United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant **and** **DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION EARLE, Colts Neck, NJ, Employer**	)	**Docket No. 07-699** **Issued: July 11, 2007**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 17, 2007 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 12, 2006 granting an additional schedule award. Pursuant to 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 more than an additional 11 percent impairment of each of his upper extremities and 3 percent impairment of his left lower extremity for which he received schedule awards.

FACTUAL HISTORY

On May 14, 1992 appellant, then a 44-year-old hazardous waste handler, filed a traumatic injury claim alleging that he injured his neck shoulder and arm moving 55-gallon drums in the performance of his federal duties. The Office accepted this claim for cervical radiculopathy and

granted appellant a schedule award for 12 percent impairment of the left upper extremity on May 18, 1993. Appellant filed a second claim for traumatic injury on September 27, 2003 alleging that he slipped on cable and injured his left ankle. The Office accepted this claim for left ankle strain. Appellant filed a third claim on January 20, 1998 alleging that on January 17, 1998 he injured his right and left thumbs and left heel when he slipped off the ladder of a railroad car. The Office accepted this claim for strain both wrists and authorized bilateral thumb surgery. Dr. Kenneth M. Chekofsky, a Board-certified orthopedic surgeon, performed right thumb ligament joint reconstruction with trapezium metacarpal interposition arthroplasty on July 20, 1998. Appellant underwent a left thumb ligament and joint reconstruction of the trapeziometacarpal interposition arthroplasty on November 9, 1998. The Office later accepted left ankle strain and authorized arthroscopy of the left ankle. Appellant underwent an arthroscopy of the left ankle with debridement synovium and scar tissue on September 15, 2000. The Office accepted lumbar sprain and strain as a result of the January 17, 1998 employment injury on March 15, 2002.

In a report dated March 14, 2002, Dr. Nicholas Diamond, an osteopath, noted appellant's history of injury and provided findings on physical examination. He found that appellant had 38 percent impairment of his right upper extremity due to loss of grip strength, resection arthroplasty, loss of motor strength and pain. Dr. Diamond also found that appellant had 39 percent impairment of the left upper extremity due to loss of grip strength, loss of motor strength and pain. He concluded that appellant had 29 percent impairment of his left lower extremity due to sensory impairments of the L5 and S1 nerve roots, loss of motor strength and pain. Dr. Diamond opined that appellant reached maximum medical improvement on March 14, 2002.

The Office medical adviser reviewed Dr. Diamond's report on October 28, 2002. He found that appellant had 30 percent impairment of his left upper extremity due to loss of grip strength, 31 percent impairment of the right upper extremity due to resection arthroplasty and loss of grip strength and 25 percent impairment of the left lower extremity due to sensory nerve root impairments and loss of motor strength. The Office medical adviser excluded motor strength in the upper extremities finding that this would be included in the grip strength impairments and stated that the award of three percent for pain was "too vague." In the left lower extremity, he excluded the finding of three percent impairment due to pain as appellant received impairment due to sensory losses.

The Office found a conflict of medical opinion evidence between the Office medical adviser and Dr. Diamond regarding the nature and extent of appellant's upper and lower extremity impairments. The Office referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, by letter dated August 21, 2003. Dr. Fries completed a report dated September 30, 2003 and provided a history of injury and detailed findings on physical examination. He reported appellant's loss of grip strength and loss of range of motion. Dr. Fries concluded that appellant had 11 percent impairment of his right upper hand due to the resection arthroplasty and 10 percent impairment of his right upper extremity. He made a similar finding regarding appellant's left upper extremity. In regard to appellant's left lower extremity, Dr. Fries found that appellant had one percent impairment due to left ankle synovitis following the arthroscopic debridement.

The Office medical adviser reviewed Dr. Fries' report on November 4, 2003 and agreed with these impairment ratings. By decision dated December 8, 2003, the Office granted appellant schedule awards for 10 percent impairment of each of his upper extremities and 1 percent impairment of his left lower extremity.

Appellant, through his attorney, requested an oral hearing on December 15, 2003. He testified at the oral hearing on July 21, 2004. Following the oral hearing, Dr. Diamond submitted a report dated August 18, 2004 disagreeing with Dr. Fries' findings. He indicated that appellant was also entitled to an additional 11 percent impairment due to a left resection arthroplasty, that Dr. Fries tested for grip strength but did not include this impairment in his report of either of the upper extremities and that Dr. Fries did not test for abduction strength of appellant's thumbs.

By decision dated October 18, 2004, the hearing representative set aside the Office's December 8, 2003 decision and remanded the claim for additional development of the medical evidence. The hearing representative noted that Dr. Fries did not explain why he determined appellant's impairment rating through the diagnosis-based estimate rather than basing his impairment on loss of strength and pain. She found that he failed to provide sufficient medical reasoning to support his impairment rating and that Dr. Fries' report was not sufficiently detailed to resolve the existing conflict of medical opinion evidence. The hearing representative remanded the claim for the Office to amend the statement of accepted facts regarding appellant's left ankle condition and to request a supplemental report from Dr. Fries regarding the nature and extent of appellant's permanent impairments.

The Office requested a supplemental report from Dr. Fries on February 8, 2005. In a report dated February 16, 2005, Dr. Fries stated that he originally expressed appellant's left lower extremity impairment in terms of the whole person and that for his lower extremity impairment he was entitled to three percent due to left ankle synovitis postarthroscopic debridement with no loss of motion and no objective findings except minute surgical scars. He stated that, on examination, appellant did not have lower extremity sensory or motor deficits. In regard to the difference between his rating and that of Dr. Diamond for the upper extremities, Dr. Fries stated that he based his impairment on the "carpometacarpal pathology for which (appellant) had bilateral carpometacarpal arthroplasties." He opined that Dr. Diamond's assessments were excessive as the maximum value for the thumb carpometacarpal joint is 22 percent of the upper extremity. Dr. Fries stated that appellant did not mention hand pain complaints during his examination. He noted that he explicitly excluded muscle strength based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[1] Dr. Fries noted that appellant did not have any unusual strength deficits and that he had no condition which would result in a remarkable amount of pain.

The Office medical adviser reviewed this report on April 5, 2005 and stated: "Dr. Fries did not explain the three percent rating for the left lower extremity but I assume it was for pain in the absence of objective findings." He noted that Dr. Fries had explained how he reached the 10 percent impairment ratings for each of appellant's upper extremities.

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[1] A.M.A., *Guides*, 5th ed. (2000).

By decision dated April 8, 2005, the Office granted appellant a schedule award for an additional two percent impairment of his left lower extremity.

Appellant, through his attorney, requested an oral hearing on April 15, 2005. He testified at the oral hearing on December 13, 2005. By decision dated January 31, 2006, the hearing representative set aside the Office's April 8, 2005 decision and remanded the claim for additional development of the medical evidence. The hearing representative found that Dr. Fries had not adequately explained how he reached the left lower extremity impairment rating of three percent. He noted that the Office medical adviser attributed this impairment to pain, but that this opinion was not sufficient to resolve the conflict of medical opinion evidence. The hearing representative found that Dr. Fries should revisit each of his impairment ratings and explain his conclusions with supportive references to the A.M.A., *Guides*. The hearing representative remanded the case for an additional supplemental report from Dr. Fries and a *de novo* decision by the Office.

The Office requested a supplemental report from Dr. Fries on February 23, 2006. In a March 23, 2006 report, Dr. Fries stated that there was no specific table in the A.M.A., *Guides* that provided a rating for ankle synovitis following arthroscopic debridement and that he felt he should use his clinical judgment. He stated that he chose the minimum impairment of one percent of the whole person and felt that this was appropriate based on appellant's ankle surgery with a documented finding of synovitis and surgical scars. Dr. Fries further stated that he improperly converted the 11 percent impairment due to carpometacarpal arthroplasty to 10 percent and that appellant was entitled to 11 percent impairment of each upper extremity under the A.M.A., *Guides*. The Office medical adviser reviewed this report on April 1, 2006 and rated 11 percent of each upper extremity due to arthroplasty. He also awarded three percent impairment of the left lower extremity for pain based on Chapter 18 of the A.M.A., *Guides*.

By decision dated April 12, 2006, the Office granted schedule awards for an additional one percent loss of use of both the right and left upper extremities.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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.[4] Effective

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id.*

February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[5]

The Act provides that, if there is a 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.[6] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[7]

It is well established that, when 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 proper factual and medical background must be given special weight.[8] When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[9] However, when the impartial specialist is unable to clarify or elaborate on his original report of if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[10]

ANALYSIS

Appellant sustained injuries in the performance of duty which he felt entitled him to a schedule award. In support of his claim, he submitted a report from Dr. Diamond, an osteopath, addressing the extent of appellant's permanent impairment and finding that appellant had 38 percent impairment of his right upper extremity due to loss of grip strength, resection arthroplasty, loss of motor strength and pain. Dr. Diamond also found that appellant had 39 percent impairment of the left upper extremity due to loss of grip strength, loss of motor strength and pain. He concluded that appellant had 29 percent impairment of his left lower extremity due to sensory impairments of the L5 and S1 nerve roots, loss of motor strength and pain. The Office medical adviser reviewed this report and disagreed with the impairment percentages found by Dr. Diamond. He found that appellant had only 30 percent impairment of

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[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6(a) (August 2002).

[6] 5 U.S.C. §§ 8101-8193, 8123.

[7] 20 C.F.R. § 10.321.

[8] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[9] *L.R. (E.R).,* 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

[10] *Id.*

his left upper extremity due to loss of grip strength, 31 percent impairment of the right upper extremity due to resection arthroplasty and loss of grip strength and 25 percent impairment of the left lower extremity due to sensory nerve root impairments and loss of motor strength. The Office medical adviser concluded that appellant was not entitled to impairment ratings for pain and motor strength impairments. Due to the difference of opinion regarding the nature and extent of appellant's permanent impairment between Dr. Diamond and the Office medical adviser, the Office properly found a conflict of medical opinion evidence and referred appellant to Dr. Fries, a Board-certified orthopedic surgeon and impartial medical examiner, to determine appellant's permanent impairment for schedule award purposes.

On September 30, 2003 Dr. Fries concluded that appellant had 11 percent impairment of his right upper hand due to the resection arthroplasty and 10 percent impairment of his right upper extremity. He made a similar finding regarding appellant's left upper extremity. In regard to appellant's left lower extremity, Dr. Fries found that appellant had one percent impairment due to left ankle synovitis following the arthroscopic debridement. He did not offer any explanation of why he determined that this was the most appropriate method of determining appellant's impairment for schedule award purposes and did not correlate his left lower extremity impairment rating with the A.M.A., *Guides*. The hearing representative found that a supplemental report was required. In a February 16, 2005 report, Dr. Fries stated that he originally expressed appellant's left lower extremity impairment in terms of the whole person and that for his lower extremity impairment he was entitled to three percent due to left ankle synovitis postarthroscopic debridement with no loss of motion and no objective findings except minute surgical scars. Following this report, on January 31, 2006, the hearing representative found that Dr. Fries had not adequately explained how he reached the left lower extremity impairment rating of three percent. The hearing representative further noted that it was unclear why Dr. Fries had reduced appellant's upper extremity impairment to 10 percent rather than the 11 percent found in the A.M.A., *Guides*. The hearing representative remanded the case for an additional supplemental report from Dr. Fries.

Dr. Fries' September 30, 2003 and February 16, 2005 reports were not sufficiently detailed and rationalized to constitute the weight of the medical opinion evidence and resolve the existing conflict of medical opinion evidence. He did not address whether appellant's impairments could have been rated under a separate method as alleged by Dr. Diamond and appellant's attorney and did not adequately explain how he reached either the upper or lower extremity ratings under the A.M.A., *Guides*. Dr. Fries' March 23, 2006 report did not resolve the defects of his prior reports. He did not address whether an alternative method of calculation appellant's upper extremity impairment was available under the A.M.A., *Guides*. Dr. Fries failed to offer rationale for his determination that appellant had three percent impairment of his left lower extremity. As these reports were not sufficient to resolve the issue of appellant's permanent impairment for schedule award purposes, the Office should refer appellant, a statement of accepted facts and a list of specific questions, to a Board-certified physician to resolve the conflict of medical opinion evidence.

CONCLUSION

The Board finds that the case should be referred to a second impartial medical examiner to resolve the existing conflict of medical opinion evidence regarding the nature and extent of

appellant's permanent impairment for schedule award purposes. As this and such other development as the Office deems necessary the Office should issue a *de novo* decision regarding the full extent of appellant's entitlement to a schedule award and should therein consider its May 18, 1993 left upper extremity schedule award decision.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2006 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: July 11, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board