United States Department of Labor
Employees' Compensation Appeals Board

P.L., Appellant	)	
and	)	**Docket No. 12-873**
	)	**Issued: September 6, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 13, 2012 appellant timely appealed the February 17, 2012 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of his claim for a schedule award. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3 (2011), the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant is entitled to a schedule award for permanent impairment of the right upper extremity.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case was previously before the Board.[2] Appellant, a 73-year-old former letter carrier, has an accepted claim for right shoulder traumatic impingement due to slipping on a freshly painted curb and falling on his right elbow, which occurred on October 1, 1991. He retired effective April 2, 1995, a few weeks prior to his 56th birthday. On May 28, 2008 appellant filed a claim for a schedule award (Form CA-7). For administrative reasons, OWCP had destroyed his October 1, 1991 injury claim file and, therefore, efforts were undertaken to recreate the case record. However, the only prior treatment records appellant was able to secure at the time consisted of a November 12, 1991 report from Dr. David L. Galt, a Board-certified orthopedic surgeon, who noted an October 1, 1991 history of injury and diagnosed right shoulder traumatic impingement.[3]

In support of his current claim for a schedule award, appellant submitted a May 12, 2008 impairment rating from Dr. Thomas J. Purtzer, a Board-certified neurosurgeon, who diagnosed mild chronic pain syndrome due to chronic right shoulder impingement syndrome with secondary osteoarthritis. Dr. Purtzer calculated five percent impairment of the right upper extremity (RUE) due to loss of shoulder abduction (one percent) and internal rotation (four percent).[4] He attributed appellant's loss of motion to his right shoulder impingement syndrome, which in turn was caused by the October 1, 1991 employment injury. An August 21, 2008 right shoulder magnetic resonance imaging scan revealed evidence suggesting a partial thickness rotator cuff tear. In an October 30, 2008 addendum, Dr. Purtzer indicated that the additional imaging studies did not alter his previous five percent RUE impairment rating, but the findings did suggest that appellant might benefit from surgical intervention.

When the case was last before the Board, OWCP had denied appellant's claim for a schedule award and had also denied reconsideration. In denying the claim, OWCP found that Dr. Purtzer had not provided an explanation of how appellant's five percent RUE impairment was causally related to the October 1, 1991 employment injury.

By decision dated January 21, 2010, the Board set aside OWCP's December 16, 2008 and April 17, 2009 decisions, and remanded the case for further medical development. While Dr. Purtzer's opinion regarding the cause of appellant's five percent RUE impairment was insufficient to discharge appellant's burden, this evidence was nonetheless sufficient to require further development by OWCP. The Board's January 21, 2010 decision is incorporated herein by reference.

Following remand, OWCP received additional treatment records covering the period October 16, 1991 to February 18, 1992. The records pertained to appellant's October 1, 1991

[2] Docket No. 09-1454 (issued January 21, 2010).

[3] In addition to right shoulder traumatic impingement, Dr. Galt noted the possibility of right glenoid chip fracture. At the time, He recommended rotator cuff rehabilitation therapy and possible further evaluation to rule out a loose body.

[4] Dr. Purtzer rated appellant under the then-applicable fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001).

right shoulder employment injury and included an October 16, 1991 physical therapy assessment and treatment plan for right shoulder musculature strain, physical therapy progress notes through October 28, 1991, an October 29, 1991 duty status report (Form CA-17) and February 18, 1992 treatment notes from Dr. Galt.

In his February 18, 1992 follow-up report, Dr. Galt noted that appellant's pain was reportedly gone and he was able to perform full range of motion (ROM) without discomfort, except for internal rotation. Appellant informed Dr. Galt that he had rested over his last two weeks of vacation in January 1992. Dr. Galt also noted that appellant reported that he had no night pain. Appellant was also not taking any medications.[5] Physical examination of the right shoulder revealed full ROM and negative impingement arc. Dr. Galt also noted resisted elevation 5/5, without pain and resisted rotation strength 5/5, similarly without pain. His diagnostic impression was resolved right shoulder impingement. Dr. Galt advised that appellant should continue activities as tolerated, and he anticipated that appellant would reach a medically stationary state in one month's time, with no permanent impairment.

OWCP prepared an April 30, 2010 statement of accepted facts (SOAF), which included the accepted condition of right shoulder impingement, and the dates and identity of various physicians who had previously treated or evaluated appellant, as well as the dates of imaging studies obtained.

Dr. Timothy R. Borman, an orthopedic surgeon and OWCP referral physician, examined appellant on June 8, 2010. Based on his physical examination and review of the record, including the latest SOAF, Dr. Borman found 14 percent impairment of the RUE. The rating was based on loss of shoulder ROM under the A.M.A., *Guides* (6th ed. 2008). Dr. Borman stated that appellant suffered permanent functional loss of use of his right arm due to the work event of October 1, 1991.

After reviewing Dr. Borman's report, OWCP asked him to clarify his report in view of Dr. Galt's 1992 report finding that appellant's work-related injury has resolved.

In a supplemental report dated July 7, 2010, Dr. Borman noted reviewing Dr. Galt's February 18, 1992 clinical note and found that appellant had not suffered permanent functional loss of his right arm due to the October 1, 1991 work event. He stated that, because of the reported normal shoulder ROM, normal strength, and normal function as of February 18, 1992, any functional loss of the right arm would be due to factors subsequent to and completely independent from the October 1, 1991 work event.

In a decision dated July 22, 2010, OWCP denied appellant's claim for a schedule award based on Dr. Borman's July 7, 2010 supplemental report.

Appellant requested an oral hearing and he also submitted a November 22, 2010 report from Dr. Purtzer. Appellant's physician took issue with Dr. Borman's finding that other, unspecified factors must have been responsible for appellant's current right upper extremity

[5] When Dr. Galt initially examined appellant on November 12, 1991, he prescribed Naprosyn.

impairment. Dr. Purtzer thought it untenable to base one's opinion solely on Dr. Galt's February 18, 1992 findings.

At the December 7, 2010 oral hearing, appellant's then representative argued, *inter alia*, that OWCP "badgered" Dr. Borman into changing his opinion. Appellant testified that his condition waxed and waned over the years and never fully resolved. As to his reported lack of pain on February 18, 1992, he noted that he had been on vacation for two weeks just prior to his last visit with Dr. Galt. Appellant explained that he just might have been having a good day when Dr. Galt examined him on February 18, 1992. However, the pain had been continually present since then. Appellant also testified that he did not seek further treatment from Dr. Galt because there was no guarantee that surgery would improve his condition. He "decided that [he] would learn to live with it...."

By decision dated February 4, 2011, the Branch of Hearings & Review affirmed OWCP's July 22, 2010 decision denying appellant's claim for a schedule award.

Appellant requested reconsideration on May 22, 2011. He submitted a March 2, 2011 letter from Dr. Galt who indicated that he had purged all of his treatment records regarding appellant's right shoulder condition. Appellant also submitted another copy of Dr. Purtzer's November 22, 2010 report.

In a February 17, 2012 decision, OWCP reviewed the schedule award claim on the merits, but denied modification of its prior decisions.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[6] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[7] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[8]

FECA provides that, if there is disagreement between an OWCP-designated examining physician and the employee's physician, OWCP shall appoint a third physician who shall make

[6] For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[7] 20 C.F.R. § 10.404.

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

an examination.[9] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[10] Where OWCP has referred the employee to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion regarding the cause and extent of appellant's right upper extremity impairment. Pursuant to the Board's January 21, 2010 decision, OWCP obtained a second opinion evaluation from Dr. Borman, who found 14 percent right upper extremity impairment under the A.M.A., *Guides* (6th ed. 2008). However, upon further inquiry on whether the impairment was causally related to the 1991 accepted injury, Dr. Borman found the current impairment not causally related to the accepted injury. Appellant's physician, Dr. Purtzer, provided a November 22, 2010 report wherein he disagreed with Dr. Borman's July 7, 2010 opinion on causal relationship. Dr. Purtzer continued to attribute appellant's current right shoulder impairment to his October 1, 1991 employment injury.[12] The evidence is currently in equipoise. Accordingly, the Board finds that there is an unresolved conflict in medical opinion regarding the cause and extent of any right upper extremity impairment.

On remand, OWCP should refer appellant to an impartial medical examiner for evaluation and an impairment rating consistent with A.M.A., *Guides* (6th ed. 2008). After such further medical development as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

[9] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[10] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[11] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[12] Although the heading of Dr. Purtzer's November 22, 2010 report references the "[s]ixth [e]dition," he did not provide any specific references to the A.M.A., *Guides* (6th ed. 2008) that might otherwise support his current 10 percent RUE impairment rating.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 6, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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