

On June 15, 1994 appellant underwent right shoulder surgery performed by Dr. Steven Berkowitz, an attending Board-certified orthopedic surgeon. In a June 23, 1994 report, Dr. Berkowitz provided findings on examination and described appellant's treatment and the expected date of his return to work. In a report dated July 7, 1994, Dr. Robert Dennis, a Board-certified orthopedic surgeon and an associate of Dr. Berkowitz, stated that he examined appellant regarding his condition following his right shoulder surgery. He provided physical findings on examination and described a proposed course of postsurgery treatment.

In an operative report dated May 15, 2000, Dr. Berkowitz indicated that appellant underwent debridement of the right elbow on that date.

In a November 25, 2000 report, Dr. David Weiss, an osteopath, provided findings on physical examination and opined that appellant had a 62 percent permanent impairment of the right upper extremity.

On February 5, 2001 appellant filed a claim for a schedule award.

In a report dated February 12, 2001, an Office medical adviser stated that appellant had a 24 percent impairment of the right upper extremity based on the physical findings in the November 25, 2000 report of Dr. Weiss.

By decision dated February 12, 2001, the Office granted appellant a schedule award for 74.88 weeks for the period February 12, 2001 to July 21, 2002, based on a 24 percent impairment of the right upper extremity.

In an April 24, 2001 report, Dr. Berkowitz provided findings on physical examination and determined that appellant had a 21 percent impairment of the right upper extremity for loss of range of motion and decreased grip strength, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant requested a hearing that was held on March 7, 2002.

By decision dated May 9, 2002, an Office hearing representative remanded the case for resolution of an unresolved conflict in the medical opinion evidence between Dr. Weiss and the Office medical adviser as to appellant's permanent impairment of his right upper extremity.

The Office referred appellant to Dr. Dennis for an impartial examination and evaluation of his right upper extremity impairment.

In a report dated October 2, 2002, Dr. Dennis provided a history of appellant's condition and a review of the medical records.¹ He indicated that he had been asked to referee the impairment determinations of Dr. Weiss and Dr. Berkowitz. Dr. Dennis opined that appellant had a 17 percent permanent impairment of the right upper extremity and provided calculations based on the fifth edition of the A.M.A., *Guides*.

¹ He noted that he had examined appellant on July 7, 1994 while he was in practice with Dr. Berkowitz.

By decision dated November 7, 2002, the Office denied appellant's claim for an additional schedule award.

Appellant requested an oral hearing that was held on July 27, 2004.

By decision dated October 26, 2004, an Office hearing representative affirmed the November 7, 2002 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ sets 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 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 appropriate standard for evaluating losses.⁴

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 shall appoint a third physician who shall make an examination.⁵ Where a case is referred to an impartial medical specialist 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.⁶

ANALYSIS

Due to the conflict in the medical opinion evidence between Dr. Weiss and the district medical director as to the permanent impairment of appellant's right upper extremity, the Office referred appellant to Dr. Dennis, a Board-certified orthopedic surgeon, for an independent medical examination.

Appellant argued that Dr. Dennis should be disqualified because he was previously associated with Dr. Berkowitz.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.*

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

⁶ *See* *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

In this case, the record shows that Dr. Dennis was previously an associate of Dr. Berkowitz and that he examined and treated appellant on July 7, 1994 following his right shoulder surgery.

The Board has held that, under section 8123(a) of the Act,⁷ a physician serving as the impartial specialist should be one who is wholly free to make a completely independent evaluation and judgment, untrammelled by a conclusion rendered on prior examination.⁸ The Board has disqualified physicians from serving in the capacity of an impartial medical specialist when the record demonstrates that such specialist is in association or otherwise affiliated with a physician whose medical opinion was used to create a conflict with appellant's attending physician or when the physician has otherwise reviewed the case record and provided an opinion on the claim.⁹ Section 10.321 of Title 20 Code of Federal Regulations requires that the selected impartial medical specialist be a physician "who has had no prior connection with the case."¹⁰ The Office must assure that the person designated as the impartial medical specialist has no prior association or affiliation with any other physician who has examined the claimant or provided an opinion on the claim.¹¹ To hold otherwise would undermine the impartiality sought under section 8123(a). Because Dr. Dennis had previously been an associate of Dr. Berkowitz and had examined appellant on a previous occasion, the Office improperly selected him to serve as the impartial medical specialist in this case. Therefore, there remains an unresolved conflict in the medical evidence as to the permanent impairment of appellant's right upper extremity.

CONCLUSION

The Board finds that this case is not in posture for a decision due to the unresolved conflict in the medical opinion evidence. On remand, the Office should refer appellant to an impartial medical specialist not previously associated with this case for an examination and evaluation in order to resolve the conflict in the medical opinion evidence regarding his right upper extremity impairment. After such further development as it deems necessary, the Office shall issue an appropriate decision.

⁷ 5 U.S.C. § 8123(a).

⁸ *Wallace B. Page*, 46 ECAB 227 (1994); *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

⁹ *Daniel A. Davis*, 39 ECAB 151 (1987).

¹⁰ 20 C.F.R. § 10.321(b).

¹¹ *Daniel A. Davis*, *supra* note 9; *see id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2004 is set aside and the case is remanded for further action consistent with this decision.

Issued: September 23, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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