United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 09-2304**
	)	**Issued: May 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
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 16, 2009 appellant filed a timely appeal from the June 24, 2009 decision of the Office of Workers' Compensation Programs adjudicating his schedule award claim and the August 12, 2009 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has more than 15 percent impairment to his left upper extremity; and (2) whether the Office abused its discretion in denying his request for reconsideration.[1]

FACTUAL HISTORY

On January 2, 2006 appellant, then a 53-year-old expeditor/clerk, filed a claim for a traumatic injury to his left shoulder after feeling pain when he loaded trays of mail into a bulk

[1] Appellant is not appealing a March 12, 2009 wage-earning capacity decision.

mail container. On April 11, 2006 the Office accepted a left rotator cuff tear, left bicipital tenosynovitis and impingement syndrome as causally related to the January 2, 2006 employment incident. On September 1, 2006 appellant underwent left shoulder arthroscopic surgery, including subacromial decompression and a "mini open" rotator cuff repair performed by Dr. Charles Mannis, an attending Board-certified orthopedic surgeon. Appellant subsequently filed a claim for a schedule award.

On September 27, 2007 Dr. Mannis opined, based on his examinations and treatment of appellant, that he had 20 percent impairment to his left arm due to his accepted rotator cuff tear. He did not explain how he calculated the impairment.

On October 22, 2007 Dr. David H. Garelick, a Board-certified orthopedic surgeon and an Office medical adviser, reviewed the case file and calculated six percent left arm impairment for decreased range of motion.[2]

The Office found a conflict in medical opinion between Dr. Mannis and Dr. Garelick as to appellant's left arm impairment. It referred him, together with the case file, statement of accepted facts and a list of questions, to Dr. David W. Strege, a Board-certified orthopedic surgeon, for an independent medical examination and evaluation of his left arm impairment.

On February 26, 2008 Dr. Strege reviewed the medical history and provided findings on physical examination. He found that appellant had not reached maximum medical improvement.

On October 15 and December 12, 2008 Dr. Mannis provided findings on physical examination. Left shoulder range of motion measurements included forward elevation to 150 degrees, backward elevation to 30 degrees, extension to 30 degrees, abduction to 135 degrees, adduction to 30 degrees, internal rotation to 45 degrees and external rotation to 75 degrees. Appellant described his shoulder pain as 5 out of a maximum 10. There was no sensory loss. Appellant's weakness or atrophy of the left upper extremity was 4/5. The weakness was not localized to any specific muscle group. There were no other types of left upper extremity impairment. Dr. Mannis opined that appellant had 25 to 30 percent left upper extremity impairment. He did not explain how he calculated the impairment.

On January 12, 2009 Dr. Garelick calculated appellant's left upper extremity impairment rating using the reports of both Dr. Mannis and Dr. Strege. He averaged the range of motion measurements they provided and calculated 15 percent left upper extremity impairment.

[2] *See* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (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).

By decision dated February 19, 2009, the Office granted appellant a schedule award based on 15 percent left upper extremity impairment for 46.8 weeks, from October 15, 2008 to September 7, 2009.[3]

On May 18, 2009 an Office hearing representative set aside the February 19, 2009 decision and remanded the case for further development of the medical evidence and a *de novo* decision. She found that Dr. Garelick had improperly averaged the range of motion measurements provided by Dr. Mannis and Dr. Strege. Additionally, the measurements of Dr. Strege were made at a time when appellant had not reached maximum medical improvement.

On May 25, 2009 Dr. Garelick found that appellant had seven percent left upper extremity impairment based on the 6th edition of the A.M.A., *Guides*.

By decision dated June 24, 2009, the Office found that appellant had no more than 15 percent left upper extremity impairment.

Appellant requested reconsideration. He submitted the October 15, 2008 report of Dr. Mannis previously considered by the Office. On August 12, 2009 the Office denied appellant's reconsideration request on the grounds that the evidence submitted was not sufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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* 6th edition has been adopted by the Office as the appropriate standard for evaluating schedule losses.[6]

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 [of Labor] shall appoint a third physician who shall make an examination."[7] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

[3] The Act provides for 312 weeks of compensation for 100 percent loss or loss of use of the upper extremity. 5 U.S.C. § 8107(c)(10). Multiplying 312 weeks by 15 percent equals 46.8 weeks of compensation.

[4] 5 U.S.C. § 8107.

[5] *See* 20 C.F.R. § 10.404; *see also* FECA Bulletin No. 9-03, issued March 15, 2009 (effective May 1, 2009 the Office began using the providing for use of the 6th edition of the A.M.A., *Guides* (6th ed. 2008).

[6] *Id.*

[7] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[8]

ANALYSIS -- ISSUE 1

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

Due to the conflict in medical opinion between Dr. Mannis and Dr. Garelick as to appellant's left upper extremity impairment, the Office properly referred appellant to Dr. Strege for an impartial medical evaluation. On February 26, 2008 Dr. Strege reviewed the medical history and provided findings on physical examination. He found that appellant had not reached maximum medical improvement. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury.[9] Maximum medical improvement arises at the point at which the injury has stabilized and will not improve further. This determination is factual in nature and depends primarily on the medical evidence.[10] Because Dr. Strege found that appellant had not reached maximum medical improvement, he could not determine appellant's permanent impairment of his left upper extremity at that time.

Dr. Garelick reviewed the medical evidence following appellant's examination by Dr. Strege. He calculated appellant's left upper extremity impairment at 15 percent, using the reports of Dr. Mannis and Dr. Strege. The Office did not follow its procedures in referring the case to Dr. Garelick. Office procedures state, "No report which addresses a conflict should be reviewed by [an Office medical adviser] who was involved in creating the conflict since bias might be inferred from this action. Arrangements must be made to have another [Office medical adviser] or a physician acting as a consultant to the Office review the file."[11] Following the May 18, 2009 decision vacating the February 19, 2009 schedule award decision, the case was again improperly referred to Dr. Garelick. The Board finds that this case must be remanded for referral of the case to a new Office medical adviser, or a physician acting as a consultant to the Office, to review the medical evidence, determine whether appellant has reached maximum medical improvement and if so calculate appellant's left upper extremity impairment.

In light of the Board's resolution of the first issue, the second issue is moot.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer the case file for review by a new Office medical adviser or an Office medical

[8] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

[9] *See Mark A Holloway*, 55 ECAB 321 (2004).

[10] *Peter C. Belkind*, 56 ECAB 580 (2005).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (March 2005).

consultant. After such further development as the Office deems necessary, it should issue an appropriate decision on appellant's left upper extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 12 and June 24, 2009 are set aside and the case is remanded for further action consistent with this decision.

Issued: May 20, 2010
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