United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 09-629**
	)	**Issued: September 15, 2009**
U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, FL Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 5, 2009 appellant filed a timely appeal of the September 25, 2008 decision of the Office of Workers' Compensation Programs finding that he had three percent impairment of his left upper extremity. 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 three percent impairment of his left upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On July 12, 2003 appellant, then a 41-year-old mail carrier, filed an occupational disease alleging that he developed left shoulder and elbow pain beginning June 17, 2003, which he attributed to his job duties. The Office accepted his claim for left shoulder impingement syndrome and left epicondylitis.

On July 5, 2006 Dr. David P. Kalin, a family practitioner, examined appellant and found that his left shoulder demonstrated tenderness over the anterior glenohumeral joint with full range of motion without deformity, swelling, crepitation or discoloration; the left elbow also demonstrated tenderness over the lateral epicondyle with full range of motion and normal neurovascular status. He diagnosed post-traumatic chronic pain, left shoulder and elbow secondary to capsulitis and epicondylitis and boney island lateral humeral head. Dr. Kalin also diagnosed history of intermittent dysesthesia from the left forearm to the fourth and fifth fingers suggestive of left ulnar nerve entrapment and cubital tunnel syndrome. He opined that appellant had reached maximum medical improvement, but stated, "Marginal improvement may be achieved subsequent to review of additional recommended diagnostic studies…."

Dr. Samy F. Bishai, an orthopedic surgeon, examined appellant on March 8 and July 12, 2007 and found slight tenderness overlying the lateral humeral epicondyle with almost full range of motion. Regarding appellant's left shoulder, he found tenderness overlying the anterior and lateral as well as the posterior aspect of the left shoulder. Appellant's left shoulder range of motion gradually increased and by July 12, 2007 was forward elevation of 130 degrees; backward elevation of 30 degrees; abduction 130 degrees; adduction of 25 degrees, external rotation of 75 degrees and internal rotation of 30 degrees. On October 25, 2007 Dr. Bishai advised that appellant's range of motion had stabilized. He found that appellant had 11 percent impairment of the upper extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) due to loss of range of motion of the left shoulder.

Appellant requested a schedule award on December 12, 2007. The district medical adviser reviewed the medical records on January 18, 2008 and opined that he had not yet reached maximum medical improvement. He recommended a second opinion evaluation and noted that appellant had not declined surgical treatment.

On March 20, 2008 Dr. Bishai opined that appellant had reached maximum medical improvement as of October 25, 2007. He provided findings on examination. The district medical adviser reviewed the medical evidence on April 15, 2008 and noted appellant's accepted and diagnosed condition of impingement syndrome with degenerative arthritis of the acromial joint, which had resisted conservative treatment. He opined that surgery was usually indicated to prevent a possible rotator cuff tear. The district medical adviser queried whether arthroscopic surgery had been considered.

The Office determined that there was a conflict of medical opinion evidence regarding whether appellant had reached maximum medical improvement. It referred him for an impartial medical evaluation with Dr. George Canizares, a Board-certified orthopedic surgeon, on July 14, 2008. In a report dated July 29, 2008, Dr. Canizares noted appellant's history of injury and found no gross signs of atrophy on the upper extremity with pain along the parascapular region of the left shoulder. Appellant had forward elevation from 0 to 150 degrees with external rotation of 50 degrees. Dr. Canizares opined that appellant might benefit from some therapy and injections, which he declined. He found that appellant was at maximum medical improvement on October 25, 2007. Appellant had retained internal rotation to "T10;" external rotation from 50 to 60 degrees and forward elevation to 150 degrees. Dr. Canizares did not list backward

elevation, abduction or adduction, noting that these measurements were not applicable. He recommended an impairment rating of 11 percent.

The district medical adviser reviewed the medical reports and stated, "The referee examination on July 29, 2008 provide objective findings of quite good [range of motion of the left] shoulder." He recommended three percent impairment of the left upper extremity. The district medical adviser noted that 150 degrees of forward elevation was two percent impairment, that 150 degrees of abduction was one percent impairment and that "80" degrees of internal rotation and 60 degrees of external rotation were not ratable impairments.

By decision dated September 25, 2008, the Office granted appellant a schedule award for three percent impairment of the left upper extremity.

On appeal, appellant contends that the opinion of Dr. Bishai should be accorded the weight of the medical evidence and established 11 percent impairment of his left upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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 regulations as the appropriate standard for evaluating schedule losses.[3] Effective 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.[4]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from a physician. In obtaining medical evidence required for a schedule award, the evaluation made by the physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] *Id.*

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

that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[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 regulations 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]

ANALYSIS

The Office accepted that appellant sustained left shoulder impingement syndrome and left epicondylitis due to factors of his federal employment. Appellant's attending physician, Dr. Bishai, an orthopedic surgeon, opined that appellant had reached maximum medical improvement on October 25, 2007. The district medical adviser reviewed the medical records and noted that surgery was an appropriate treatment for shoulder impingement. As appellant did not appear to have considered surgery as an option, he was not at maximum medical impairment. The Office properly found a conflict of medical opinion evidence regarding whether he had reached maximum medical improvement on the grounds that there were additional treatment options available that he had not considered.

The Office referred appellant Dr. Canizares, a Board-certified orthopedic surgeon, to determine whether he had reached maximum medical improvement. Dr. Canizares opined that appellant might benefit from additional therapy and injections, but advised that he was not interested in additional treatment. He determined that appellant had reached maximum medical improvement on October 25, 2007, as noted by Dr. Bishai. This report is based on a proper history of injury and provides sufficient reasoning to resolve the existing conflict regarding whether appellant had reached maximum medical on October 25, 2007.

Dr. Canizares provided findings on physical examination. Appellant had retained internal rotation to "T10;" external rotation from 50 to 60 degrees and forward elevation to 150 degrees. Dr. Canizares did not list backward elevation, abduction or adduction, noting that these measurements were not applicable. He recommended an impairment rating of 11 percent of the

[5] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[6] 5 U.S.C. §§ 8101-8193, 8123.

[7] 20 C.F.R. § 10.321.

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

left upper extremity. The district medical adviser reviewed Dr. Canizares' report and relied upon the range of motion measurements provided to rate permanent impairment.

The Board finds that Dr. Canizares did not provide full listing of range of motion to the left shoulder in of degrees of motion. Dr. Canizares did not provide a numerical value for appellant's internal rotation such that a layperson could correlate this finding with the A.M.A., *Guides*. He also failed to provide measurements for backward elevation, abduction or adduction. Dr. Canizares found that appellant had 11 percent impairment of the left upper extremity due to loss of motion without correlating his rating to the tables of the A.M.A., *Guides*. He did not address whether there was any sensory or motor loss.

The district medical adviser utilized the report of Dr. Canizares to make an impairment rating based on range of motion to the shoulder. He did not consider Dr. Bishai's findings, addressing backward elevation, abduction or adduction. Rather, it appears that he assumed that these measurements were normal based on "not applicable" designation in Dr. Canizares report. The Board will remand the case for additional development of one medical evidence. On remand, the Office should obtain findings on physical examination, including all shoulder range of motion measurements and such other factors that contribute to impairment of appellant's left arm. After such development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the extent of permanent impairment to appellant's left arm.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: September 15, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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