United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 09-16**
	)	**Issued: March 9, 2009**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK 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:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 1, 2008 appellant filed a timely appeal from December 10, 2007 and June 20, 2008 decisions of the Office of Workers' Compensation Programs adjudicating his claim for 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 11 percent impairment of his right upper extremity for which he received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case.[1] By decision dated October 4, 2007, the Board remanded the case for further development of the medical evidence. The facts of the previous Board decision are incorporated herein by reference.

On October 15, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an Office medical adviser, reviewed the medical evidence, including an October 20, 2003 report from Dr. Jatin D. Gandhi, a Board-certified orthopedic surgeon and Office referral physician, and a January 8, 2004 report from Dr. Nicholas Diamond, an osteopathic specialist in pain management.[2] Dr. Berman found that appellant had no more than 11 percent right upper extremity impairment, including 4 percent for decreased range of motion in the wrist, 4 percent for Grade 3 sensory deficit in the right elbow due to ulnar nerve compression and 3 percent for pain in the right shoulder.[3] He indicated that appellant's right shoulder pain was based on mechanical abnormalities due to inflammation of the rotator cuff and associated structures, not a nerve condition. Dr. Berman stated that, because appellant's shoulder pain was related to shoulder mechanics, not a nerve condition, the only method to rate pain in that situation was to use Figure 18-1 at page 574 of the A.M.A., *Guides*. He indicated that Dr. Diamond was incorrect in finding impairment for motor strength deficit of the right shoulder supraspinatus muscle, in the section of the A.M.A., *Guides* relating to peripheral nerve disorders,[4] because there was no evidence of weakness related to the suprascapular nerve which innervates the supraspinatus muscle.

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[1] *See* Docket No. 07-1111 (issued October 4, 2007). On July 9, 2002 appellant, then a 43-year-old painter, sustained an injury to his right arm when he fell while exiting a high-reach basket. The Office accepted his claim for a right arm contusion. On May 5, 2004 appellant filed a claim for a schedule award. On February 15, 2005 the Office granted him a schedule award for 7 percent impairment of his right upper extremity (4.2 percent, rounded to 4 percent, for sensory deficit of the ulnar nerve, according to Table 16-15 at page 492 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and 3 percent for pain, according to Figure 18-1 at page 574. By decision dated March 29, 2006, it granted appellant an additional schedule award based on four percent additional impairment for right wrist range of motion of 50 degrees dorsiflexion and 50 degrees of flexion, according to Figure 16-28 at page 467. In its February 15, 2000 decision, the Office accepted the additional conditions of a triangular fibrocartilaginous complex rupture of the right wrist, a triquetrum unit ligament rupture of the right wrist, ulnar neuropathy of the right elbow, rotator cuff syndrome of the right shoulder, a cervical sprain and cervical disc herniations at C4-5 and C6-7. It affirmed the March 29, 2006 schedule award decision on October 17, 2006.

[2] Dr. Gandhi's October 20, 2003 report and Dr. Diamond's January 8, 2004 report were addressed in the Board's October 4, 2007 decision.

[3] *See* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[4] In his January 8, 2004 report, Dr. Diamond found four percent impairment of appellant's right upper extremity due to a Grade 4 motor deficit of the suprascapular nerve, according to Table 16-11 at page 484 and Table 16-15 at page 492 of the A.M.A., *Guides*.

By decision dated December 10, 2007, the Office denied appellant's claim for an increased schedule award. Appellant requested an oral hearing before an Office hearing representative that was held on April 8, 2008.

In an April 18, 2008 report, Dr. Diamond found that appellant had 28 percent combined impairment of his right upper extremity, including 6 percent for Grade 2 sensory deficit of the ulnar nerve, according to Table 16-15 at page 492 of the A.M.A, *Guides* and Table 16-10 at page 482, 4 percent for Grade 4 motor deficit of the supraspinatus muscle, according to Table 16-11 at page 484 and Table 16-15 at page 492 and 20 percent for right grip strength deficit, according to Table 16-34 at page 509. He noted that the A.M.A., *Guides* states at page 508 that, if the examiner believes that an individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately. Otherwise, the impairment rating based upon objective anatomic findings takes precedence. Dr. Diamond stated that appellant sustained a significant injury to his right upper extremity and, although he had full range of motion, his grip strength was markedly decreased. After reviewing the findings on physical examination, diagnoses and current complaints, he felt that the appropriate method to rate appellant's right wrist loss of strength was the grip strength method. Dr. Diamond stated that appellant's right wrist loss of strength was not adequately considered by other impairment rating methods. He noted that his impairment rating for appellant no longer included three percent for pain because the sensory deficit impairment of appellant's right wrist ulnar nerve incorporated impairment due to pain.[5]

By decision dated June 20, 2008, an Office hearing representative affirmed the December 10, 2007 decision.[6]

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[7] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8]

Section 8123(a) of the Act provides that, "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

[5] The Board notes that Dr. Diamond's April 18, 2008 report was not routed to an Office medical adviser pursuant to Office regulations. *See supra* note 3.

[6] Subsequent to the June 20, 2008 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[of Labor] shall appoint a third physician who shall make an examination."[9] Where 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.

ANALYSIS

On October 15, 2007 Dr. Berman reviewed the medical evidence and calculated that appellant had no more than 11 percent right upper extremity impairment, including 4 percent for decreased range of motion in the wrist, 4 percent for sensory loss and pain in the right elbow due to ulnar nerve compression and 3 percent for pain in the right shoulder. He indicated that appellant's right shoulder pain was based on mechanical abnormalities due to inflammation of the rotator cuff, not a nerve condition. Dr. Berman stated that, because appellant's shoulder pain was related to shoulder mechanics, not a nerve condition, the only method to rate pain in that situation was to use Figure 18-1 at page 574 of the A.M.A., *Guides*. He indicated that Dr. Diamond was incorrect in finding impairment for motor strength deficit of the right shoulder supraspinatus muscle in the section of the A.M.A., *Guides* relating to peripheral nerve disorders because there was no evidence of weakness related to the suprascapular nerve.

In an April 18, 2008 report, Dr. Diamond found that appellant had 28 percent combined impairment of his right upper extremity, including 6 percent for sensory deficit of the ulnar nerve, according to Table 16-15 at page 492 of the A.M.A, *Guides* and Table 16-10 at page 482, 4 percent for Grade 4 motor deficit of the right shoulder supraspinatus muscle, according to Table 16-11 at page 484 and Table 16-15 at page 492 and 20 percent for right grip strength deficit, according to Table 16-34 at page 509. Regarding impairment due to motor deficit, the Board found in its October 4, 2007 decision that Dr. Berman provided detailed medical rationale explaining why impairment based on right shoulder motor deficit was not established. In his April 18, 2008 report, Dr. Diamond provided no rationale explaining his determination of motor deficit impairment and he did not address Dr. Berman's rationale in excluding motor deficit impairment. Therefore, it is not established that appellant is entitled to additional impairment based on right shoulder motor deficit. Dr. Diamond noted that the A.M.A., *Guides* states at page 508 that, if the examiner believes an individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately. He stated that appellant sustained a significant injury to his right upper extremity and his grip strength was markedly decreased. Dr. Diamond found that appellant's loss of strength represented a factor that was not considered adequately by other impairment rating methods. For that reason, he included 20 percent impairment for right wrist loss of grip strength in his rating of appellant's right upper extremity. Although Dr. Diamond provided rationale in his April 18, 2008 report for including impairment for loss of grip strength based on Table 16-34 at page 509, he did not follow the procedures in the A.M.A., *Guides* for determining grip strength. Section 16.8b, titled "Grip and Pinch Strength", at page 508, provides that grip strength measurements are to be determined by using a Jamar dynamometer. Dr. Diamond did not provide any objective measurements obtained by Jamar dynamometer. Additionally, he did not explain how he

[9] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

calculated 20 percent impairment from Table 16-34 which provides for a range of 10 to 30 percent impairment. Due to these deficiencies, Dr. Diamond has not established that appellant has impairment of his right upper extremity due to right wrist loss of grip strength.

The Board finds that there is a conflict in medical opinion between Dr. Berman and Dr. Diamond regarding appellant's impairment due to right elbow ulnar nerve sensory deficit and impairment due to right shoulder pain. Regarding right elbow sensory deficit, Dr. Berman calculated 4 percent impairment based on a Grade 3 sensory deficit, according to Table 16-10 at page 484 and Table 16-15 at page 492 of the A.M.A., *Guides* (60 percent maximum for Grade 3 multiplied by 7 percent maximum for the ulnar nerve equals 4.2 percent, rounded to 4 percent). However, Dr. Diamond calculated 6 percent impairment based on Grade 2 impairment (80 percent maximum for Grade 2 multiplied by 7 percent maximum for the ulnar nerve equals 5.6 percent, rounded to 6 percent). Neither physician provided rationale explaining his choice of grade from Table 16-10 at page 482. Therefore, an unresolved conflict exists on the matter of appellant's right upper extremity impairment due to right elbow sensory deficit. Regarding appellant's right shoulder pain, Dr. Berman provided rationale for his inclusion of an additional three percent impairment based on Chapter 18 of the A.M.A., *Guides*. Dr. Diamond noted that appellant experienced right shoulder pain, but did not address the issue of whether he had any impairment due to right shoulder pain. Therefore, the issue of appellant's impairment related to right shoulder pain requires further development.

Due to the conflict in the medical opinion evidence, the Office should refer appellant to an impartial medical specialist for a thorough physical examination and evaluation of his right upper extremity impairment. After such further development as it deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer appellant to an impartial medical specialist to resolve the conflict in the medical evidence as to his right upper extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 20, 2008 and December 10, 2007 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 9, 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