U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER A. JESERITZ and U.S. POSTAL SERVICE,
POST OFFICE, Minneapolis, MN

Docket No. 00-1875; Submitted on the Record;
Issued September 20, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has greater than a 20 percent permanent impairment of his right upper extremity and greater than a 10 percent permanent impairment of his left upper extremity, for which he has received a schedule award.

On June 20, 1989 appellant, then a 40-year-old distribution clerk, filed a claim alleging that he sustained acute wrist tendinitis, causally related to his federal employment. The Office of Workers' Compensation Programs accepted appellant's claim for right wrist tendinitis and thereafter expanded his claim to include acceptance of bilateral flexor tendinitis of the hands and wrists, bilateral median nerve entrapment, bilateral carpal tunnel syndrome and chronic hypertrophy with flexor synovitis of both wrists and forearms. Appellant received all appropriate compensation benefits and was able to return to work alternating use of his hands. Appellant again experienced problems, and in May 1990 he was placed on restricted duties with limited hours; he stopped work on September 30, 1994 as the employing establishment had no job within his restrictions.

On January 31, 1994 appellant filed a claim for a schedule award.

Based upon the medical evidence of record on December 1, 1994 the Office granted appellant a schedule award for a 56 percent permanent impairment of his right upper extremity and a 53 percent permanent impairment of his left upper extremity for the period February 16, 1993[1] to August 24, 1999 for a total of 340.08 weeks of compensation.

Appellant resumed work at the employing establishment on January 1, 1995.

By letter dated May 5, 1995, the employing establishment requested that the Office review the schedule award granted to appellant. It noted that, although Dr. Dennis Peterson, a Board-certified family practitioner, found by report dated August 26, 1994, that appellant had a 56 percent impairment of his right upper extremity and a 53 percent impairment of his left upper

[1] The date of maximum medical improvement.

extremity, further evaluation by Dr. Peter C. Amadio, a Board-certified orthopedic surgeon, who specialized in upper extremities, and Dr. John H. Beaumier, another Board-certified orthopedic surgeon, resulted in a 20 percent bilateral upper extremity permanent impairment rating, in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* The employing establishment postulated that appellant's condition was resolving and that he had not reached maximum medical improvement.

Appellant resumed working eight hours per day on June 10, 1995.[2]

On December 2, 1995 the Office referred appellant's records to an Office medical adviser with the question of whether the further submitted medical evidence altered his medical opinion as to the extent of appellant's bilateral upper extremity permanent impairment. The Office medical adviser replied that, based on his review of the medical evidence, appellant had not reached maximum medical improvement and that further improvement had occurred. He opined that the moderate degree of median nerve entrapment at the wrist then present in appellant was in line with Dr. Beaumier's assessment at a 20 percent bilateral upper extremity impairment and that maximum medical improvement occurred on February 13, 1995.

On March 8, 1996 the employing establishment directed appellant to attend a fitness-for-duty examination.[3]

Appellant was put under surveillance by the postal inspection service during the summer of 1996. During this time he was videotaped on various dates engaged in his normal activities both on and off the job. Appellant was videotaped on July 18, 1996 playing softball; on July 22, 1996 playing and umpiring softball and working at the employing establishment; on July 24, 1996 playing softball; on July 31, 1996 playing softball and working at the employing establishment; on August 12, 1996 playing softball and working at the employing establishment; and on August 22, 1996 cutting and removing sod at a softball field. Appellant later admitted during questioning that he had taken part in about 20 softball games over the summer in 1996; that he helped his brother shingle his house during the 1996 summer; and that during the winter of 1996 he shoveled snow around his house and undertook other projects.

In a report dated September 18, 1996, Dr. Thomas C. Jetzer, a Board-certified occupational medicine specialist, noted that he reviewed the video tapes taken by the inspection service, he opined that the videos demonstrated that appellant "has not been suffering any ill effects from accumulative trauma from [postal work]," and that they demonstrated that appellant had "good upper extremity function," during the summer of 1996, "despite his complaints of continued disability." Dr. Jetzer opined that any further claims from appellant for medical treatment or disability payment should be denied.

[2] An overpayment of compensation was determined to have occurred because the Office erroneously paid appellant compensation with cost-of-living adjustments made effective to March 1, 1990. This issue is not now before the Board on this appeal.

[3] On November 15, 1996 the Office made a loss of wage-earning capacity determination finding that appellant's reemployment position fairly and reasonably represented his wage-earning capacity, and that he, therefore, had no loss of wage-earning capacity. This issue is not now before the Board on this appeal.

In a report dated December 19, 1996, Dr. Peterson noted that he had reviewed appellant's video tapes and he recommended that no further disability award should be paid out until further evaluation, including another functional capacity evaluation, could be accomplished.

On June 5, 1997 the Office advised appellant that another physical examination was required, as the newly elicited factual evidence called into question his presentation to his physicians.

A June 18, 1997 electromyogram (EMG) was reported as revealing "[E]lectrodiagnostic evidence of bilateral median neuropathy with significant decrease in amplitude of motor nerve noted at [two centimeters] proximal to distal wrist crease on the right and [three centimeters] on the left. No evidence of axonal degeneration."

On July 2, 1997 Dr. Edward C. McElfresh, a Board-certified orthopedic surgeon, opined that these EMG changes noted upon June 18, 1997 testing were due to appellant's employment and not due to his playing softball. He opined that appellant must avoid repetitive activities which included mail sorting.

On July 9, 1997 the Office referred appellant, together with a statement of accepted facts and questions to be resolved, to Dr. Steven S. Lebow, a Board-certified neurosurgeon, for another second opinion examination.

In a report dated July 23, 1997, Dr. Lebow reviewed appellant's factual and medical history and the videotapes and opined that, in accordance with the A.M.A., *Guides*, appellant had a 20 percent bilateral permanent impairment for loss of function due to sensory deficit, pain or discomfort with the median nerve below mid forearm.

On August 26, 1997 an Office medical adviser, Dr. Nabil F. Angley, a Board-certified orthopedic surgeon, reviewed Dr. Lebow's findings and conclusions, and indicated that, although Dr. Lebow rated appellant's bilateral median nerve entrapment as moderate, he felt that without reported sensory asymmetries and with intermittent symptoms which occurred after repetitive activities, appellant's median nerve entrapment was mild. Dr. Angley opined that, in accordance with Table 16, page 57 of the A.M.A., *Guides*, therefore appellant had a 10 percent permanent impairment of each upper extremity due to mild nerve entrapment.

By decision dated November 19, 1997, the Office modified appellant's schedule award effective November 10, 1997 finding that the evidence of record established that he had no greater than a 10 percent permanent impairment of each upper extremity. The Office determined that appellant was only entitled to 62.40 weeks of compensation.

On December 3, 1997 appellant requested an oral hearing before an Office hearing representative which was held on June 25, 1998, during which appellant testified and submitted several medical reports into the record.

On March 17, 1998 appellant underwent a right carpal tunnel release.

By decision dated November 23, 1998, the Office remanded the case for further development. The hearing representative found that the record contained conflicting evidence and opinion regarding the extent and degree of appellant's permanent impairment, and directed that another second opinion evaluation be conducted.

On December 30, 1998 the Office referred appellant for a second opinion evaluation of his impairment rating to Dr. Mario R. Quinonos, a Board-certified neurologist.

By report dated January 18, 1999, Dr. Quinonos reviewed appellant's factual and medical history, detailed his findings upon extensive physical examination of his upper extremities, noted that upon palpation appellant experienced tenderness and discomfort similar to that experienced after maintaining extension, flexion or repetitive motion of the hand, sometimes with pain that extended up to the elbow and opined that he had developed an employment-related median nerve entrapment. He opined that, on the basis of the A.M.A., *Guides*, for loss of function due to sensory deficit, pain and discomfort with the median nerve below the mid-forearm, appellant had an intermittent sensory deficit estimated at a 20 percent permanent impairment.

On February 24, 1999 the Office referred the case record back to Dr. Angley, the Office medical adviser, who reviewed Dr. Quinonos' findings and assessment and opined as follows:

> "Dr. Quinonos' report stated the presence of tenderness over the median nerve at the wrist on deep palpation. The flexor tendons were adherent to the scar. But sensation to pinprick, touch and vibration sense to both hands were normal. No atrophy of muscles. Normal grip of both hands. However, [appellant] experienced recurrent pain in his right hand after strenuous activity and because of it, he was unable to work. Therefore I would rate the entrapment at the right wrist as moderate. The left hand had only minimal symptoms and can be rated as mild."

Dr. Angley opined that in accordance with Table 16, page 57 of the A.M.A., *Guides* appellant had a 20 percent permanent impairment of his right upper extremity due to moderate entrapment and a 10 percent impairment of his left upper extremity due to mild entrapment.

By decision dated March 26, 1999, the Office modified appellant's schedule award finding that appellant had a 20 percent permanent impairment of his right upper extremity and a 10 percent permanent impairment of his left upper extremity.

In a letter dated April 24, 1999, appellant requested an oral hearing before an Office hearing representative.

Appellant returned to work at the employing establishment effective May 22, 1999.

In support of his hearing request, appellant submitted a December 30, 1999 report from Dr. Peterson in which he noted that "to consider repeating a full A.M.A., *Guide*[*s*] disability exam[ination] would be difficult without repeating all of the extensive strength testing and measurements. At this point I do not see a justification for this nor can I do this without repeating a functional capacity evaluation." Dr. Peterson noted that appellant continued to have problems with his forearms, including forearm discomfort, right greater than left, with predominant symptoms coming from his right forearm at the site of his previous surgery, and chronic flexor tenosynovitis. He indicated that appellant's repetitive work over the preceding six months at the employing establishment had increased some of his chronic symptoms.

An oral hearing was held on January 4, 2000 at which appellant testified about his ongoing symptoms.

By decision dated April 7, 2000, the hearing representative affirmed the Office's March 26, 1999 decision finding that Dr. Angley's opinion constituted the weight of the medical opinion evidence and established that appellant had a 20 percent permanent impairment of his right upper extremity and a 10 percent permanent impairment of his left upper extremity.[4]

The Board finds that the Office met its burden of proof to modify its schedule award.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5]

On December 1, 1994 the Office granted appellant a schedule award for a 56 percent permanent impairment of his right upper extremity and a 53 percent permanent impairment of his left upper extremity. On December 2, 1995 an Office medical adviser determined that the evidence of record supported that appellant had not yet reached maximum medical improvement, and that further improvement since the granting of the schedule award had occurred.

Although Dr. Peterson initially opined that appellant had a 56 percent impairment of his right upper extremity and a 53 percent impairment of his left upper extremity, based upon his complaints of loss of use, after reevaluation and the consideration of new factual and medical evidence, he determined on December 19, 1996 that appellant's activities during recreational endeavors were inconsistent with his activities while at work. Dr. Peterson changed his original opinion, based upon this new evidence, and recommended that no further disability award be granted, and suggested that another functional capacity evaluation be conducted.

On December 30, 1998 Dr. Quinonos reviewed appellant's factual and medical history, performed a thorough upper extremity examination, and opined that the basis of appellant's impairment was his loss of function due to sensory deficit, pain and discomfort with the median nerve below the mid-forearm. He referred to the A.M.A., *Guides* and determined that appellant had a 20 percent permanent impairment for his intermittent sensory disturbances.

Thereafter Dr. Angley, reviewed Dr. Quinonos' findings upon examination, applied the A.M.A., *Guides*, and determined that, in accordance with Table 16, page 57, appellant had a 20 percent impairment of his right upper extremity and a 10 percent impairment of his left upper extremity.

As the burden of proof to modify a schedule award is on the Office, it has to obtain new, rationalized, clear and concise evidence, based upon a proper factual and medical background, demonstrating that the previous schedule award was in error or that the claimant's condition was not permanent and stationary, and had substantially improved.[6]

As none of the subsequently obtained medical opinions support the level of permanent impairment initially awarded appellant based on evaluation by Dr. Peterson, and as Dr. Peterson

[4] A subsequent May 2, 2000 decision by the Office determining that appellant's position as a modified distribution clerk fairly and reasonably represented his wage-earning capacity, is not now before the Board on this appeal. *See* 5 U.S.C. § 501.2 (c).

[5] *Harold S. McGough*, 36 ECAB 332 (1984).

[6] *See Mary Lou Barragy*, 46 ECAB 781 (1995); Gary *L. Ward*, 44 ECAB 1014 (1993).

admitted that his earlier determination was based upon an inconsistent presentation such that he felt that appellant was now not entitled to any further compensation for permanent impairment, these reports are sufficient to support that appellant had improved and had less upper extremity permanent impairment than that for which he received a schedule award. Therefore, in reliance upon the extensive new rationalized evidence of record, and upon Dr. Peterson's admission that his original determination was incorrect and not supported by demonstration appellant's actual abilities, the Office proceeded to modify his schedule award entitlement.

The Board further finds that appellant has no greater than a 20 percent permanent impairment of his right upper extremity and a 20 percent permanent impairment of his left upper extremity.

Although Dr. Peterson, in his subsequent reports, did not provide a modified bilateral upper extremity impairment rating, he explained why he was changing his original impairment determination, and agreed with the impairment determination made by Dr. Lebow, that appellant had a 20 percent bilateral permanent upper extremity impairment.

Appellant was thereafter referred to Dr. Quinonos for a second opinion evaluation. Dr. Quinonos agreed with Dr. Lebow, determining after a complete upper extremity evaluation, that appellant had no more than a 20 percent bilateral permanent impairment of his upper extremities, and supporting this opined with medical rationale. Dr. Quinonos found that appellant's bilateral upper extremity loss of function was due to sensory deficit, pain and discomfort with the median nerve below the mid-forearm and he referred to the A.M.A., *Guides* and on that basis he determined that appellant had a 20 percent permanent impairment for his intermittent sensory disturbances.

The Office medical adviser, Dr. Angley, determined pursuant to Table 16, page 57 "Upper Extremity Impairment Due to Entrapment Neuropathy" that appellant had no greater than a 20 percent permanent impairment of his right upper extremity and a 10 percent permanent impairment of his left upper extremity. He opined that appellant's left upper extremity impairment was "mild" rather than "moderate," in accordance with the A.M.A., *Guides*, Table 16.

The A.M.A., *Guides* explain that impairment of the upper extremity due to entrapment neuropathy is properly evaluated under Table 16. Evaluation of entrapment neuropathy is explained as follows:

> "Impairment of the hand and upper extremity secondary to entrapment neuropathy may be derived by measuring the sensory and motor deficits as described in preceding parts of this section.
>
> "An alternative method is provided in Table 16 (p. 57). The evaluator *should not* use both methods. Impairment of the upper extremity secondary to an entrapment neuropathy is estimated according to the severity of involvement of each major nerve at each entrapment site."[7] (Emphasis in the original.)

[7] A.M.A., *Guides*, Table 16, page 57 (4th edition 1993).

The medical evidence of record establishes that appellant has entrapment neuropathy of the median nerve at both wrists. Pursuant to Table 16, a mild degree of median nerve entrapment at the wrist is a 10 percent impairment of the upper extremity, a moderate degree of entrapment is a 20 percent impairment of the upper extremity and a severe degree of entrapment is a 40 percent impairment.

Dr. Quinonos rated appellant's impairment of both wrists as moderate, his opinion was supported by the previous findings of Drs. Amadio, Beaumier and Lebow. In reviewing his report, in his 1999 report Dr. Angley opined that, while he agreed with the 20 percent impairment for appellant's right upper extremity, appellant's left upper extremity impairment was only mild and therefore rated a 10 percent permanent impairment. Dr. Angley did not provide any specific factual or medical analysis in support of his opinion that the left extremity impairment was only mild and he did not explain why he disagreed with Dr. Quinonos' evaluation. He also did not comment on the results of the 1997 EMG findings wherein the decrease in amplitude of the motor nerve was noted as two centimeters on the right, and three centimeters on the left. The medical evidence of record therefore supports a finding that appellant has no more than a 20 percent bilateral permanent impairment of the upper extremities.

The decision of the Office of Workers' Compensation Programs dated April 7, 2000 is hereby modified to reflect that appellant has a 20 percent bilateral permanent impairment of the upper extremities.

Dated, Washington, DC
September 20, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member