

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

S.P., Appellant)	
)	
and)	Docket No. 09-2322
)	Issued: June 23, 2010
U.S. POSTAL SERVICE, POST OFFICE, North Metro, GA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2009 appellant filed a timely appeal from the May 4, 2009 merit decision of the Office of Workers' Compensation Programs rescinding its acceptance of 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 the Office met its burden of proof to rescind its acceptance of appellant's claim for a schedule award which it had granted for a two percent permanent impairment of his right arm.

FACTUAL HISTORY

The Office accepted that on March 19, 2002 appellant, then a 46-year-old security guard, sustained a sprain of his right shoulder and upper arm and internal derangement of his left knee.¹

¹ Appellant previously had a right above-the-knee amputation secondary to a sarcoma and used crutches to walk. A March 19, 2002 emergency room report indicated that appellant chiefly complained of left knee and right elbow pain. The report contained the diagnoses of left knee and right elbow contusions.

Appellant received compensation from the Office for periods of disability. He returned to limited-duty work for the employing establishment on April 1, 2002 and to regular-duty work on May 7, 2002.

On May 28, 2003 Dr. Laura W. Hatch, an attending Board-certified physical medicine and rehabilitation physician, stated that she had not seen appellant since July 31, 2002 and noted that he reported that his pain resolved about a month and a half prior. She noted that appellant now reported having left thigh, lateral hip and knee pain and she diagnosed right trochanter bursitis. On September 5, 2008 appellant filed a claim for a schedule award due to his March 19, 2002 work injury.²

In an October 14, 2008 report, Dr. Christopher Jarrett, an attending Board-certified orthopedic surgeon, reported the findings of his examination of September 30, 2008. He stated that appellant sustained a fall at work on May 19, 2002 which resulted in injuries to his left shoulder, left hip and left leg and indicated that he was reinjured on December 11, 2006 which caused injuries to his low back, right shoulder and neck. Dr. Jarrett indicated that appellant reached maximum medical improvement by the date of his examination. He found that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had a two percent permanent impairment of his left arm due to having 50 degrees of internal rotation of his left shoulder.³ Dr. Jarrett stated that appellant had a seven percent impairment of his left leg due to trochanteric bursitis of his left hip and a five percent impairment of his whole body due to facet arthropathy and degenerative disc disease of his back.⁴

Dr. James W. Dyer, a Board-certified orthopedic surgeon, serving as an Office medical adviser, was asked to review the evidence of record, including Dr. Jarrett's report and provide an impairment rating. On December 30, 2008 he stated that due to a 2002 fall at work appellant sustained a right rotator cuff sprain and bursitis of his left hip and knee. Dr. Dyer indicated that based on limited range of motion of appellant's right shoulder a two percent impairment rating could be assigned to his right arm in agreement with the opinion of Dr. Jarrett "who incorrectly identified the left shoulder in his report of September 30, 2008."⁵ He stated:

"Therefore, the final correct impairment of the RUE [right upper extremity] equals two percent in agreement with the [attending physician]. There is no basis for impairment of the [left] knee from the work injury of 2002 and the impairment LLE [left lower extremity] equals zero percent."

² Appellant also began to complain of left arm pain around the time he filed his schedule award claim.

³ Dr. Jarrett also reported other range of motion findings for appellant's left shoulder, but he noted that these findings did not result in impairment. Appellant had 75 degrees of external rotation, 130 degrees of flexion, 30 degrees of extension, 110 degrees of abduction and 20 degrees of adduction.

⁴ Dr. Jarrett indicated that appellant had a 60 percent impairment of the whole person due to a Class 4 gait disorder derived from Table 13-15 on page 336 of the A.M.A., *Guides*.

⁵ Dr. Dyer made reference to Figures 16-40 to 16-46 on pages 476 to 479 of the A.M.A., *Guides*. He found that there was no basis to find that appellant had a 60 percent impairment of the whole person due to a gait disorder.

In a February 27, 2009 decision, the Office granted appellant a schedule award for a two percent permanent impairment of his right arm. The award ran for 6.24 weeks from September 30 to November 12, 2008.

In a March 20, 2009 letter, appellant requested reconsideration of his claim. He stated that, with respect to the schedule award for his right arm, an impairment evaluation of his left arm was sent in by error. Appellant indicated that he was submitting a new impairment evaluation of his right shoulder and left knee.

In a March 13, 2009 report, Dr. Jarrett stated that appellant reported that he injured his right shoulder and left knee when he fell at work. He indicated that, with respect to range of motion of his right shoulder, appellant had six percent impairment of his right arm due to 90 degrees of flexion, two percent impairment due to 20 degrees of extension, a five percent impairment due to 80 degrees of abduction and a three percent impairment due to 40 degrees of internal rotation.⁶ These figures were added to equal a 16 percent impairment of appellant's right arm. Dr. Jarrett determined that appellant had a 10 percent impairment of his left leg due to five degrees of flexion contracture of his left knee.⁷

On March 31, 2009 an Office medical adviser reviewed the medical evidence of record, including the March 13, 2009 impairment evaluation of Dr. Jarrett, and indicated that the examination of appellant on the date of injury, March 19, 2002, showed that he sustained a left knee contusion and right elbow contusion. He stated that examination of appellant's right elbow was normal and that examination of his left knee was also normal except for mild tenderness of the patella. The March 19, 2002 x-rays of his right elbow and left knee were negative. The magnetic resonance imaging scan of appellant's left knee on August 8, 2002 showed early cartilage degeneration. The Office medical adviser stated that an attending physician's report of May 28, 2003 showed that appellant's pain had resolved and concluded, "Because of the above conflicting reports [I] believe second opinion evaluation is indicated."

In a May 4, 2009 decision, the Office rescinded its acceptance of appellant's claim for a schedule award which it had granted for a two percent permanent impairment of his right arm. The Office indicated that the rescission was justified because Dr. Dyer, the Office medical adviser, had improperly applied findings for appellant's left shoulder to determine that he had a two percent impairment of his right arm. It also indicated that the medical evidence showed that appellant's right shoulder condition had resolved by the time appellant returned to regular-duty work on May 7, 2002.⁸

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own

⁶ Dr. Jarrett indicated that appellant had 90 degrees of external rotation, but he did not list a finding for adduction. He referred Figures 16-40, 16-43 and 16-46 on pages 476, 477 and 479 of the A.M.A., *Guides*.

⁷ Dr. Dyer referenced Table 17-10 on page 537 of the A.M.A., *Guides*.

⁸ The Office also mentioned that on December 11, 2006 appellant had a new injury at work when he fell again on a wet floor. The record of the present claim does not contain documents concerning this apparent injury.

motion or on application.⁹ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹⁰ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.¹¹

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.¹²

The schedule award provision of the Act¹³ and its implementing regulations¹⁴ 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 to 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁵

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden 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.¹⁶ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁷

ANALYSIS

The Office accepted that on March 19, 2002 appellant, then a 46-year-old security guard, sustained a sprain of his right shoulder and upper arm and internal derangement of his left knee.

⁹ 5 U.S.C. § 8128.

¹⁰ *John W. Graves*, 52 ECAB 160, 161 (2000).

¹¹ *See* 20 C.F.R. § 10.610.

¹² *John W. Graves*, *supra* note 10.

¹³ 5 U.S.C. § 8107.

¹⁴ 20 C.F.R. § 10.404.

¹⁵ *Id.*

¹⁶ *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹⁷ *See Robert F. Hart*, 36 ECAB 186 (1984).

In a February 27, 2009 decision, the Office granted appellant a schedule award for a two percent permanent impairment of his right arm. The award was based on the September 30, 2008 findings of Dr. Jarrett, an attending Board-certified orthopedic surgeon, as interpreted by Dr. Dyer, a Board-certified orthopedic surgeon, serving as an Office medical adviser.

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for the schedule award which it had granted for a two percent permanent impairment of his right arm. In finding that the February 27, 2009 schedule award should be rescinded, the Office provided a clear explanation of its rationale for rescission. It explained that the rescission was justified because Dr. Dyer had improperly applied findings for appellant's left shoulder to determine that he had a two percent impairment of his right arm. The Office correctly found that the record did not contain an evaluation of appellant's right arm impairment at the time it awarded its February 27, 2009 schedule award and therefore there was no basis to grant a schedule award for his right arm.¹⁸

The Board further finds that additional development of the medical evidence is necessary with respect to appellant's permanent impairment. In March 2009 appellant submitted a March 13, 2009 report of Dr. Jarrett which contained an impairment evaluation. Dr. Jarrett indicated that, with respect to range of motion of his right shoulder, appellant had six percent impairment of his right arm due to 90 degrees of flexion, a two percent impairment due to 20 degrees of extension, a five percent impairment due to 80 degrees of abduction and a three percent impairment due to 40 degrees of internal rotation. He also determined that appellant had a 10 percent impairment of his left leg due to five degrees of flexion contracture of his left knee.¹⁹

The Office sent Dr. Jarrett's March 13, 2009 to an Office medical adviser for further evaluation. On March 31, 2009 the Office medical adviser discussed appellant's symptoms and diagnostic testing results and recommended that appellant be referred to a second opinion specialist.²⁰ The March 13, 2009 report of Dr. Jarrett suggests that appellant has permanent impairment related to his right shoulder and left knee, the two areas for which the Office accepted work injuries.²¹ As noted, the Office shares responsibility in the development of the evidence.²² For these reasons, the case is remanded to the Office for further development of the

¹⁸ At the time it granted the February 27, 2009 schedule award, the Office suggested that Dr. Jarrett inadvertently reported findings for appellant's right arm as being for his left arm. The content and context of Dr. Jarrett's report shows that he only evaluated appellant's left arm. The Office has not accepted any work injury for appellant's left arm.

¹⁹ Dr. Jarrett referred to Figures 16-40, 16-43 and 16-46 and Table 17-10 on pages 476, 477, 479 and 537 of the A.M.A., *Guides*.

²⁰ The Office medical adviser did not provide an assessment of appellant's impairment.

²¹ The Office had indicated that the medical evidence showed that appellant's right shoulder condition had resolved by the time appellant returned to regular-duty work on May 7, 2002. The Board notes, however, that the Office's assessment is not clearly supported by the evidence of record.

²² See *supra* notes 16 and 17.

medical evidence with respect to appellant's permanent impairment.²³ After such development as it deems necessary, the Office shall issue an appropriate decision regarding appellant's entitlement to schedule award compensation.

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a schedule award which it had granted for a two percent permanent impairment of his right arm. The Board further finds that the case requires further development of the medical evidence regarding appellant's permanent impairment and the case is remanded to the Office for that purpose to be followed by the issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: June 23, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²³ There is some evidence in the record that appellant sustained a work injury on December 11, 2006. In developing the medical evidence, consideration should be given to whether such a work injury, if established, would affect the assessment of appellant's permanent impairment.