U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REY M. VILLANUEVA and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

Docket No. 01-752; Submitted on the Record;
Issued May 8, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant has greater than a one percent permanent impairment for each upper extremity, causally related to his March 8 and October 15, 1998 or April 28, 2000 employment injuries; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a further review on its merits under 5 U.S.C. § 8128(a).

Appellant, currently a 49-year-old mail processor, has filed five separate claims for injuries sustained on December 27, 1997,[1] March 8[2] and October 15, 1998,[3] November 17, 1999[4] and April 28, 2000.[5] His claims were accepted for left shoulder strain, cervical strain (twice) with subsequent anterior discectomy, bilateral epicondylitis and lumbar strain. He received appropriate compensation benefits and medical treatment, underwent cervical discectomy surgery with bone graft fusion on December 17, 1998 and was able to return to work on modified duty. On April 13, 2000 the Office combined the identified five cases under A16-0323455, the claim for injuries on October 15, 1998.

By report dated December 2, 1998, Dr. Donald L. Hilton, Jr., a Board-certified neurosurgeon, noted that appellant had chronic neck pain stemming from an initial injury in 1997, that he had subsequent reinjury resulting in cervical spine pain radiating into both arms, and that his magnetic resonance imaging (MRI) scan showed a herniated nucleus pulposus at

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[1] A16-0308967 for right side neck and shoulder injury; no condition was accepted.

[2] A16-0318375 accepted for left shoulder strain, cervical strain and bilateral epicondylitis.

[3] A16-0323455 accepted for cervical strain and an anterior cervical discectomy. This has become the master file into which all four other claims have been combined.

[4] A16-0351120 for a right hip condition; no condition was accepted.

[5] A16-0353805 accepted for lumbar sprain.

C6-7 with spondylosis and cord compression. Surgery was recommended and performed on December 17, 1998.

Thereafter appellant filed a request for a schedule award for permanent impairment due to his employment injuries.

By report dated April 13, 1999, Dr. Theodore W. Parsons, III, a Board-certified orthopedic surgeon and second opinion specialist, noted that appellant complained of ongoing neck pain which radiated into his upper back and some right lateral thigh numbness since the bone graft harvest surgery. Dr. Parsons noted appellant's right thigh symptomatology and opined that appellant sustained injury to his lateral femoral cutaneous nerve which might not recover and noted that he was going to continue with neck stiffness and pain probably indefinitely. He opined that appellant's current findings were associated with his injury and that his current residuals were a combination of cervical spondylosis as well as the C6-7 fusion.

On June 15, 1999 an Office medical officer noted appellant's accepted condition as cervical strain which resulted in an anterior cervical discectomy and fusion at C6-7, noted that the date of maximum medical improvement had been established by Dr. Howard J. Hassell, a Board-certified orthopedic surgeon, as March 26, 1999, noted that at that time appellant was complaining of loss of neck motion, neck pain and bilateral elbow pain, and noted that measurement based upon of degrees of lost flexion for bilateral elbow motion according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* was one percent for each upper extremity.[6] No impairment rating for pain was given.

By decision dated June 25, 1999, the Office granted appellant a schedule award for a one percent permanent impairment of his bilateral upper extremities for the period March 26 to May 8, 1999 for a total of 6.24 weeks of compensation.

On August 9, 1999 appellant requested an oral hearing on claim number A16-0318375 and A16-0323455. A hearing was held on February 29, 2000 at which appellant testified. Appellant claimed that he continued to experience neck, shoulder, bilateral elbow and right leg pain which he attributed to his accepted employment injuries and subsequent surgical interventions.

Electrodiagnostic evaluation and testing on September 13, 1999 was reported as revealing bilateral C7 sensory radiculopathy as well as peripheral delay of the right median and ulnar Erb's potentials. Distal slowing of the bilateral median and ulnar stimulations was noted to correlate with appellant's mild sensory slowing across the wrists for both median nerves.

On February 1, 2000 Dr. Hilton noted that appellant continued to complain of difficulty with his elbows and right hip problems with pain radiating from the right hip into the posterior portion of his hip.

[6] Despite appellant's complaints of ongoing bilateral elbow pain no allowance for impairment due to pain was considered.

On February 21, 2000 appellant filed a claim for occupational injury due to prolonged sitting in a nonergonomic chair.

By reports dated February 22 and 29, 2000, Dr. Miguel J. Saldana, a Board-certified surgeon, diagnosed cervical arthropathy, C5-6 and C6-7, bilateral epicondylitis and right iliac crest pain secondary to the bone graft taken for his cervical graft and he opined that post-operative defects in appellant's cervical spine with some mild stenosis were "definitely related to the lateral epicondylitis, carpal tunnel as well as the cubital tunnel syndromes and should all be considered when doing the impairment rating as well as the il[i]ac crest pain."

In a report dated March 6, 2000, Dr. Hassell diagnosed bilateral epicondylitis, bilateral ulnar neuritis and status post C5-6 anterior interbody fusion and reiterated Dr. Saldana's findings and opinion.

In a report dated March 22, 2000 from South Texas Orthopedic Physical Therapy and Rehabilitation, the supervising physician noted that an October 14, 1998 electromyogram demonstrated "both chronic and acute denervation bilaterally in muscles having C8 nerve root innervation in common." He noted that postoperatively appellant had no elbow relief and that elbow pain persisted and was diagnosed as bilateral epicondylitis with ulnar neuritis.

On April 3, 2000 the Office referred appellant's medical records, along with a statement of accepted facts, to an Office medical adviser for an opinion as to appellant's impairment rating.[7]

By report dated April 7, 2000, an Office medical adviser noted that South Texas Orthopedic Physical Therapy and Rehabilitation found a surgical treated disc lesion with no residual signs or symptoms effecting levels C6-7, noted that impairment values provided for decreased cervical motion were not pertinent to this claim as the spine was not ratable for purposes of permanent impairment and noted that "impairment based on decreased range of motion of the left shoulder is not acceptable, as the left shoulder (pathology/injury) has not been accepted as a work-related condition." The Office medical adviser found that the medical evidence of record supported no more than a one percent permanent impairment of the left and right upper extremities.

By decision dated April 13, 2000, the hearing representative noted that in accordance with case management procedures the Office had combined/doubled appellant's accepted employment injuries into master file No. A16-0323455, and that by decision dated June 25, 1999 the Office awarded appellant a schedule award for a one percent permanent impairment of each upper extremity. The hearing representative affirmed the June 25, 1999 decision finding that appellant's physicians, Drs. Hilton and Hassell, provided impairment opinions based on limitations of appellant's cervical spine, which were not compensable under the Federal Employees' Compensation Act and that therefore such opinions were of reduced probative value. The hearing representative also noted that a supplemental March 2000 report from South Texas Orthopedic Physical Therapy and Rehabilitation provided a whole person impairment rating of

[7] The Board notes that the statement of accepted facts identifies only one of appellant's several accepted conditions, mild cervical strain, as the accepted employment injury. It is therefore inaccurate and incomplete.

20 percent, which is also not cognizable under the Act. The hearing representative quoted the Office medical adviser who had noted "impairment based on decreased range of motion of the left shoulder is not acceptable, as the left shoulder (pathology/injury) has not been accepted as a work-related condition." The hearing representative found that the Office medical adviser provided an April 7, 2000 opinion based upon the fourth edition of the A.M.A., *Guides*, which constituted the weight of the medical opinion evidence and established that appellant had a one percent impairment of each upper extremity.

By report dated May 2, 2000, Dr. Saldana noted that appellant continued to complain of lateral epicondylitis and bilateral hand discomfort, and noted that he had a positive Tinel's sign, a positive flexion test and a positive elbow flexion test with a positive Tinel's in the cubital tunnel.

By letter dated May 3, 2000, appellant requested reconsideration of the April 13, 2000 decision, arguing that the medical evidence of record supported that he had referred pain from his neck to his lateral elbows, and permanent pain in the lateral femoral cutaneous nerve from the bone graft harvest site. He argued that this pain was compensable under the schedule award provisions of the Act and that the hearing representative erroneously disregarded his left shoulder impairment which was related to the left shoulder strain condition accepted by the Office on November 4, 1998.

By decision dated May 8, 2000, the Office rejected appellant's claim for right hip injury, low back and neck injury and peptic ulcer. The Office found that appellant had failed to establish fact of injury.

In response, on June 6, 2000 appellant requested a review of the written record.

By decision dated August 11, 2000, the Office affirmed the April 13, 2000 decision finding that appellant had not submitted evidence sufficient to warrant reopening his case for a further review on its merits under 5 U.S.C. § 8128(a). The Office found, upon limited review, that the evidence submitted was repetitious.

By letter dated August 21, 2000, appellant requested reconsideration of the schedule award decision arguing that others with injured backs at work received schedule awards.

By decision dated September 14, 2000, after review of the written record, the hearing representative affirmed the May 8, 2000 decision finding that none of the evidence submitted supported fact of injury.[8] The hearing representative found that appellant failed to provide any rationalized medical evidence supporting causal relation between his claimed injuries and sitting in his nonergonomic chair.

By decision dated December 18, 2000, the Office denied review of the prior decision under 5 U.S.C. § 8128(a) finding that the argument submitted was repetitious and was insufficient to warrant further review of the case on its merits. The Office found that appellant

[8] Appellant has not specifically appealed this decision to the Board.

did not submit any new relevant medical evidence in support of further impairment, and that his argument was repetitive.

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

The Act[9] provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[10] In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.[11]

The schedule award provisions of the Act[12] and its implementing regulation[13] 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 appropriate standard for evaluating schedule losses.[14]

The A.M.A., *Guides* standards for evaluating the impairment of extremities are based primarily on loss of range of motion.[15] However, all factors that prevent a limb from functioning normally, including pain or discomfort, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[16] The A.M.A., *Guides* provides grading schemes and procedures for determining the impairment of an affected body part due to pain, discomfort or loss of sensation.[17]

In this case, the Office second opinion specialist, Dr. Parsons, noted that appellant had ongoing neck pain which radiated into his upper back and right lateral thigh pain from the bone graft harvest site. Dr. Hassell found that appellant had ongoing neck pain, bilateral elbow pain in

[9] 5 U.S.C. §§ 8101-8193.

[10] *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

[11] *See Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404 (1999).

[14] *Id.*

[15] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[16] *See Paul A. Toms*, 28 ECAB 403 (1987).

[17] A.M.A., *Guides*, Fifth Edition, Chapter 18, pp. 565-74.

addition to loss of degrees of flexion. He noted that appellant continued with pain radiating from the right hip into the posterior portion of his hip. Dr. Saldana noted bilateral epicondylar pain and right iliac crest pain secondary to the bone graft harvest site. However, the Office medical adviser did not consider any of appellant's documented pain in his impairment determination, and instead considered only appellant's degrees of lost flexion in calculating his impairment rating.

Further, the Office medical adviser, in his supplemental opinion on appellant's impairment rating noted "Impairment based on decreased range of motion of the left shoulder is not acceptable, as the left shoulder (pathology/injury) has not been accepted as a work-related condition." To the contrary, the Office, in the combined claims, had accepted a left shoulder sprain condition as being employment related. Therefore, the Office medical adviser's opinion was not based upon a complete and accurate statement of accepted facts, and hence is of diminished probative value. As the Office medical adviser's opinion is of diminished probative value, it is insufficient to constitute the weight of the medical opinion evidence.

Therefore, the case must be remanded for a reorganization of the record combining all five claims, the creation of a new and complete statement of accepted facts and referral to an appropriate medical specialist for a rationalized medical opinion as to the totality of appellant's injury-related impairment rating, taking into consideration all of appellant's accepted conditions.

Due to the Board's disposition on the first issue of the case, the second issue on merit review becomes moot.

Consequently, the decisions of the Office of Workers' Compensation Programs dated December 18, August 11 and April 13, 2000 are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, DC
May 8, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member