U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL C. MILNER and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, VA

Docket No. 01-620; Submitted on the Record;
Issued March 13, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has greater than a 20 percent impairment of his right upper extremity for which he received a schedule award.

On December 13, 1994 appellant, then a 36-year-old letter carrier, filed an occupational disease claim alleging that he sustained right carpal tunnel syndrome while in the performance of duty. He became initially aware of his condition on July 29, 1994 and that it was caused by his employment on October 11, 1994. The Office of Workers' Compensation Programs on February 18, 1997 accepted appellant's claim for right carpal tunnel syndrome and aggravation of a preexisting neuropathy. Appellant was paid appropriate compensation including wage loss.

On June 12, 1998 appellant filed a claim for a schedule award.

In a report dated May 5, 1998, Dr. William H. Bowers, appellant's treating orthopedic surgeon, stated that appellant had reached maximum medical improvement and that he would perform an impairment evaluation if authorized. He noted that appellant had a preexisting 1979 injury based on an incident incurred while appellant was on active duty. Dr. Bowers stated that appellant's "employment … has exacerbated the original injury in 1979 and for that reason he continues to have difficulties."

In a report dated August 3, 1998, Dr. Bowers evaluated appellant and stated:

> "The hand is impaired by 49 percent that contributes a 44 percent impairment to the upper extremity. The wrist impairs the upper extremity by 8 percent. The upper extremity is impaired by 48 percent and contributes a 29 percent impairment to the whole person."

In a report dated August 24, 1998, an Office medical adviser reviewed appellant's record and recommended an impairment rating of 20 percent for the right upper extremity. He stated that appellant's moderate entrapment neuropathy of the median nerve at the wrist merited a

20 percent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).[1] The Office medical adviser added that his rating included appellant's preexisting 1978 injury.

In a report dated August 31, 1998, Dr. Bowers stated that he had relied on the A.M.A., *Guides* in his August 3, 1998 evaluation noting that for appellant's elbow, wrists and each digit of each hand, he relied on the A.M.A., *Guides* at chapter 3, pages 38 to 41, for hand range of motion, he relied on pages 35 to 38 and for "sensation according to the recommendations in this chapter, page 20, section 3.1c." Dr. Bowers added that, although appellant's "considerable loss of grip strength was evident on strength testing, we did not include the strength deficit as a portion of the rating, because we felt that the upper extremity rating of 48 percent adequately reflected" appellant's functional impairment.

In a decision dated November 6, 1998, the Office awarded appellant a 20 percent impairment for the right upper extremity.

By letter dated December 2, 1998, appellant, through counsel, requested an oral hearing.

A hearing was held on May 13, 1999. In a decision dated and issued on May 11, 2000, the hearing representative found a conflict in medical opinion between Dr. Bowers, appellant's treating physician, and the Office medical adviser. The case was remanded to the Office for referral to an impartial medical examiner.[2]

The Office referred appellant on August 30, 2000 to Dr. Kennedy Daniel, a Board-certified orthopedic surgeon, as the impartial medical examiner. In its statement of accepted facts, the Office noted that appellant sustained a service-connected injury to his right upper extremity for which he was awarded a 40 percent service-related disability.

In his report dated October 12, 2000, Dr. Daniel noted appellant's history of injury and referred to appellant's military records that included a history of the January 26, 1978 injury to his flexor tendons, median nerve and ulnar artery. Upon examination, he noted that appellant seemed "somewhat depressed" and that "[t]here is apparently some emotional or psychological factor involved as well of which I have very little knowledge except to say that he seemed unusual in his affect when I saw him…." Dr. Daniel found that appellant had decreased sensation throughout the radial side of his palm and digits and the dorsum of the hand and exhibited 135 pounds of grip strength on the left and only 5 pounds on the right. Dr. Daniel also noted that appellant started to shake when trying to squeeze the dynamometer and that appellant did not actively abduct his thumb from his palm. He noted that appellant held his hand in an awkward and clenched way and that he had to use his other hand in attempts to flatten his hand. Appellant had limited motion of wrist in flexion and extension, radial and ulnar deviation, as well as pronation and supination and full range of motion of his elbow and shoulder. Dr. Daniel noted that appellant's hand was exquisitely tender and appeared to be without usable function due to the posture with which it was held. Appellant exhibited a very flat affect and seemed

[1] A.M.A., *Guides*, 57, Table 16.

[2] *See Dallas E. Mopps*, 44 ECAB 454, 456 (1993).

resigned to the fact that his right hand had no function. With respect to the degree of permanent impairment of the right upper extremity, Dr. Daniel stated:

> "There is no such impairment. The aggravation that the patient's job may have caused to the median nerve should have been repaired by Dr. Bowers' surgery. There was no objective finding at the time of the surgery that could be definitely related to any specific job injury and, therefore, I feel every impairment this patient has is related to his original [1978] injury. [Appellant's] symptoms and examination are subjective in many ways and it seems from reading the records that the function perceived by the examiners was very much swayed by the patient's reporting of symptoms…."

Dr. Daniel added that appellant's "unwillingness or inability to open or close his hand at all on my examination cannot be explained on any organic basis." In response to the question regarding the impact that appellant's preexisting condition had on his impairment, Dr. Daniel stated that all of his impairment is due to his original injury and that there is "[n]o specific job-related injury here." He added that "[i]f one were to accept that he did not have a job-related injury, the date of maximum medical improvement would be November 3, 1994, the date that Dr. Bowers released him to return to work.

In a decision dated October 30, 2000, the Office found appellant had no more than a 20 percent impairment of the right upper extremity.

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

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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 regulation as the appropriated standard for evaluating schedule losses.[5]

In this case, there was a conflict in opinion between Dr. Bowers, appellant's physician, who found a 48 percent impairment of the right upper extremity, and an Office medical adviser, who found a 20 percent impairment. Due to this conflict in medical opinion, the Office properly referred appellant to Dr. Daniel, a Board-certified orthopedic surgeon, for an impartial examination and evaluation of appellant's impairment. Dr. Daniel provided a thorough examination and review of appellant's records, determined that appellant had no impairment based on his work-related injuries and that any impairment was a result of appellant's preexisting, nonemployment disability. However, the Board notes that the impartial medical

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id.*

examiner improperly isolated that portion of appellant's right upper extremity impairment pertaining to his service-connected 1978 injury. It is well established that in determining entitlement to a schedule award, preexisting impairment to the schedule member are to be included.[6] As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him."[7] For this reason, the report of Dr. Daniel is of diminished probative value and not sufficient to resolve the conflict of medical opinion.

Upon remand, the Office should refer appellant to an impartial medical specialist to resolve whether appellant has a greater than 20 percent impairment of his right upper extremity for which he received a schedule award.[8] After such further development as necessary, the Office shall issue a *de novo* decision.

[6] *See Lela M. Shaw*, 51 ECAB ___ (Docket No. 98-1587, issued March 15, 2000); *Kenneth E. Leone*, 46 ECAB 133 (1994).

[7] Larson, *The Law of Workers' Compensation* §§ 9.02, 87.02 (2000). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition ... the entire disability is compensable, and ... no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, § 90.04.

[8] Appellant is reminded of his requirement to cooperate in the impartial medical examiner's physical examination; *see Guiseppe Aversa*, 46 ECAB 974 (1995).

The decision of the Office of Workers' Compensation Programs dated October 30, 2000 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
March 13, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member