United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant **and** **DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Philadelphia, PA, Employer**	)	**Docket No. 08-2534** **Issued: March 11, 2009**

Appearances:
Thomas R. Uliase, 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 September 29, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated December 3, 2007 and June 20, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award.

ISSUE

The issue is whether appellant has sustained any permanent impairment to a scheduled member of his body casually related to his accepted bilateral shoulder condition, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

This is the third appeal before the Board. Appellant, a 67-year-old inspector, filed a claim for benefits on August 19, 1997, alleging that he tripped and fell on highway pavement, striking his head. The Office accepted the claim for head abrasion and bilateral shoulder

contusion. By decision dated March 13, 2000, it terminated appellant's compensation benefits. An Office hearing representative affirmed the March 13, 2000 decision on February 5, 2001.

Appellant submitted a March 17, 2000 report from Dr. David Weiss, an attending osteopath, who found that appellant had a 32 percent permanent impairment of the right upper extremity and a 50 percent permanent impairment of the left upper extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (the A.M.A., *Guides*). On June 20, 2001 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right and left upper extremities.

In a September 13, 2001 decision,[1] the Board affirmed the Office's February 5, 2001 decision terminating appellant's compensation benefits effective March 13, 2000, as he no longer had work-related residuals of an accepted August 19, 1997 head contusion and shoulder abrasions. The Board found that the opinion of Dr. Easwaran Balasubramanian, a Board-certified orthopedic surgeon and impartial medical examiner, finding that appellant no longer had residuals from his accepted conditions represented the weight of the medical evidence.

By decision dated March 6, 2002, the Office denied appellant's schedule award claim on the grounds that Dr. Balasubramanian found no work-related residuals as of February 8, 2000. The Office found that Dr. Balasubramanian's referee opinion represented the weight of the medical evidence. By decision dated September 21, 2004, an Office hearing representative affirmed the March 6, 2002 decision. In a February 2, 2007 decision,[2] the Board set aside the Office's September 21, 2004 decision. The Board found that the Office hearing representative improperly relied on Dr. Balasubramanian's opinion to find that appellant had no ratable impairment stemming from his accepted bilateral shoulder condition. The Board noted that there was no schedule award claim pending or any conflict regarding a schedule award issue at the time of the Office's January 10, 2000 referral to Dr. Balasubramanian; therefore, his opinion could not be accorded the weight of an impartial medical specialist with regard to the schedule award issue. As such, the Board found there was a conflict of medical opinion between Dr. Weiss and Dr. Balasubramanian as to whether appellant had ratable upper extremity impairment. The Board therefore set aside the Office's September 21, 2004 decision and remanded it to the Office for referral to a newly selected impartial medical specialist to resolve the conflict of opinion regarding whether appellant had any permanent impairment to a scheduled member of his body casually related to his accepted bilateral shoulder condition. The complete facts of this case are set forth in the Board's September 13, 2001 and February 2, 2007 decisions and are herein incorporated by reference.

[1] Docket No. 01-1492 (issued September 13, 2001).

[2] Docket No. 06-1751 (issued February 2, 2007).

The Office referred appellant for a referee medical examination with Dr. Thomas J. Dowd, a specialist in orthopedic surgery, who stated in an October 30, 2007 report that appellant had no ratable impairment stemming from his accepted bilateral shoulder condition. Dr. Dowd stated:

> "Examination of [appellant's] shoulders reveals he has extension to about 160 degrees and abduction about 150 degrees. He has mild signs of impingement in both shoulders and he is actually quite tender over the AC [acromioclavicular] joint bilaterally, which reproduces most of his shoulder pain at this time."
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> "X-ray of the right shoulder which was done on June 25, 1997, prior to the fall, shows degenerative changes in the right shoulder, AC joint changes.
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> "A MRI [magnetic resonance imaging] [scan] of the same shoulder taken on December 19, 1997 showed degenerative changes in the shoulder and by the body of the report, either a partial thickness tear or a rotator cuff tendinitis….
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> "[Appellant] has a clear history of a right shoulder injury prior. It was noted that he still had pain in the right shoulder at the time of the injury in August 1997.
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> "Today's exam[ination] shows degenerative changes in the cervical spine. I find no evidence of an ongoing symptom complex related to this. I am certain he had a cervical strain/sprain superimposed over the significant preexistent degenerative changes. The findings I see here today are consistent with the amount of arthritis he has in the spine and not secondary to a single episode of trauma, especially in light of a relatively benign exam where he has pain in his left shoulder, mild pain in the right shoulder which he considered to be old. There were minimal findings in the cervical spine at the time of the first visit to the [emergency room].
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> "He clearly had an injury to his right shoulder prior to the injury of August 1997 and while the MRI scan showed changes in his rotator cuff, these are most likely consistent with wear and tear changes for a man his age doing the kind of work he is doing. The right shoulder MRI [scan] findings are not clearly consistent with a tear or a specific episode of trauma and are more consistent with age-related and degenerative-related changes. This is especially true in light of the previous trauma in June 1997 causing symptoms in the shoulder with no clear-cut exacerbation in the emergency room noted by the doctor indicating that it was 'old.'
>
> "Therefore this patient sustained a cervical strain/sprain superimposed over very significant preexistent degenerative findings and today's findings are consistent with the arthritis rather than to a single episode of trauma.
>
> "Degenerative changes in his rotator cuff noted on the exams and the changes noted on the MRI [scan] of AC joint arthritis bilaterally are consistent with arthritis and are unlikely related to a single episode of trauma as this patient

> describes, especially in light of the findings at the time of the visit in the [emergency room].
>
> "As a whole my report would be very similar to the examination of Dr. Balasubramanian; my conclusions are similar.[3]
>
> "Since I cannot find any evidence of an ongoing symptom complex related to the 1997 injury on today's exam[ination] or on review of the chart I would not be able to assign a specific percentage of disability."

By decision dated December 3, 2007, the Office determined that appellant did not sustain any permanent impairment casually related to his accepted bilateral shoulder condition entitling him to a schedule award. It found that Dr. Dowd's referee opinion represented the weight of the medical evidence.

By letter dated December 6, 2007, appellant's attorney requested an oral hearing, which was held on April 9, 2008. At the hearing, he contended that Dr. Dowd's opinion was not entitled to the weight of an impartial medical specialist since there was no documentation in the record indicating that he was selected in accordance with Physicians Directory System (PDS) procedure. Counsel also contended that the statement of accepted facts presented to Dr. Dowd prior to his examination and report was not sufficient because it did not include a prior condition, stemming from a 1987 left elbow injury. He therefore argued that, as Dr. Dowd did not have all the relevant facts before making his evaluation, his opinion was not valid.

By decision dated June 20, 2008, an Office hearing representative affirmed the December 3, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] sets 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 loss of use.[5] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the

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[3] In his February 8, 2000 report Dr. Balasubramanian opined that appellant's cervical pathologies and rotator cuff tears were unrelated to the August 19, 1997 injuries. He stated that, based on his examination, history and reviews of MRI scan reports and other records, he sustained injuries to the cervical spine and the shoulder as a result of the work injury. However, Dr. Balasubramanian found no evidence of residuals from the cervical spine injury, which appeared to be an aggravation of degenerative disc disease of the cervical spine. He also stated that appellant had impingement syndrome in the right shoulder; however, he did consider this to be work related, as earlier reports indicated that appellant had bilateral rotator cuff disease based on the degenerative process. Dr. Balasubramanian concluded that appellant had no disability arising from the work injury.

[4] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[5] 5 U.S.C. § 8107(c)(19).

Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[6]

ANALYSIS

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 a proper factual and medical background, must be given special weight.[7] Dr. Dowd was properly selected to act as an impartial medical specialist in this case.

Dr. Dowd, the impartial specialist, found that appellant had no ratable impairment stemming from his accepted bilateral shoulder condition. He advised that appellant's bilateral upper extremity symptomatology was attributable to degenerative changes caused by normal wear and tear and age and not to a single traumatic incident. Dr. Dowd noted that appellant already had pain in his right shoulder at the time of the August 1997 work injury. He stated that x-rays of the right shoulder taken two months prior to the August 1997 injury, as well as a December 1997 MRI scan of the right shoulder, showed degenerative changes in the right shoulder; the MRI scan indicated either a partial thickness tear or a rotator cuff tendinitis and were more consistent with age-related and degenerative-related changes. Appellant had mild signs of impingement in both shoulders with tenderness over the AC joint bilaterally, which accounted for most of his current shoulder pain. Dr. Dowd noted on examination that appellant also had degenerative changes in the cervical spine, but found no evidence of an ongoing cervical condition or symptoms. He considered his examination findings on the whole to be "relatively benign." Dr. Dowd stated that since he was unable to find any evidence of an ongoing symptom complex related to the 1997 injury based on examination or appellant's medical history he was unable to assign a specific percentage of disability. He noted his general agreement with Dr. Balasubramanian's conclusions.

The Board finds that the Office properly relied on Dr. Dowd's referee opinion that appellant did not sustain any ratable impairment due to his accepted conditions. Dr. Dowd's report is sufficiently thorough, probative and well rationalized to warrant the weight of an impartial examiner. As there is no other medical evidence establishing that appellant sustained any permanent impairment based on his work-related bilateral shoulder condition, the Office properly found that appellant was not entitled to a schedule award under 5 U.S.C. § 8107 in its December 3, 2007 decision.

Following the December 3, 2007 decision, appellant's attorney contended that the Office did not provide sufficient proof or documentation that Dr. Dowd was properly selected as an impartial medical examiner. However, counsel did not object to the selection at the time the appointment was made[8] or present any evidence to support his allegation that the Office did not

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[6] 20 C.F.R. § 10.404.

[7] *Franklin D. Haislah*, 52 ECAB 457 (2001).

[8] *See G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008) (a claimant must timely raise any objection to the selected physician in order to participate in the process in accordance with Office procedures and must provide valid reasons).

follow its procedures. The Office procedures provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the PDS should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.[9] The Office provided appellant's representative with a copy of the paperwork used to select the impartial medical specialists. However, he did not submit any evidence or argument regarding how this resulted in bias or was contrary to Office procedures.[10] The Board finds that appellant did not present any evidence establishing that the impartial specialist selection was improper.[11] The Board will affirm the June 20, 2008 Office decision.

CONCLUSION

The Board finds that appellant has not sustained any permanent impairment to a scheduled member of his body casually related to his accepted bilateral shoulder condition, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

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[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Albert Cremato*, 50 ECAB 550 (1999).

[10] *See James F. Weikel*, 54 ECAB 660, 663 (2003) (allegations of bias are not sufficient to establish the fact; an impartial specialist properly selected under the Office's procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise).

[11] The Board rejects the contention by appellant's attorney that Dr. Dowd's opinion is not valid because he did not consider appellant's preexisting left elbow condition, stemming from a 1987 injury, in evaluating the degree of left upper extremity impairment. The Board notes that, in determining entitlement to a schedule award, preexisting impairments to the scheduled member are to be included in the permanent impairment evaluation. *Michael C. Milner,* 53 ECAB 446 (2002). Dr. Weiss' March 2000 report, submitted in support of appellant's claim for a schedule award for the left and right upper extremities, does provide a left upper extremity impairment rating of 30 percent for the left elbow for left ulnar nerve entrapment. The left elbow condition, however, pertains to a separate claim for another part of the body made 10 years prior to the subject bilateral shoulder injury in this case, for which the Office and the Board have found appellant has no ratable permanent impairment. In addition, in rendering his rating Dr. Weiss cited to Table 16 at page 57 of the A.M.A., *Guides*; however, there is no such table pertaining to upper extremities at page 57 of the A.M.A., *Guides*. If appellant wishes to file a claim for a schedule award based on a left elbow condition, he may do so by filing a Form CA-7 with the Office.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2008 and December 3, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: March 11, 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