

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of JANE B. KENNERLY and TENNESSEE VALLEY AUTHORITY,
Chattanooga, Tenn

*Docket No. 97-56; Submitted on the Record;
Issued October 5, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she has greater than a five percent permanent impairment of the left upper extremity, for which she received a schedule award.

On August 3, 1994 appellant, a 42-year-old technical writer, sustained multiple fractures and a dislocation of her left arm when she tripped while descending a staircase. Appellant filed a claim on August 3, 1994 which the Office of Workers' Compensation Programs ultimately accepted for fracture and dislocation of the left elbow.

On June 15, 1994 appellant began treatment with Dr. George R. Baddour, a Board-certified orthopedic surgeon, who performed bone graft surgery on appellant's left arm on August 4, 1994. In a report, updating appellant's condition, dated September 5, 1995, Dr. Baddour stated that appellant noted occasional pain and residual swelling in her arm, with some limitation in work and day-to-day activities. Dr. Baddour stated that on examination, the surgical incision remained well healed, that her range of motion remained unchanged from her previous office visit of January 25, 1995, and that an x-ray examination showed the fracture to be healed in anatomic position with no change in the position of the orthopedic. Dr. Baddour found that appellant had a permanent impairment of the left upper extremity of nine percent, which he stated was rated pursuant to American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On December 5, 1995 appellant filed a Form CA-7 claim for a schedule award based on partial loss of use of her left upper extremity.

On January 25, 1996 an Office medical adviser, Dr. Harry L. Collins, a Board-certified orthopedic surgeon, reviewed Dr. Baddour's report and determined that appellant had a one percent permanent partial impairment of her left upper extremity pursuant to the fourth edition of the A.M.A., *Guides*. Dr. Collins calculated that 145 degrees retention of flexion accounted for a 0 percent impairment of the left upper extremity pursuant to page 40, figure 32 of the A.M.A.,

Guides; that a 10 degree loss of extension accounted for a 1 percent impairment of the left upper extremity pursuant to page 40, figure 32 of the A.M.A., *Guides*; that 80 degrees retention of pronation equated to a 0 percent impairment of the left upper extremity pursuant to page 41, figure 35 of the A.M.A., *Guides*; that 75 degrees retention of supination equated to a 0 percent impairment of the left upper extremity pursuant to page 41, figure 35 of the *Guides*; and that occasional discomfort and pain in the left upper extremity accounted for a 0 percent impairment of the left upper extremity, which totaled a 1 percent left upper extremity impairment.

Dr. Collins stated in his February 15, 1996 narrative notes that, Dr. Baddour had not shown how his finding of a nine percent permanent impairment of the left upper extremity was calculated in accordance with the A.M.A., *Guides*, and he therefore concluded that appellant had a one percent permanent impairment of the left upper extremity.

In a letters dated May 23, 1996, the Office stated that a conflict existed in the medical evidence between the opinions of Drs. Baddour and Collins regarding appellant's schedule award determination, and it therefore referred appellant to Dr. Marty P. Gagliardi, a Board-certified orthopedic surgeon, for an independent medical examination on June 23, 1996. The examination was ultimately scheduled for June 10, 1996.

In a report dated June 10, 1996, Dr. Gagliardi noted upon examination that appellant lacked about 10 degrees of full flexion, about 5 degrees of full extension, 10 degrees of full supination, and had almost full pronation, with no joint effusion. Based on his review of x-rays, Dr. Gagliardi stated that appellant had complete healing of the proximal ulna and olecranon fracture. Dr. Gagliardi concluded that, considering the surgical procedure necessary, the fact that she might develop post-traumatic arthritis, and the mild residual losses of motion, appellant was entitled to a five percent permanent impairment of the left upper extremity. Dr. Gagliardi advised that this rating was based on "the tables" outlined for losses of elbow flexion, extension, supination and pronation, which, when added together, accounted for "basically" a five percent impairment to the upper extremity. Dr. Gagliardi considered this a reasonable impairment rating based on the magnitude of the trauma appellant sustained and the surgical procedure involved. In response to a telephone inquiry from the Office, Dr. Gagliardi found that the date of maximum medical improvement was "one year postop[erative]," which the Office determined to be August 4, 1995.

On August 12, 1996 the Office granted appellant a schedule award for a five percent permanent impairment of the left upper extremity for the period from August 4 to November 21, 1995, for a total of 15.60 weeks of compensation.

The Board finds that appellant has no more than a five percent permanent impairment for loss of use of her left upper extremity, for which she has received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for

¹ 5 U.S.C. § 8101 *et seq.*; *see* 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

permanent loss, or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.⁴

In the instant case, the Office determined that appellant had a five percent permanent impairment of his right upper extremity by adopting the findings of Dr. Gagliardi, the independent medical examiner,⁵ who determined the precise impairment rating by gauging the lack of full flexion and full extension, together with the lack of full supination and full pronation, in appellant's left upper extremity based on the applicable figures and table of the A.M.A., *Guides*.⁶

The Board concludes that Dr. Gagliardi, the independent medical examiner, correctly applied the A.M.A. *Guides* in determining that appellant has no more than a five percent permanent impairment for loss of use of the left upper extremity, for which she has received a schedule award from the Office, and that appellant has failed to provide probative, supportable medical evidence that she has greater than the five percent impairment already awarded.

³ 5 U.S.C. § 8107(c)(19).

⁴ *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

⁵ In a memorandum to the file dated August 7, 1996, the Office stated that the first doctor to whom appellant was referred indicated he was no longer accepting workers' compensation cases, and that another examination had been scheduled for Dr. Gagliardi as a second opinion physician and "not as a referee examination as it should have been." The Office stated that this meant appellant would have to be referred to another physician for a referee examination. Notwithstanding this statement, however, the Office went ahead and authorized the five percent schedule award based on Dr. Gagliardi's report "in order to expedite payment of this schedule award." The Board finds that this memorandum has no affect on the propriety of Dr. Gagliardi's status as a referee physician in this case or the probative value of his impairment rating, and will therefore not affect the outcome of the instant case. The Office informed appellant in its May 23, 1996 letter that she was being referred to Dr. Gagliardi to resolve the conflict in medical evidence, and that she retained the right to notify the Office and object to the choice of Dr. Gagliardi. As the record contains no evidence that Dr. Gagliardi had a prior association with the case or that he had previously served as an Office referral physician, the Board finds the Office did not act improperly or abuse its discretion in designating Dr. Gagliardi as a referee physician. 5 U.S.C. § 8123(a); see *Wallace B. Page*, 46 ECAB 227 (1994). Thus, the Board will not set aside his impairment rating which was adopted by the Office.

⁶ Although Dr. Gagliardi did not specifically refer to these tables, his findings correspond to figure 32 on page 40 and figure 35 on page 41 of the A.M.A., *Guides*, which were the same tables utilized by the Office medical adviser in his February 15, 1996 narrative report and impairment rating evaluation.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 12, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 5, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member