United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 08-951**
	)	**Issued: September 22, 2008**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, PA, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 13, 2008 appellant filed a timely appeal from a September 14, 2007 decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed a March 16, 2007 decision of the Office denying her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether appellant is entitled to a schedule award for permanent impairment to her right upper extremity.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated March 4, 1998, the Board affirmed a September 6, 1995 hearing representative's decision and a December 12, 1994

Office decision terminating appellant's compensation benefits on the grounds that her injury-related disability had ceased.[1]

On April 8, 1993 appellant, then a 44-year-old tax technician, sustained an injury to her right upper extremity. On January 4, 1994 the Office accepted her claim for right ulnar neuropathy and cervical radiculitis.

On January 10, 1994 the Office's second opinion examiner, Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon, concluded that appellant was no longer disabled as a result of her accepted condition. Appellant's treating physician, Dr. John Bowden, an osteopathic practitioner, continued to opine that appellant was totally disabled as a result of her accepted injury. In order to resolve the conflict in medical opinion, the Office referred appellant to Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 19, 1994, Dr. Shlomchik opined that appellant was not disabled from her date-of-injury position and that her accepted condition had resolved. His examination of the right shoulder revealed full passive and active range of motion. Dr. Shlomchik diagnosed transient peripheral ulnar nerve symptoms, resolved. He found no evidence of a right peripheral ulnar nerve neuropathy or of a cervical radiculopathy.

On December 12, 1994 the Office terminated appellant's compensation benefits on the grounds that the effects of her work-related injury had ceased, finding that Dr. Shlomchik's October 19, 1994 report represented the weight of medical evidence.[2] By decision dated September 6, 1995, an Office hearing representative affirmed the December 12, 1994 decision on the grounds that the injury-related disability had ceased. In a decision dated March 4, 1998, the Board affirmed the termination of appellant's compensation benefits, finding that she had no continuing disability resulting from her accepted injury.

On October 13, 1998 appellant, through her representative, requested a schedule award. In support of her request, she submitted a September 16, 1998 report from Dr. Nicholas Diamond, a Board-certified osteopath, specializing in osteo manipulative medicine, who opined that appellant had a 30 percent permanent impairment of her right upper extremity. He provided a history of injury and treatment, as well as findings on examination. Dr. Diamond diagnosed C3-4, C4-5 central herniated nucleus pulposus, unresolved; right C5 radiculitis, unresolved; chronic right shoulder girdle and cervical spine strain and sprain; and tenosynoviitis of the right wrist and elbow. Examination of the cervical spine revealed paravertebral muscle spasm and tenderness on the right. Range of motion testing revealed: forward flexion -- 40/80 degrees; backward extension -- 30/45 degrees; left lateral flexion -- 30/45 degrees; right lateral flexion -- 30/45 degrees; and right and left rotation -- 60/80 degrees. Foraminal compression and Travell's

[1] Docket No. 96-573 (issued March 4, 1998). The Board notes that the issue addressed previously by the Board was whether the Office had properly terminated appellant's wage-loss compensation benefits on the grounds that she had no continuing disability. The Board did not address appellant's right to receive medical benefits under the Federal "Employees' Compensation Act.

[2] In a letter accompanying its decision, the Office informed appellant that her claim for compensation and medical benefits had been "disallowed" and that further medical treatment was not authorized.

trigger points were positive. A right shoulder examination revealed periscapular, acromioclavicular and rhomboid tenderness. Range of motion testing showed cross-over adduction of 65/75 degrees and external rotation of 90 degrees. Internal rotation was to L5 with pain. Dr. Diamond found supraspinous muscle weakness of 4/5. Range of motion testing of the right wrist revealed: dorsifllexion -- 0 to 50/75 degrees; palmar flexion -- 0 to 50/75 degrees; radial deviation -- 0 to 15/20 degrees; ulnar deviation -- 0 to 25/35 degrees. Grip strength testing reflected 14 kilograms (kg) of force strength in the right hand, versus 24 kg in the left. Sensation was decreased to pinprick and light touch in the right upper extremity. Motor strength testing revealed a grade of 4/5. Dr. Diamond provided an impairment rating in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). Ratings for range of motion deficits for the right wrist were as follows: two percent for dorsiflexion, and two percent for palmer flexion pursuant to Figure 26 at page 36; one percent for radial deviation and one percent for ulnar deviation pursuant to Figure 29 at page 38. Dr. Diamond found a two percent range of motion deficit for right shoulder flexion under Figure 38 at page 43, and a one percent rating for right shoulder abduction under Figure 41 at page 44. Referring to Table 11 at page 48, he provided a four percent rating for a right C5 sensory deficit. Dr. Diamond awarded a 20 percent rating for grip strength deficit according to Table 12 at page 49, for a total combined right upper extremity impairment rating of 30 percent.

In a letter dated December 16, 1999, the Office informed appellant's representative that appellant was not entitled to a schedule award, since a determination had been made that she had no further residuals of the work-related injury. On January 27, 2000 the representative contended that a finding that appellant is not disabled for wage-loss purposes, does not preclude her entitlement to a schedule award.

On March 14, 2000 the Office medical adviser reviewed Dr. Diamond's September 16, 1998 report at the Office's request. Noting that the Board had determined that appellant had no further residuals of her accepted condition as of December 12, 1994, he stated that any impairment that may have developed after that date was not attributable to the April 8, 1993 injury. He further indicated that, although neuropathies and radiculopathies can be transient, there was no evidence of permanent nerve damage which would lead to a schedule award in the evaluations considered by the Board.

In numerous letters, including correspondence dated May 26 and 30 and July 19, 2000, the Office informed appellant's representative that appellant was not entitled to a schedule award because the Board had determined that she had no further injury-related disability. On June 27, 2003 the representative insisted that the Office issue a decision on appellant's schedule award request.

In a decision dated March 16, 2007, the Office denied appellant's claim for a schedule award. It found that Dr. Diamond's report was insufficient to overcome the weight of medical evidence, which was represented by Dr. Shlomchik's October 19, 1994 report.

On March 20, 2007 appellant, through her representative, requested an oral hearing, which was held on July 26, 2007. Appellant submitted a report of a nerve conduction velocity

and electromyogram study dated December 21, 2006 from Dr. Kenneth Izzo, a Board-certified physiatrist, who reported evidence of chronic right C6 and C7 cervical radiculopathy.

By decision dated September 14, 2007, an Office hearing representative affirmed the March 16, 2007 decision denying appellant's schedule award request. The representative found that Dr. Diamond's September 16, 1998 report was insufficient to equal or outweigh the report of Dr. Shlomchik, who found that appellant had no continuing disability or medical condition causally related to the April 8, 1993 accident at the time of his October 19, 1994 examination.

LEGAL PRECEDENT

The schedule award provision of the Act[3] and its implementing regulation[4] 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 of loss of use.[5] However, neither the Act nor the regulation specify the manner in which the percentage of impairment 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 all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from his physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[8]

Proceedings under the Act are not adversarial in nature; nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[9] Once the Office has begun an

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

[4] 20 C.F.R. § 10.404.

[5] 5 U.S.C. § 8107(c)(19).

[6] *See supra* note 4.

[7] Federal (FECA) Procedure Manual, Part 3 – Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (November 2002); *see Jesse Mendoza*, 54 ECAB 802 (2003).

[8] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[9] *John J. Carlone* , 41 ECAB 354, 359-60 (1989).

investigation of a claim, it must pursue the evidence as far as reasonably possible.[10] The Office has an obligation to see that justice is done.[11]

ANALYSIS

The Board finds that this case is not in posture for a decision. The Office found that appellant was not entitled to a schedule award for permanent impairment of her right upper extremity. The Office reasoned that, as the Office and the Board had previously determined that the effects of her work-related injury had ceased effective December 12, 1994, any impairment that may have developed after that date could not possibly be attributable to the April 8, 2003 employment injury. In its September 14, 2007 decision, the Office hearing representative relied on the October 19, 1994 report of Dr. Shlomchik, who served as the impartial medical examiner to resolve a conflict as to whether appellant was disabled at that time and found that the September 16, 1998 report of Dr. Diamond, who opined that appellant had a 30 percent permanent impairment of the right upper extremity, was insufficient to overcome the weight of medical evidence, which was represented by Dr. Shlomchik's October 19, 1994 report. The Board finds that further development of the medical evidence is required to determine whether appellant is entitled to a schedule award for impairment to her right upper extremity.

In support of her request for a schedule award, appellant submitted a September 16, 1998 report from Dr. Diamond, who opined that she had a 30 percent permanent impairment of her right upper extremity. After providing a history of injury and treatment, and detailed findings on examination, Dr. Diamond diagnosed C3-4, C4-5 central herniated nucleus pulposus, unresolved; right C5 radiculitis, unresolved; chronic right shoulder girdle and cervical spine strain and sprain; and tenosynoviitis of the right wrist and elbow. Based on the results of his examination, he provided impairment ratings in accordance with the fourth edition of the A.M.A., *Guides*, which was in use at the time of his report. Ratings for range of motion deficits for the right wrist were as follows: two percent for dorsiflexion, and two percent for palmer flexion pursuant to Figure 26 at page 36; one percent for radial deviation and one percent for ulnar deviation pursuant to Figure 29 at page 38. Dr. Diamond found a two percent range of motion deficit for right shoulder flexion under Figure 38 at page 43, and a one percent rating for right shoulder abduction under Figure 41 at page 44. Referring to Table 11 at page 48, he provided a four percent rating for a right C5 sensory deficit. Dr. Diamond awarded a 20 percent rating for grip strength deficit according to Table 12 at page 49, for a total combined right upper extremity impairment rating of 30 percent.

On March 14, 2000 the Office medical adviser dismissed Dr. Diamond's September 16, 1998 report as nonprobative, stating that there was no objective evidence of permanent nerve damage which would lead to a schedule award in the evaluations considered by the Board. As the Board had determined that appellant had no further residuals of her accepted condition as of December 12, 1994, the adviser concluded that any impairment that may have developed after that date was not attributable to the April 8, 1993 injury. In accordance with the Office medical adviser's report, the Office found that Dr. Diamond's report was insufficient to overcome the

[10] *Edward Schoening*, 41 ECAB 277, 282 (1989).

[11] *Lourdes Davila*, 45 ECAB 139, 143 (1993).

weight of medical evidence, which was represented by Dr. Shlomchik's October 19, 1994 report. On September 14, 2007 the representative affirmed the Office decision.

The Board finds that the Office inappropriately accorded special weight to Dr. Shlomchik's October 19, 1994 report. Although he served as an impartial medical examiner, his report was prepared for the purpose of resolving a conflict regarding appellant's disability and residuals at that time. Dr. Shlomchik was not asked to render an opinion on, nor did he address, the degree of appellant's permanent impairment pursuant to the A.M.A., *Guides*, or the date of maximum medical improvement. Therefore, not only is Dr. Shlomchik's report not entitled to the special weight accorded to impartial medical examiners, but it is of limited probative value on the schedule award issue. Moreover, his October 19, 1994 report does not constitute current medical evidence, as his examination occurred 4 years prior to Dr. Diamond's report, and nearly 13 years prior to the decisions denying appellant's schedule award claim.

In its March 4, 1998 decision, based on Dr. Shlomchik's opinion that the injury-related disability had ceased, the Board affirmed the termination of appellant's compensation benefits, finding that she had no continuing disability resulting from her accepted injury as of December 12, 1994. However, a determination that appellant was not disabled on December 12, 1994, does not preclude the possibility that appellant might become disabled or develop an impairment related to her accepted condition at a later date. Office regulations and procedures provide for payment of compensation when a claimant sustains a recurrence of disability[12] and for an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury.[13] In this case, there was no previous schedule award determination. However, interpreting Dr. Shlomchik's opinion as a conclusion that appellant had no permanent impairment causally related to her accepted injury on December 12, 1994, appellant has submitted medical evidence regarding a permanent impairment at a date subsequent to Dr. Shlomchik's examination. Therefore, she is entitled to a *de novo* decision on the medical evidence.

The Board notes that the Office medical adviser did not address any of the physical findings made by Dr. Diamond, or Dr. Izzo's December 21, 2006 report; nor did he express an opinion on the date of maximum medical improvement. Therefore, his report is of limited probative value.

In his September 16, 1998 report, Dr. Diamond did not sufficiently explain his opinion as to the degree of appellant's permanent impairment. Additionally, by virtue of its date, his

[12] 20 C.F.R. § 10.5(x) (2002).

[13] *Linda T. Brown*, 51 ECAB 115 (1999). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995). This section states that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on the situation presented here: medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated. *See also B.K.*, 59 ECAB ___ (Docket No. 07-1545, issued December 3, 2007) (a claimant may have an employment-related condition that results in permanent impairment without any disability for work or the need for continuing medical treatment).

opinion does not contain references to the fifth edition of the A.M.A., *Guides*, which is currently in effect. However, his report is generally supportive of her claim for a schedule award and constitutes sufficient evidence to warrant further development of the issue by the Office.[14] It is well established that proceedings under the Act are not adversarial in nature,[15] and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[16] The Office has an obligation to see that justice is done.[17] The case will therefore be remanded for further development on the issue of whether appellant has a permanent impairment of the right upper extremity which would entitle her to a schedule award and the date of maximum medical improvement. After this and such further development deemed necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant is entitled to a schedule award for a permanent impairment of her right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the September 14 and March 16, 2007 decisions of the Office of Workers' Compensation Programs be set aside and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: September 22, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[14] *Horace Langhorne*, 29 ECAB 820 (1978).

[15] *John J. Carlone*, 41 ECAB 354 (1989).

[16] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[17] *William J. Cantrell*, 34 ECAB 1233 (1983).