

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

_____)	
J.B., Appellant)	
)	
and)	Docket No. 09-310
)	Issued: August 18, 2009
U.S. POSTAL SERVICE, POST OFFICE,)	
Richmond, VA, Employer)	
_____)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2008 appellant, through her attorney, filed a timely appeal from May 21 and September 24, 2008 merit decisions of the Office of Workers' Compensation Programs denying her claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUE

The issue is whether appellant has more than a 23 percent permanent impairment of the right upper extremity for which she received schedule awards.

FACTUAL HISTORY

This case is before the Board for the fourth time. In the initial appeal, the Board set aside an August 22, 2001 decision after finding that appellant filed a timely request for reconsideration. The Board affirmed a May 1, 2001 decision finding that she did not establish a

recurrence of disability on December 8, 2000 due to her June 1994 work injury.¹ On appeal for the second time, the Board set aside a February 22, 2006 decision denying appellant's claim for an increased schedule award.² The Board instructed the Office to refer her for a second opinion evaluation to accurately assess the extent of her permanent impairment.

On appeal for the third time, the Board set aside a June 14, 2007 decision finding that appellant had no more than a 23 percent permanent impairment of the right upper extremity and a 6 percent permanent impairment of the left upper extremity.³ The Board found that Dr. Alexander L. Lambert, II, a Board-certified orthopedic surgeon and Office referral physician, provided inadequate clinical findings in finding appellant had a three percent bilateral impairment due to loss of range of motion of the shoulders and failed to apply the proper provisions of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), in finding right and left upper extremity impairments due to carpal tunnel syndrome. The Board further determined that Dr. Lambert did not reference the A.M.A., *Guides* in concluding that appellant had a 10 percent impairment due to arthritis of the AC joint on the right. The Board noted that the Office medical adviser concurred with Dr. Lambert's findings with the exception of the 10 percent impairment for AC joint arthritis. The Board remanded the case for further development after concluding that neither Dr. Lambert nor the Office medical adviser provided an impairment conforming to the A.M.A., *Guides*. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On remand the Office determined that a conflict in medical evidence existed between Dr. Lambert and the Office medical adviser and referred appellant to Dr. William Fleming, a Board-certified orthopedic surgeon, for resolution of the conflict. It requested that the impartial medical examiner determine whether she was entitled to impairment due to AC joint degenerative arthritis. Based on Dr. Fleming's report, by decision dated May 21, 2008, the Office found that appellant was not entitled to an increased schedule award. On June 2, 2008 appellant's attorney requested reconsideration, arguing that Dr. Fleming could not serve as impartial medical examiner as he had previously performed an examination.

On July 16, 2008 the Office referred appellant to Dr. Terry L. Whipple, a Board-certified orthopedic surgeon, for an impartial medical examination. It noted that the issue was whether appellant had more than the 23 percent impairment of the right upper extremity previously awarded and described the disagreement between Dr. Lambert and the Office medical adviser over whether she had an impairment due to AC joint arthritis.

In a report dated August 12, 2008, Dr. Whipple indicated that he understood that a conflict existed regarding whether appellant was entitled to an award for right AC joint

¹ Docket No. 02-273 (issued February 27, 2003). The Office accepted appellant's claim for bilateral epicondylitis, fibromyalgia, bilateral carpal tunnel syndrome, acromioclavicular (AC) joint arthritis, rotator cuff tendinosis and right shoulder impingement syndrome. By decision dated March 6, 1995, it granted her a schedule award for an 11 percent permanent impairment of the right upper extremity and a 6 percent permanent impairment of the left upper extremity. On March 7, 2000 the Office granted appellant a schedule award for an additional 12 percent impairment of the right upper extremity.

² Docket No. 06-879 (issued October 17, 2006).

³ Docket No. 07-1889 (issued January 29, 2008).

degenerative arthritis and would thus “concentrate my report on physical findings and any appropriate physical impairment ratings of the acromioclavicular arthritis, per request.” He determined that she was not entitled to an additional award for an impairment of the AC joint arthritis as it was included in her impairment due to loss of range of motion under the A.M.A., *Guides*.⁴ Dr. Whipple thus concluded that appellant did not have more than a 23 percent permanent impairment of the right upper extremity. He stated, “The original PPI [permanent partial impairment] awards for her right and left upper extremities are unchallenged and need not [be] recapitulated.”

On September 3, 2008 an Office medical adviser reviewed Dr. Whipple’s report and concurred with his findings. By decision dated September 24, 2008, the Office denied modification of its May 21, 2008 decision after finding that the medical evidence did not support that appellant had more than a 23 percent permanent impairment of the right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act,⁵ and its implementing federal 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁸

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.⁹ While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁰ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹¹

ANALYSIS

By decision dated January 29, 2008, the Board remanded the case for the Office to further develop the medical evidence. The Board found that Dr. Lambert, the Office referral

⁴ A.M.A., *Guides* 499.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁹ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁰ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹¹ *Melvin James*, 55 ECAB 406 (2004).

physician, did not properly apply the A.M.A., *Guides* in determining appellant's impairment due to loss of range of motion and carpal tunnel syndrome and did not explain his finding that she had an impairment due to AC joint arthritis on the right side. The Board noted that the Office medical adviser concurred with Dr. Lambert's impairment evaluation except for the right AC joint arthritis. The Board found that neither the Office medical adviser nor Dr. Lambert properly applied the A.M.A., *Guides* and remanded the case for the Office to obtain an opinion in accordance with the A.M.A., *Guides*.

On remand the Office found that a conflict in medical opinion existed between Dr. Lambert and the Office medical adviser regarding whether appellant was entitled to an additional impairment due to right AC joint arthritis. The record, however, did not contain a conflict in medical evidence but instead, as found by the Board, lacked an opinion on her impairment that comported with the A.M.A., *Guides*. Dr. Whipple, consequently, was a referral physician rather than an impartial medical examiner. He provided an opinion that addressed only whether appellant was entitled to an impairment for right AC joint arthritis rather than determining the full extent of her right and left upper extremity impairments. Consequently, the Office has not, as instructed by the Board, obtained an opinion sufficient to determine the extent of appellant's impairment of the upper extremities. The case will again be remanded for that purpose.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 24 and May 21, 2008 are set aside and the case is remanded for further proceedings in accordance with this opinion of the Board.

Issued: August 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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