United States Department of Labor
Employees' Compensation Appeals Board

RALPH J. COX, Appellant	)	
and	)	**Docket No. 04-351**
	)	**Issued: September 29, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On November 24, 2003 appellant, through his attorney, filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated November 16, 2003 which denied modification of the Office's July 14, 2003 decision. In the July 14, 2003 decision, the Office found that appellant failed to establish that he was entitled to a schedule award for an impairment of his right upper extremity. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established his entitlement to a schedule award for an impairment of his right upper extremity.

FACTUAL HISTORY

On March 2, 1999 appellant, then a 34-year-old laundry worker, filed a traumatic injury claim assigned number A9-0451827 alleging that on March 1, 1999 he broke a finger on his right

hand when his hand got caught in a chain while he was letting an overhead door down. By letter dated April 12, 1999, the Office accepted appellant's claim for a fracture of the right index finger and authorized pin removal of the same finger and physical therapy.

On August 8, 2001 appellant filed another traumatic injury claim assigned number A9-2012105 alleging that on August 6, 2001 he hurt his right hand when a laundry elevator fell on it and crushed it. On September 26, 2001 the Office accepted appellant's claim for a fracture of the index metacarpal finger of the right hand.

On October 22, 2001 appellant filed a claim for a schedule award for his March 1, 1999 employment-related injury. By letter dated October 26, 2001, the Office advised appellant that it appeared that he had a current injury to his right hand that could possibly involve an injury that was related to the same body part for which he was claiming a schedule award. Based on this situation, the Office advised appellant that his right hand injury must be resolved to the point where a physician indicated that he had reached maximum medical improvement before a schedule award could be addressed for the other accepted injury to his finger.

On October 23, 2001 appellant filed a claim for a schedule award for his August 6, 2001 employment injury. He submitted leave records and an October 10, 2001 attending physician's report of Dr. Gregory Hill, an orthopedic surgeon, indicating with an affirmative mark that his fracture of the index metacarpal finger of the right hand was caused by the August 6, 2001 employment injury.

In letters dated November 1 and 27, 2001, the Office requested that Dr. Hill provide an assessment of permanent impairment of appellant's right index finger utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). The Office also requested that Dr. Hill provide a medical report including whether appellant reached maximum medical improvement and if so when, his range of motion and objective findings, appellant's subjective complaints causing impairment and an explanation of how he calculated an impairment rating using the applicable tables in the A.M.A., *Guides*.

On December 7, 2001 the Office received a March 4, 1999 medical report of Dr. Hill providing a history of appellant's March 1, 1999 employment injury, his findings on physical examination and review of x-ray results. He diagnosed a fracture of the right index middle phalanx finger and status post gunshot wound of the right supraclavicular area with claw deformity/brachial plexopathy.

In response to the Office's November 1 and 27, 2001 letters, Dr. Hill submitted a December 31, 2001 report finding that appellant reached maximum medical improvement as of November 20, 2001. He provided his range of motion and other objective findings for appellant's right thumb, index, middle, ring and little fingers. Dr. Hill stated that appellant had a prominent second metacarpal head, as well as, a claw deformity of the right hand. He noted that appellant had subjective complaints of pain in the area of the second metacarpal head. Utilizing the fifth edition of the A.M.A., *Guides* 438-39, 459, 460-61, 463-64, 485-86, Tables 16.1, 16.2, 16-12, 16-8a, 16-8b and 16-9, Figures 16-21, 16-23 and 16-25, Dr. Hill determined that appellant had a 29 percent impairment of the thumb, which constituted a 12 percent impairment of the

hand. He further determined that each of appellant's index and middle fingers had over 100 percent impairment, which equaled a 20 percent impairment of the hand. Dr. Hill combined the 20 percent impairment of the index finger and 20 percent impairment of the middle finger which totaled a 40 percent impairment. Regarding the ring and little fingers, Dr. Hill determined that each was over 100 percent impaired, which equated to a 10 percent impairment each which totaled a 20 percent impairment when combined. He concluded that appellant had a 12 percent impairment of the thumb, a 40 percent impairment of the index and middle fingers and a 20 percent impairment of the ring and little fingers totaling a 72 percent impairment of the right hand which constituted a 65 percent impairment of the right upper extremity.

On January 25, 2002 the Office requested that an Office medical adviser review appellant's medical records including, Dr. Hill's report and the statement of accepted facts to determine whether appellant had any permanent loss of use of his right hand and the date he reached maximum medical improvement. On February 6, 2002 an Office medical adviser reported that he had reviewed appellant's medical records including, Dr. Hill's report and the statement of accepted facts. He stated that he was unable to provide the requested permanent impairment rating due to inaccurate information in Dr. Hill's report. He explained that Dr. Hill's finding that appellant's index, middle, ring and little fingers of the right hand had an impairment rating of over 100 percent each was not possible unless all the fingers had been amputated. He suggested that appellant be referred to another physician for an accurate report concerning his impairment.

By letter dated March 4, 2002, the Office referred appellant together with medical records, a statement of accepted facts and a list of specific questions to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, to determine whether he had any permanent loss of use of his right hand and the date of maximum medical improvement.[1]

Dr. Kaffen submitted an April 10, 2002 medical report providing a history of appellant's March 1, 1999 and August 6, 2001 employment injuries and medical treatment. He also noted a history that appellant suffered a gunshot wound to the right shoulder region in 1993 resulting in nerve damage and permanent clawing of the fingers of the right hand. On physical examination, Dr. Kaffen found that the right hand had multiple surgical scars and clawing of all of the digits on the right hand with muscle atrophy. He also found a surgical scar measuring approximately one inch overlying the dorsal aspect of the proximal phalanx of the index finger extending over the metacarpophalangeal (MP) joint and no angular or rotational deformity of the index finger. Dr. Kaffen reported tenderness over the proximal phalanx of the right index finger but, no swelling. The right MP joint had 0 degrees of extension and 80 degrees of flexion, the proximal interphalangeal (PIP) joint flexion contracture was 90 degrees with further flexion to 105 degrees and the distal interphalangeal (DIP) joint flexion contracture was 10 degrees with further flexion of 40 degrees. Dr. Kaffen found that the restriction of motion of appellant's index finger was comparable to the restrictions of his other fingers and it was due to the preexisting clawing deformity and contractures.

[1] The record reveals that on March 4, 2002 appellant advised the Office that he had retired from the employing establishment on disability.

Dr. Kaffen diagnosed remote fracture of the middle phalanx of the right index finger, remote cellulites of the right index finger and a healed undisplaced fracture of the second metarcarpal right hand. Based on appellant's history, his findings on physical examination and review of medical records, Dr. Kaffen opined that no further medical treatment was required for the March 1, 1999 and August 6, 2001 employment injuries. He explained that appellant initially sustained an undisplaced fracture of the metacarpal which was treated successfully. Dr. Kaffen further explained that appellant's current physical findings and complaints were secondary to the remote nerve damage to the right upper extremity causing clawing and atrophy of the right hand. He stated that appellant was medically capable of returning to his date-of-injury job as a laundry worker without restrictions as he was able to perform his work duties prior to the March 1, 1999 employment injury with no restrictions due to his preexisting nerve involvement of the right upper extremity. Regarding the extent of permanent impairment, Dr. Kaffen opined that the limitations of motion of appellant's right index finger were due to the preexisting nerve injury of the right upper extremity which caused clawing, contractures and atrophy. He, therefore, concluded that the permanent impairment of the upper extremity due to the March 1, 1999 and August 6, 2001 employment injuries was zero percent. He estimated that appellant reached maximum medical improvement of the August 6, 2001 employment injury on approximately November 1, 2001. Dr. Kaffen's accompanying work capacity evaluation dated April 3, 2002 provided that appellant could work eight hours a day per workday with no restrictions.

On May 17, 2002 the Office requested that an Office medical adviser review appellant's case record including, Dr. Kaffen's report and determine the loss of use of his right hand and date of maximum medical improvement. On June 6, 2002 the Office medical adviser agreed with Dr. Kaffen's finding that appellant's impairment appeared to be due to preexisting injuries and not the March 1, 1999 and August 6, 2001 employment injuries.

By decision dated June 11, 2002, the Office found the evidence of record insufficient to establish that appellant was entitled to a schedule award for his right hand based on the opinions of Dr. Kaffen and the Office medical adviser, who found that his impairment was due to a preexisting condition and not the accepted employment injuries. In a June 15, 2002 letter, appellant, through his attorney, requested an oral hearing before an Office hearing representative.

On July 9, 2002 the Office doubled appellant's claim for his August 6, 2001 employment injury assigned A9-2012105 into his claim for his March 1, 1999 employment injury assigned A9-451827 and created a master case file assigned number A9-451827.

Prior to the May 21, 2003 hearing, the Office received an August 7, 2002 letter from Dr. T.J. Reilly, a Board-certified orthopedic surgeon specializing in hand surgery and appellant's new treating physician, in response to its June 11, 2002 letter requesting him to review the enclosed statement of accepted facts and Dr. Kaffen's report and provide a rationalized medical opinion as to whether he agreed with Dr. Kaffen's findings.[2] In his August 7, 2002 response letter, Dr. Reilly agreed with Dr. Kaffen's findings regarding appellant's diagnosis, future medical treatment, the causal relationship between appellant's injuries and current complaints,

[2] The record indicates that Dr. Reilly began treating appellant on December 5, 2001. On January 30, 2002 appellant requested authorization from the Office to change his physician from Dr. Hill to Dr. Reilly. The Office granted appellant's request on June 11, 2002.

appellant's ability to work and assessment of permanent impairment. He stated that the far overwhelming residual impairment in appellant's upper extremity was due to severe neurological injury sustained from his gunshot wound that left him with a severe hand deformity secondary to his clawing posture. He also stated that appellant had no loss of motion secondary to his work-related fractures and no residual deformity. Dr. Reilly concluded that he could not pinpoint any particular objective finding that would explain appellant's complaint of chronic pain after fractures that had been treated and healed.

In a July 14, 2003 decision, the Office hearing representative found that the weight of the medical opinion evidence established that appellant was not entitled to a schedule award for his right upper extremity. In a September 1, 2003 letter, appellant, through his attorney, requested reconsideration accompanied by a July 10, 2003 letter from Dr. Hill. In this letter, Dr. Hill responded to a May 29, 2003 letter from appellant's attorney. He noted that, although appellant had sustained a gunshot injury in 1993 resulting in nerve damage and permanent clawing of the hand, this injury had not been problematic for appellant. Dr. Hill stated that any complaints appellant had were either related to the metacarpal fracture sustained in 2001 or the injury to the middle index phalanx sustained in 1999. He reviewed an evaluation of Dr. Caplan and agreed that appellant had reached maximum medical improvement regarding his March 1, 1999 and August 6, 2001 employment injuries.[3]

By decision dated November 6, 2003, the Office denied appellant's request for modification based on a merit review of his claim. The Office found that the weight of the medical opinion evidence rested with Drs. Kaffen and Reilly.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[5] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[6]

The schedule award provision of the Act[7] and its implementing regulation[8] 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

[3] The Board notes that the record does not contain either appellant's attorney's May 29, 2003 letter or Dr. Caplan's report.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[6] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (2002).

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.[9]

ANALYSIS

Appellant has not submitted sufficient evidence establishing that he sustained a ratable permanent impairment of his right upper extremity. Dr. Hill's March 4, 1999 report, received December 7, 2001, finding that appellant sustained a fracture of the right index middle phalanx finger and a status post gunshot wound of the right supraclavicular area with claw deformity/brachial plexopathy, failed to provide an impairment rating for appellant's right upper extremity based on the A.M.A., *Guides*. Similarly, his July 10, 2003 letter indicating that appellant's complaints were either related to his 1999 employment injury to the middle index phalanx or the 2001 employment-related metacarpal fracture and that appellant had reached maximum medical improvement regarding his March 1, 1999 and August 6, 2001 employment injuries failed to provide an impairment rating utilizing the A.M.A., *Guides*. Board cases are clear that, if the attending physician does not utilize the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of any permanent impairment.[10]

In his December 31, 2001 report, Dr. Hill utilized the A.M.A., *Guides* 438-39, 459, 460-61, 463-64, 485-86, Tables 16.1, 16.2, 16-12, 16-8a, 16-8b and 16-9, Figures 16-21, 16-23 and 16-25, and found that appellant had a 12 percent impairment of the thumb, a 40 percent impairment of the index and middle fingers and a 20 percent impairment of the ring and little fingers totaling a 72 percent impairment of the right hand, which represented a 65 percent impairment of the right upper extremity. In so doing, Dr. Hill determined, among other things, that appellant had over 100 percent impairment of each of his right index, middle, ring and little fingers. The Office medical adviser correctly pointed out that Dr. Hill's conclusion is impossible without complete amputation or the equivalent thereof.[11] In this regard, the record does not establish that appellant's hand was amputated or that he sustained the equivalent of an amputation. Therefore, he would not be eligible for the maximum amount of award allowable under the Act. Further, although Dr. Hill cited the tables he used to calculate appellant's impairment rating, he did not explain how he used these tables to rate appellant's impairment. Accordingly, Dr. Hill's report is of diminished probative value.

On the other hand, Dr. Kaffen, the Office referral physician, provided in his April 10, 2002 medical report, that appellant reached maximum medical improvement around November 1, 2001. He also provided his findings on physical examination, which included range-of-motion testing of appellant's right index finger and concluded that appellant had a zero percent impairment of his right upper extremity due to his March 1, 1999 and August 6, 2001 employment injuries. In arriving at this figure, Dr. Kaffen found that appellant's right hand had

[9] *See id.; James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[10] *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

[11] The Board notes that the maximum amount allowable under the schedule awards provisions would be for a 100 percent permanent impairment of an upper extremity, which would equate with total amputation of the extremity.

multiple surgical scars and clawing of all of the digits of the right hand with muscle atrophy. He also found a surgical scar measuring approximately one inch overlying the dorsal aspect of the proximal phalanx of the index finger extending over the MP joint and no angular or rotational deformity of the index finger. Dr. Kaffen noted tenderness over the proximal phalanx of the right index finger but, no swelling. Regarding appellant's right finger, he reported that appellant had 0 degrees of extension and 80 degrees of flexion of the MP joint,[12] 90 degrees of flexion with further flexion of 105 degrees of the PIP joint[13] and 10 degrees of flexion with further flexion of 40 degrees of the DIP joint.[14] Dr. Kaffen opined that the restriction of motion of appellant's right finger was comparable to the restrictions of his other fingers and it was due to his preexisting 1993 gunshot wound of the right shoulder area. He further opined that the accepted condition of undisplaced fracture of the second metacarpal right hand had healed. Based on his physical examination findings and a review of appellant's medical records, Dr. Kaffen concluded that appellant's current complaints were secondary to the remote nerve damage to the right upper extremity that he sustained from his gunshot wound which caused clawing and atrophy of the right hand. He concluded, therefore, that appellant had a zero percent impairment due to his March 1, 1999 and August 6, 2001 employment injuries. Dr. Kaffen stated that appellant did not require further medical treatment for his employment injuries and he could return to his date-of-injury job as a laundry worker without restrictions as he was able to perform the duties of this position without restrictions prior to the March 1, 1999 employment injury.

The Office medical adviser, as well as, Dr. Reilly, appellant's treating physician, agreed with Dr. Kaffen's finding that appellant's impairment of the right upper extremity was caused by his preexisting gunshot wound based on a review of the case record. The Board finds that the medical opinion of Dr. Kaffen, which is supported by the Office medical adviser and Dr. Reilly, is well rationalized and based on an accurate factual and medical background. Therefore, his opinion constitutes the weight of the medical evidence in this claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for an impairment of his right upper extremity.

[12] A.M.A., *Guides* 464, Figure 16-25.

[13] *Id*. at 463, Figure 16-23.

[14] *Id*. at 461, Figure 16-21.

ORDER

IT IS HEREBY ORDERED THAT the November 16 and July 14, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 29, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member