Appel indicated that he would find a 30 percent thumb impairment. Table 16-4 provides a 50 percent thumb impairment or an 18 percent arm impairment, for amputation at the IP level.[9] As Dr. Appel noted, the amputation was above the IP level and

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[4] This section provides: "If there is a disagreement between the physician making the examination for the Unites States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[5] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (May 2003).

[6] *See Terence R. Stath*, 45 ECAB 412, 421 (1994). Exclusion of medical reports is required, for example, when leading questions have been posed or a medical report is obtained through telephone contact with the Office.

[7] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[8] *See Willie M. Miller*, 53 ECAB 697 (2002) (appellant did not raise objection to selection of referee physician until after claim was denied and raised only general allegations the selection was improper).

[9] A.M.A., *Guides* 440, Table 16-4. The conversion from thumb impairments to upper extremity impairments is provided in Tables 16-1 and 16-2.

Figure 16-4 does indicate that a 30 percent thumb impairment would be appropriate.[10] A 30 percent thumb impairment corresponds to an 11 percent arm impairment.

Dr. Appel's report failed to adequately explain how he calculated the remaining five percent arm impairment. He initially discussed only a one percent impairment for IP loss of motion, but later referred to a one to two percent impairment for loss of motion. The A.M.A. *Guides* provide tables for loss of motion due to loss of flexion/extension in the IP joint and the MP joint. In addition, there are impairment ratings for loss of abduction, adduction and thumb opposition.[11] Dr. Appel did not specifically discuss the MP joint, although the reported 0 to 40 degrees would result in a thumb impairment. He also reported adduction to the index finger, which would appear, pursuant to Figure 16-18 and Table 16-18b, to result in additional impairment for loss of motion. Dr. Appel did not provide thumb adduction in centimeters as required by the A.M.A., *Guides* and did not discuss these tables.

According to Dr. Appel, the 16 percent impairment included "the sensory deficit and pain as described by the patient." It is not clear what percentage he assigned to sensory deficit and pain or how it was calculated. While other medical reports referred to sensory deficit, Dr. Appel indicated that appellant did not report numbness or tingling and it is not clear whether he performed two point discrimination assessment or how he evaluated sensory deficit.[12] As to pain, the A.M.A., *Guides* refers to pain associated with amputation and the methods of evaluation,[13] but Dr. Appel did not explain how he determined an impairment for pain.

The case will be remanded to the Office to request that Dr. Appel provide a supplemental report that discusses the above issues and provides a clear explanation as to how the doctor derived at his impairment rating. If he is unable to resolve the issues, the Office should refer appellant for another referee examination and secure a rationalized medical report on the relevant issues. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

Dr. Appel, the referee physician, did not properly resolve the conflict in the medical evidence and the case will be remanded to the Office for further development.

[10] *Id.* at 443, Figure 16-4.

[11] *Id.* at 450-460, section 16.4.

[12] *See id.* at 445, section 16.3

[13] *Id.* at 444, section 16.2d.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 24, 2007 and November 21, 2006 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 25, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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