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

| | | |
|---|---|---|
| **H.S., Appellant** | ) | |
| | ) | **Docket No. 08-2550** |
| **and** | ) | **Issued: September 23, 2009** |
| **U.S. POSTAL SERVICE, GULF WINDS STATION, St. Petersburg, FL, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On September 22, 2008 appellant filed a timely appeal from December 12, 2007 and July 3, 2008 merit decisions of the Office of Workers' Compensation Programs denying his claim for an increased 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 a 21 percent permanent impairment of the right upper extremity and a 25 percent permanent impairment of the left upper extremity, for which he received schedule awards.

### ***FACTUAL HISTORY* -- xxxxxx265**

On January 11, 2005 appellant filed an occupational disease claim alleging that he sustained bilateral shoulder syndrome causally related to factors of his federal employment. The Office accepted the claim, assigned file number xxxxxx265, for bilateral shoulder arthritis, a sprain of the shoulder and left arm, a biceps tendon rupture and left ulnar neuropathy.

On May 26, 2005 appellant filed a claim for a schedule award. In a March 4, 2005 impairment evaluation, Dr. David P. Kalin, an attending physician Board-certified in family practice, opined that appellant had a 70 percent impairment of the upper extremities due to his work injuries. An Office medical adviser reviewed the evidence on June 23, 2005 and opined that appellant had no impairment of either extremity due to his accepted shoulder condition.

In an impairment evaluation dated October 17, 2005, Dr. H. Gerard Siek, Jr., a Board-certified orthopedic surgeon, found that appellant had a 38 percent permanent impairment of the right upper extremity and a 37 percent permanent impairment of the left upper extremity.

The Office determined that a conflict in medical opinion existed between Dr. Kalin and the Office medical adviser. On May 30, 2006 the Office referred appellant to Dr. Michael Judson Smith, a Board-certified orthopedic surgeon, for an impartial medical examination. On June 28, 2006 Dr. Smith diagnosed bilateral osteoarthritis of the carpal metacarpal joint. He found that appellant's physical examination was inconsistent and his pain complaints excessive.

An Office medical adviser reviewed the Dr. Smith's opinion on August 2, 2006 and concurred with his finding that appellant had no impairment of the upper extremities. By decision dated August 4, 2006, the Office denied appellant's claim for a schedule award.

On November 8, 2006, following a preliminary review of the record, a hearing representative vacated the August 4, 2006 decision. She noted that Dr. Siek provided an impairment evaluation on October 17, 2005. The hearing representative found that the statement of accepted facts did not accurately list all the work injuries and noted that appellant had a carpal tunnel claim under file number xxxxxx357. She directed the Office to obtain clarification from Dr. Smith and to determine whether appellant's C5-6 radiculopathy and bilateral cubital tunnel syndrome were employment related.

On November 13, 2006 the Office prepared an updated statement of accepted facts. It noted that it had asked Dr. Smith to provide a supplemental report, but noted that he asked for prepayment. The Office referred appellant to Dr. Howard Schuele, a Board-certified orthopedic surgeon, for an impartial medical examination.

On February 15, 2007 Dr. Schuele diagnosed bilateral carpal tunnel syndrome, degenerative arthritis of the carpometacarpal (CM) joint of the thumbs, ulnar neuropathy of the left upper extremity and bilateral shoulder osteoarthritis. He reviewed the final determinations regarding the extent of appellant's permanent impairment rendered by prior examining physicians. Dr. Schuele found a positive Tinel's sign and Phalen's test bilaterally. He measured range of motion of the shoulders and elbow and noted that appellant had a positive Tinel's sign at the ulnar nerve. Dr. Schuele stated:

> "Most of the consensus of opinion is that the carpal tunnel syndromes, both right and left, are [five] percent. The degenerative arthritis at the CM joint is [three] percent. The ulnar neuropathy on the left is [five] percent.
>
> "I have used the range of motion method for rating his shoulders and my range of motion noted on this date was right shoulder was equal to left. Therefore, the shoulder rating on the right is 14 percent, combined with 5 percent for the carpal

tunnel, combined with 3 percent for the CM joint arthritis. This equals 20 percent upper extremity.

"On the left, 14 percent shoulder was combined with 5 percent carpal tunnel, combined with 5 percent ulnar neuropathy, combined with 3 percent degenerative arthritis [of the] CM joint, this equals 24 percent."

## ***FACTUAL HISTORY*** **-- xxxxxx357**

On October 30, 2001 appellant, then a 71-year-old letter carrier, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome and osteoarthritis of the thumbs due to factors of his federal employment. He did not stop work. The Office accepted the claim, assigned file number xxxxxx357, for bilateral carpal tunnel syndrome.

On July 7, 2002 appellant filed a claim for a schedule award. He submitted a report dated June 6, 2002 from Dr. Edward Feldman, a Board-certified orthopedic surgeon, who determined that appellant had a 12 percent permanent impairment of each upper extremity. An Office medical adviser reviewed Dr. Feldman's report and concluded that he had five percent right upper extremity impairment.

By decision dated December 17, 2002, the Office granted appellant a schedule award for a five percent permanent impairment of the right upper extremity. In a report dated November 10, 2003, Dr. Feldman found that he had a 20 percent impairment of the right upper extremity and a 15 percent impairment of the left upper extremity.

In a decision dated January 5, 2004, the hearing representative vacated the December 17, 2002 schedule award determination and remanded the case for the Office medical adviser to review Dr. Feldman's November 10, 2003 report and adjudicate the extent of any permanent impairment for both the right and left upper extremities. He also instructed the Office to determine whether appellant's bilateral thumb arthritis and bilateral ulnar nerve entrapment of the wrists were either employment related or preexisting condition such that they would be included in determining the extent of any permanent impairment.

On February 18, 2004 the Office expanded acceptance of appellant's claim to include an aggravation of bilateral osteoarthritis of the base of the thumbs. By decision dated March 4, 2004, it granted him a schedule award for a 12 percent permanent impairment of the right upper extremity and a 16 percent permanent impairment of the left upper extremity. The Office noted that appellant had previously received an award for a five percent right upper extremity impairment and thus was entitled to an award for an additional seven percent impairment.

On March 28, 2004 appellant requested an oral hearing. On January 10, 2005, following a preliminary review of the record, a hearing representative vacated the March 4, 2004 decision. He noted that the Office had not considered the November 10, 2003 report from Dr. Feldman as previously instructed. The hearing representative remanded the case for the Office medical adviser to provide a reasoned opinion regarding which upper extremity conditions were either employment related or preexisting and a determination of whether these conditions caused a permanent impairment of the upper extremities.

By decision dated April 7, 2005, the Office denied appellant's claim for an increased schedule award. On April 22, 2005 appellant requested an oral hearing. Following a preliminary review on December 30, 2005, a hearing representative set aside the April 7, 2005 decision and remanded the case for a second opinion examination regarding the extent of appellant's bilateral impairment of the upper extremities. The hearing representative found that the record did not contain a medical report with a detailed description of the upper extremity impairment.

On February 2, 2006 the Office referred appellant for a second opinion examination. In a report dated February 15, 2006, Dr. Arthur S. Dinenberg, a Board-certified orthopedic surgeon, diagnosed right and left carpal tunnel syndrome and bilateral thumb CM degenerative joint disease. He concluded that appellant had no more than the previously awarded 16 percent permanent impairment of the left upper extremity and 12 percent permanent impairment of the right upper extremity.

By decision dated March 30, 2006, the Office denied appellant's claim for an additional schedule award for the bilateral upper extremities. In a decision dated November 17, 2006, the hearing representative vacated the March 30, 2006 decision. She noted that appellant had submitted an October 2005 report from Dr. Siek, who provided a second opinion examination regarding the extent of his permanent upper extremity impairment for a bilateral hand condition under file number xxxxxx265. The hearing representative instructed the Office to prepare a statement of accepted facts for both file numbers and refer appellant for an impartial medical examination on the issue of whether he was entitled to a schedule award for an additional impairment of the upper extremities.

On December 19, 2006 the Office referred appellant to Dr. Michael D. Slomka, a Board-certified orthopedic surgeon, to resolve a conflict between Dr. Siek and Dr. Dinenberg. On January 22, 2007 Dr. Slomka found that appellant had a 13 percent permanent impairment of the right upper extremity and an 18 percent permanent impairment of the left upper extremity.

***FACTUAL HISTORY -- xxxxxx*265 & xxxxxx357**

The Office combined both of appellant's claims under master file number xxxxxx265. On February 26, 2007 it requested that the Office medical adviser review both and discuss the opinions of both Dr. Slomka and Dr. Schuele. On February 26, 2007 an Office medical adviser found that Dr. Schuele's opinion was the "most reasonable compromise." He concurred with his impairment determination but indicated that due to a discrepancy in addition appellant had a 21 percent right upper extremity impairment and a 25 percent left upper extremity impairment.

By decision dated March 7, 2007, the Office found that appellant had a 21 percent right upper extremity impairment and a 25 percent left upper extremity impairment. It granted him a schedule award for an additional nine percent impairment of each upper extremity.

On March 26, 2007 appellant requested a telephone hearing. By decision dated September 14, 2007, the hearing representative vacated the March 7, 2007 decision. He found that statement of accepted facts did not include the accepted condition of bilateral thumb arthritis and should be updated to include the conditions diagnosed by Dr. Scheule of left ulnar neuropathy and bilateral shoulder arthritis. The hearing representative further found that

Dr. Scheule did not address whether appellant had an upper extremity impairment due to preexisting conditions. He noted that the Office erred in having an Office medical adviser who created the conflict review the impartial medical examiner's report. The hearing representative instructed the Office to obtain a supplemental report from Dr. Scheule.

In a report dated October 25, 2007, Dr. Schuele listed findings on examination of a positive Tinel's sign over the left ulnar nerve of the elbow and of the bilateral hands. He listed measurements for range of motion of the shoulder. Dr. Schuele again found that the "consensus of opinion" showed a five percent bilateral impairment due to carpal tunnel syndrome, a three percent impairment due to arthritis of the CM joint and a five percent impairment of the left upper extremity for ulnar neuropathy. He determined that appellant had a 14 percent bilateral shoulder impairment due to loss of range of motion. Dr. Schuele opined that he had no neurological evidence of cervical disc disease and cervical radiculopathy, bilateral ulnar neuropathy of the wrists, bilateral medial epicondylitis or bilateral shoulder tendinitis.

By decision dated December 12, 2007, the Office denied appellant's claim for an increased schedule award. On December 16, 2007 appellant requested a telephone hearing. By decision dated July 3, 2008, the Office hearing representative affirmed the December 12, 2007 decision.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing federal regulations,[2] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) as the uniform standard applicable to all claimants.[3] 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.[4]

Section 8123(a) provides that, if there is 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.[5] 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 or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *Id*. at § 10.404(a).

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

[5] 5 U.S.C. § 8123(a).

a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[6] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

In a situation where the Office secures 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, it must secure a supplemental report from the specialist to correct the defect in his original report.[8] If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office should submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[9]

## ***ANALYSIS***

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and an aggravation of osteoarthritis of both thumbs under file number xxxxxx357. It accepted that he sustained bilateral shoulder arthritis, a sprain of the shoulder and left arm, a biceps tendon rupture and left ulnar neuropathy under file number xxxxxx265.

Appellant filed a claim for a schedule award. The Office extensively developed the record under both file numbers and determined that a conflict in medical opinion existed between Dr. Kalin and the Office medical adviser. It referred appellant to Dr. Smith for an impartial medical examination; however, when Dr. Smith declined to clarify his report the Office referred appellant to Dr. Schuele for a second impartial medical examination.

When a case is referred to an impartial medical examiner 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.[10] The Office relied upon the opinion of Dr. Schuele in determining that appellant had a 21 percent permanent impairment of the right upper extremity and a 25 percent permanent impairment of the left upper extremity. The Board finds, however, that the opinion of Dr. Schuele is insufficient to resolve the conflict in medical opinion. In reports dated February 17 and October 25, 2007, Dr. Schuele listed the conclusions of the prior medical examiner regarding the extent of appellant's impairment and then determined that the "consensus" among the physicians was that he had a five percent bilateral impairment due to carpal tunnel syndrome, a three percent impairment due to arthritis of the CM joint and a five percent impairment of the left upper extremity for ulnar neuropathy. He

[6] 20 C.F.R. § 10.321.

[7] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[8] *Phillip H. Conte*, 56 ECAB 213 (2004); *Raymond A. Fondots*, 53 ECAB 637 (2002).

[9] *Nancy Keenan*, 56 ECAB 687 (2005).

[10] *Richard R. LeMay*, 56 ECAB 341 (2005).

did not independently assess appellant's impairment due to carpal tunnel syndrome, arthritis of the CM joint or ulnar neuropathy. Dr. Schuele further made no reference to the specific tables and pages of the A.M.A., *Guides* utilized in reaching his conclusions. To properly resolve a medical conflict, the impartial medical examiner should provide a reasoned opinion as to the extent of permanent impairment in accordance with the A.M.A., *Guides*.[11] As Dr. Schuele failed to provide an independent determination regarding the extent of appellant's permanent impairment of the upper extremities in accordance with the A.M.A., *Guides*, his opinion is not entitled to special weight as the impartial medical examiner.[12] Accordingly, there remains an unresolved conflict regarding the percentage of appellant's permanent impairment of the upper extremities. Following this and any further necessary development, the Office shall issue a *de novo* decision.[13]

## ***CONCLUSION***

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

[11] *Id*.

[12] *See Elaine Sneed*, 56 ECAB 373 (2005).

[13] In view of the Board's disposition of the merits of this case, the Board will not address appellant's arguments on appeal. The Board does note that he questioned why the Office did not use Dr. Slomka's impartial medical examination. The Office medical examiner reviewed both Dr. Slomka and Dr. Schuele and found that Dr. Schuele's opinion, which gave appellant a greater impairment rating, was more reasonable.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 3, 2008 and December 12, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 23, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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