

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VITO A. CILIBERTI, JR. and DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, Missoula, MT

*Docket No. 01-572; Submitted on the Record;
Issued October 15, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than a 16 percent impairment of his right upper extremity, for which he received a schedule award.

On October 1, 1998 appellant, then a 66-year-old soil and water scientist, filed a claim asserting that he injured his right shoulder and forearm on September 30, 1998 while repairing barbed wire fences. The Office of Workers' Compensation Programs accepted his claim for degenerative joint disease, right shoulder.

On March 11, 1999 appellant submitted medical evidence to support an impairment rating for his right shoulder.¹ In a report dated March 3, 1999, Dr. Michael J. Schutte, appellant's attending orthopedist, related the following:

“His right shoulder is examined today for impairment rating purposes. He has active forward flexion of 98 degrees, which with using the A.M.A., *Guides* [American Medical Association, *Guides to the Evaluation of Permanent Impairment*] to [4th] [e]dition, corresponds to a 6 percent impairment using Figure 38 on [p]age 43. Active extension is 37 degrees, which is a 1 percent impairment using the same Figure 38. He has active abduction of 50 percent [sic] which gives a 6 percent impairment using Figure 41 on [p]age 44. Active a[d]duction of 25 degrees which gives a 1 percent impairment using Figure 41 on [p]age 44. His external rotation of the right shoulder is 12 degrees which corresponds to 2 percent impairment using Figure 44 on page 44. His internal rotation is 15 degrees which gives a 5 percent impairment using Figure 44 on [p]age 44.

¹ On April 5, 1999 appellant filed a formal claim for a schedule award.

“This summates to a 21 percent impairment of the upper extremity which using Table 3 on [p]age 20 corresponds to a 13 percent impairment of the whole person.”

On April 15, 1999 the Office notified Dr. Schutte that it could not process a schedule award based on a “whole person” rating. The Office requested that he provide an assessment of appellant’s permanent impairment using the fourth edition of the A.M.A., *Guides*.

On May 6, 1999 Dr. Schutte responded that appellant had reached maximum medical improvement with some definite restrictions. He reiterated that appellant had a 21 percent impairment of his upper extremity. Dr. Schutte added: “I do not understand how you would like for me to rate his impairment if I do not use the A.M.A., [*Guides*] [4th] [e]dition. You will need to give me more information if you would like me to reformat this in a manner that is acceptable to your system in Denver.”

The Office referred appellant to Dr. James R. Burton, an orthopedic surgeon, for a second opinion. In a report dated June 3, 1999, Dr. Burton made the following findings: forward elevation to 100 degrees; backward elevation to 10 degrees; abduction to 50 degrees; adduction to 20 degrees; internal rotation to 50 degrees; and external rotation to zero degrees. He calculated appellant’s impairment as follows:

“In figure 41 on page 3/44 of the A.M.A., *Guides* 4th [e]dition give a six percent impairment of the upper extremity. Figure 38 on page 3/43 gives a five percent for loss of forward flexion and loss of extension. In figure 44 on page 3/45 gives a five percent for loss of external rotation and two percent for loss of internal rotation.

“Using the combined values chart on page 322 we come up with a final figure of [10] percent permanent partial impairment of the upper extremity. Utilizing the table 3 on page 3/20, [10] percent of the upper extremity translates into a [6] percent whole person partial impairment.”

On June 12, 1999 an Office medical adviser reviewed Dr. Burton’s findings and calculated an 18 percent permanent impairment of the right upper extremity: 5 percent for loss of flexion, 2 percent for loss of extension, 6 percent for loss of abduction, 1 percent for loss of adduction, 2 percent for loss of internal rotation and 2 percent for loss of external rotation.

In a decision dated July 14, 1999, the Office found that the weight of the medical evidence rested with the Office medical adviser because Dr. Burton correctly applied the A.M.A., *Guides* to findings on examination and provided an explanation for impairment computations. The Office found, however, that the injury to appellant’s right arm or shoulder was not severe enough to be ratable, because it accepted the claim for only a temporary aggravation of degenerative joint disease, right shoulder.

In a decision dated July 10, 2000, an Office hearing representative set aside the July 14, 1999 decision. He found that the medical evidence clearly established two impairment ratings, 21 percent from the attending physician and 18 percent from the second opinion physician and that Dr. Burton had correctly applied the A.M.A., *Guides*. Given the medical evidence of record,

the hearing representative remanded the case for further evaluation and development as necessary based on the accepted condition of degenerative joint disease of the right shoulder and for a decision on appellant's entitlement to a schedule award.

On remand the Office referred appellant to Dr. Robert J. Seim, an orthopedist, for a second opinion. In a report dated October 17, 2000, Dr. Seim related the following findings: 100 degrees flexion; 50 degrees extension; 60 degrees abduction; 40 degrees adduction; 20 degrees internal rotation; and 40 degrees external rotation. Applying the 4th edition of the A.M.A., *Guides*, Dr. Seim determined that appellant had a 16 percent permanent impairment of the right upper extremity, or a 10 percent impairment of the whole person, based on the following impairments: 5 percent for loss of flexion; 0 percent for loss of extension; 6 percent for loss of abduction; 0 percent for loss of adduction; 4 percent for loss of internal rotation; and 1 percent for loss of external rotation.

On October 31, 2000 an Office medical adviser reviewed Dr. Seim's findings and confirmed a 16 percent permanent impairment of the right upper extremity.

On November 3, 2000 the Office issued a schedule award for a 16 percent permanent impairment of the right upper extremity, entitling appellant to 49.92 weeks of compensation.

The Board finds that appellant has no more than a 16 percent impairment of his right upper extremity, for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation payable to employees who sustain 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.

Dr. Seim's October 17, 2000 report provides appellant's most recent clinical findings. According to Figure 38, page 43, of the 4th edition of the A.M.A., *Guides*, 100 degrees of flexion corresponds to a 5 percent impairment of the upper extremity and 50 degrees of extension corresponds to a 0 percent impairment. According to Figure 41, page 44, 60 degrees of abduction corresponds to a 6 percent impairment and 40 degrees of adduction corresponds to a 0 percent impairment. According to Figure 44, page 45, 20 degrees of internal rotation corresponds to a 4 percent impairment and 40 degrees of external rotation corresponds to a 1 percent permanent impairment.

Because the relative value of each shoulder functional unit has been taken into consideration in the impairment charts, the impairment values for loss of each shoulder motion

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

are added to determine the impairment of the upper extremity.⁴ Dr. Seim's clinical findings, therefore, show that appellant has a 16 percent permanent impairment of the right upper extremity.

The Office properly followed standard procedures in comparing Dr. Seim's clinical findings to the applicable criteria in the A.M.A., *Guides*. Therefore, the Board will affirm the November 3, 2000 schedule award decision.

Appellant has raised several concerns about his schedule award. He notes that he has sustained a permanent impairment to his left upper extremity as well. While the record reflects that appellant has other claims for injuries to his left upper extremity, the claim presently on appeal (OWCP File No. 12-0178661) relates only to the injury he sustained to his right upper extremity while repairing barbed wire fences on September 30, 1998. The Board's jurisdiction is, therefore, limited to reviewing whether appellant has more than a 16 percent permanent impairment of the right upper extremity, as the Office determined in its November 3, 2000 decision.⁵ No other decisions are before the Board on this appeal. Appellant may at any time file a Form CA-7 with the Office to claim a schedule award for his left upper extremity, making clear what he is claiming and taking care to identify the appropriate OWCP File Numbers or dates of injury.

Appellant argues that his impairment has disabled him from doing the work he was once able to do and from engaging in many other activities related to everyday living. As used in the Act, the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ Disability is, therefore, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁷ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.⁸

When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from

⁴ A.M.A., *Guides* 45 (4th ed. 1993).

⁵ 20 C.F.R. § 501.2(c).

⁶ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁷ See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

⁸ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

such incapacity.⁹ Appellant's schedule award relates only to his physical impairment and does not preclude him from claiming compensation for any disability or loss of wage-earning capacity resulting from his September 30, 1998 employment injury.¹⁰

Appellant argues that 49.92 weeks of compensation does not sufficiently deal with the fact that he must contend with his condition for the rest of his life. For better or worse, the Act compensates permanent physical impairment by the payment of a specific, limited number of weeks of compensation.¹¹ The Act's compensation schedule specifies a maximum of 312 weeks of compensation for the complete loss of an arm,¹² and the schedule compensates partial losses at a proportionate rate.¹³ Accordingly, compensation for a 16 percent impairment of an arm is 16 percent of 312 weeks, or 49.92 weeks of compensation, which the Office awarded. Appellant may disagree conceptually with how the Act compensates for permanent impairments, but his disagreement is with Congress. The Office's November 3, 2000 decision complies with 5 U.S.C. § 8107 as Congress enacted that provision.

The Board notes that the Act does not authorize the payment of schedule awards for the permanent impairment of "the whole person."¹⁴ Payment is authorized only for the permanent impairment of specified members, organs or functions of the body. Whole person ratings provided by the physicians in this case are no basis for a schedule award.

Appellant also argues that his attending physician, Dr. Schutte, had found a 21 percent permanent impairment, compared to the 16 percent permanent impairment found by Dr. Seim and used by the Office. The Board has compared the clinical findings of Drs. Schutte and Seim, which span a period of 19 months and notes that the most recent measurements, obtained by Dr. Seim, show some improvement in certain ranges of motion, most notably external rotation. Even so, the measurements are not widely disparate from those obtained by Dr. Schutte and are sufficiently separated in time that they do not call into question the relative stability of appellant's condition or the necessity for a referee medical specialist. Appellant's range of motion may simply have improved to some degree with treatment and therapy.

On closer examination, Dr. Schutte's measurements, rounded to the nearest 10 degrees as required by the A.M.A., *Guides*, support only a 19 percent impairment of the right upper extremity. This is, again, not widely disparate from the rating of 16 percent given by Dr. Seim. In fact, the impairments reported by these physicians do not differ by more than 1 percent for any specific range of motion.

⁹ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

¹⁰ Appellant's schedule award also does not preclude him from claiming payment or reimbursement for medical expenses resulting from his September 30, 1998 employment injury. See 5 U.S.C. § 8103.

¹¹ This contrasts with compensation for disability or loss of wage-earning capacity, which is not limited to a specific number of weeks.

¹² 5 U.S.C. § 8107(c)(1).

¹³ *Id.* at § 8107(c)(19).

¹⁴ *Ernest P. Govednick*, 27 ECAB 77 (1975).

Should appellant's condition deteriorate and his impairment increase, he is not left unprotected. The medical record in this case indicates that appellant's right shoulder condition is permanent and will in fact worsen over time. If appellant should obtain more recent clinical measurements showing more than a 16 percent permanent impairment of the right upper extremity resulting from his accepted right shoulder condition, he may file a claim with the Office for an additional schedule award.

The November 3, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 15, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member