United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 08-1305**
	)	**Issued: July 2, 2009**
DEPARTMENT OF VETERANS AFFAIRS, COATESVILLE VETERANS HOSPITAL, Coatesville, PA, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 26, 2008 appellant, through counsel, filed a timely appeal from a March 17, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for an additional 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 16 percent impairment to the right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated January 5, 2007, the Board set aside a January 31, 2006 schedule award decision by an Office hearing representative who affirmed a 16 percent permanent impairment of the right upper extremity.[1] The Board noted

[1] Docket No. 06-756 (issued January 5, 2007).

that the impairment rating was based on loss of range of motion due to the right shoulder condition. However, the Board found that a conflict in medical opinion arose between Dr. George L. Rodriguez, an attending Board-certified physiatrist, and Dr. Dennis P. McHugh, a second opinion Board-certified orthopedic surgeon, as to whether appellant also had sensory or motor impairment. The Board remanded the case to the Office for resolution of the conflict. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.[2]

On March 9, 2007 the Office referred appellant to Dr. John H. Chidester, a Board-certified orthopedic surgeon, for an impartial medical examination to determine whether he had any sensory and motor impairment. In a March 27, 2007 report, Dr. Chidester diagnosed employment-related right shoulder and cervical injuries. He noted that diagnostic studies showed mild-to-moderate degenerative arthritic changes of the acromioclavicular joint and tendinitis of the rotator cuff tendons. The cervical studies noted a disc herniation at C4-5 and severe spinal stenosis at C5-6 due to degenerative disease. A physical examination revealed marked cervical spine limitation. Cervical range of motion included 20 percent cervical bilateral turning, 10 degrees flexion and 0 degrees extension. Dr. Chidester reported that the right shoulder revealed full external and internal rotation, full forward flexion and "weakness of abduction and some crepitation through the mid-abduction arc." He reported no upper extremity sensory, reflex or motor abnormality "other than the limitation of motion and slight weakness described above." Dr. Chidester provided work restrictions.

In a January 30, 2008 addendum, Dr. Chidester opined that appellant had no motor or sensory deficits due to his cervical spine injury. He noted limited range of motion, as addressed in the prior report, that he described as postsurgical changes and not representing neurologic deficit due to the noted disc herniation. Dr. Chidester stated that appellant's numbness and tingling in his hands had been relieved by the cervical discectomy and fusion.

In a February 19, 2008 report, the Office medical adviser reviewed Dr. Chidester's medical reports. He noted that Dr. Chidester did not confirm the sensory or motor deficits found by Dr. Rodriguez. The Office medical adviser stated that Dr. Chidester confirmed the findings of Dr. McHugh's report, which found no upper extremity sensory or motor deficits due to appellant's accepted cervical condition.

By decision dated March 17, 2008, the Office denied an additional schedule award.

[2] On September 23, 2001 appellant, a 46-year-old housekeeping aid, injured his right shoulder while throwing a heavy bag of trash in the dumpster. The Office accepted the claim for right shoulder acute and subacromial impingement and authorized right shoulder arthroscopy and rotator cuff repair, which was performed on December 27, 2001. On October 11, 2002 it accepted aggravation of cervical degenerative disc disease, herniated disc at C5-6 and authorized anterior cervical fusion surgery, which was performed on December 9, 2002. The Board affirmed the denial of appellant's claim of a schedule award for erectile dysfunction.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[7] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[8] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[9] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[10]

The Act provides that, if 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.[11] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[12]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[6] *See supra* note 4.

[7] *See Joseph Lawrence, Jr., supra* note 5; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

[8] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[9] *See supra* note 3; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[10] 5 U.S.C. § 8109(c).

[11] *Id*. at § 8123(a).

[12] 20 C.F.R. § 10.321.

It is well established that, when 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 proper factual and medical background must be given special weight.[13] 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.[14]

ANALYSIS

The Board previously noted that appellant had a 16 percent permanent impairment resulting from his employment-related right shoulder condition based on loss of range of motion. However, there was an unresolved conflict in the medical opinion evidence between Dr. Rodriguez and Dr. McHugh on the issue of whether appellant also had sensory or motor impairment due to his cervical spine condition. On remand, the Office properly referred appellant to Dr. Chidester to resolve this conflict.

In a March 27, 2007 report, Dr. Chidester noted that a physical examination revealed marked cervical spine limitation. He found, however, that there was no upper extremity sensory, reflex or sensory abnormality "other than the limitation of motion and slight weakness described above." In a January 30, 2008 addendum, Dr. Chidester opined that appellant had no motor or sensory upper extremity deficits due to his cervical spine injury. He attributed the limited range of motion addressed in his first report as the result of postsurgical changes, which did not represent any neurologic deficit due to the noted disc herniation.

The Office medical adviser noted that Dr. Chidester did not confirm the sensory or motor deficits noted by Dr. Rodriguez. He advised that Dr. Chidester confirmed the findings of Dr. McHugh's report, which found no upper extremity sensory or motor deficits due to appellant's accepted cervical spine injury. The Board finds that the Office properly relied on the findings of Dr. Chidester, the impartial medical specialist, that appellant did not sustain any sensory or motor impairment due to his accepted cervical condition. The Office properly found that Dr. Chidester's report constituted the special weight of the medical evidence and established that appellant did not have greater impairment than the 16 percent right upper extremity impairment already awarded.

As there is no other probative medical evidence establishing that appellant sustained any additional permanent impairment, the Office properly found that he did not have more than a 16 percent right upper extremity impairment.

[13] *L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[14] *L.R. (E.R).*, 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

CONCLUSION

The Board finds that appellant has not established that has more than 16 percent impairment to the right upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2008 is affirmed.

Issued: July 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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