

)	
JOHN L. FARRELL, Appellant)	
)	
and)	Docket No. 04-2
)	Issued: February 2, 2004
DEPARTMENT OF THE TREASURY, U.S.)	
CUSTOMS SERVICE, Fort Lauderdale, FL,)	
Employer)	
)	

John L. Farrell, pro se
Office of Solicitor, for the Director

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

On September 15, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 2, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant has more than a one percent impairment of his right arm, which the Office had awarded previously.

On June 23, 1997 appellant, then a 39-year-old customs officer, filed a claim for traumatic injury alleging that, while serving on board an immigration vessel on the

previous day, he hurt his neck and right arm when the boat was jarred by a wave. On August 13, 1997 the Office accepted appellant's June 22, 1997 cervical strain injury.¹

In a report dated August 31, 2001, Dr. Michael P. Feanny, appellant's treating Board-certified orthopedic surgeon, stated that appellant's neck pain had increased recently and that an x-ray revealed a disc space narrowing at C6-7.

On September 3, 2001 appellant filed a claim for a recurrence of disability, alleging that the effects of the initial injury continued. On November 8, 2001 the Office expanded his claim to include a herniated disc. The Office also accepted appellant's recurrence of disability claim.

In a report dated March 6, 2002, Dr. Feanny stated that appellant had increasing symptoms in his neck and intermittent paresthesia and numbness in his left hand. He stated that appellant's range of motion was fair and that his neurological examination was normal. Dr. Feanny requested authorization for a magnetic resonance imaging (MRI) scan of the cervical spine. On June 27, 2002 the Office expanded appellant's claim to include lumbar displacement.²

On October 30, 2002 appellant filed a claim for a schedule award. In a letter dated January 24, 2003, the Office requested that appellant obtain a report from Dr. Feanny which would include an opinion regarding whether appellant had an impairment and, if so, to rate his impairment in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and to indicate when he reached his date of maximum medical improvement. On January 31, 2003 Dr. Feanny stated that appellant had reached maximum medical improvement on September 25, 2002 and, that according to the A.M.A., *Guides*, he had a seven percent impairment to the body as a whole.³

On February 18, 2003 the Office referred appellant to Dr. Gary Gallo, a Board-certified orthopedic surgeon, for an evaluation to determine his impairment rating. In a statement of accepted facts, the Office noted that it had accepted appellant's claim for cervical strain and cervical disc herniation. The Office, on February 19, 2003, advised appellant that Dr. Feanny's impairment rating was insufficient because the Federal Employees' Compensation Act⁴ does not provide for schedule awards to the whole

¹ On August 7, 1997 appellant filed a claim for a recurrence of disability stating that, on August 5, 1997, he was in an automobile accident which aggravated his neck injury. The record does not include a decision on this claim.

² The record does not include any lumbar findings. Further, the statement of accepted facts includes only a cervical strain and cervical disc herniation as accepted injuries and the nonfatal summary does not include a lumbar displacement.

³ Dr. Feanny did not indicate what references he relied on in the A.M.A., *Guides* to support his rating, nor did he indicate what edition he used.

⁴ 5 U.S.C. §§ 8101-8193.

person and that, therefore, it was scheduling him for a second opinion examination to determine his impairment rating.

In reports dated March 5, 2003, Dr. Gallo advised that he had utilized the fifth edition of the A.M.A., *Guides* and concluded that appellant had reached maximum medical improvement “prior to office visit,” that appellant’s impairment was caused by a C7 nerve and that he had a one percent impairment of the upper extremity due to loss of function from sensory deficit, pain or discomfort and no impairment due to loss of function from decreased strength.

In a report dated March 20, 2003, an Office medical adviser stated that Dr. Gallo had used the A.M.A., *Guides* properly in his evaluation of appellant’s impairment rating. On May 9, 2003 appellant requested the Office to advise him regarding the procedure for continuing therapy for his work-related injury.

On June 2, 2003 the Office awarded appellant a one percent impairment for his right arm. His period of entitlement was for 3.22 weeks and would run from March 5 to 26, 2003. The date of maximum medical improvement was June 22, 1997.

LEGAL PRECEDENT

The schedule award provisions of the Act⁵ and its implementing regulation⁶ set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office. The Board has held, however, that 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 Office has adopted the A.M.A., *Guides*, as an appropriate standard for evaluating schedule losses and to ensure equal justice for all claimants. The Board has concurred with the adoption of these A.M.A., *Guides*.⁷

ANALYSIS

In this case, Dr. Feanny, appellant’s treating physician, found that he had a seven percent whole person impairment. However, the Act does not provide a schedule award for whole person impairments.⁸ Furthermore, Dr. Feanny did not reference any particular section of the A.M.A., *Guides* in reaching his conclusion.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁸ 5 U.S.C. § 8107(c). Further, Dr. Feanny noted that there was no evidence of parenteral nerve entrapment, nor did he attribute appellant’s loss of function in his upper extremities to a nerve.

In a report dated March 5, 2003, Dr. Gallo, a Board-certified orthopedic surgeon, stated that he had examined appellant on that day for a second opinion evaluation, noting a familiarity with his history of injury and the statement of accepted facts. Upon examination, he found that appellant had a normal range of motion of the cervical spine, noting that rotation and hyperextension to the right caused pain and increased numbness in the thumb, index and long fingers. Appellant's deep tendon reflexes were hyperactive but appeared symmetrical. Muscle testing, jugular compression and radial and ulnar pulses were normal: he also noted a negative Phalen's test bilaterally and no Tinel's sign over the median nerve bilaterally. Dr. Gallo diagnosed cervical spondylosis with associated bulging of the C6-7 disc and right radiculitis supported only by claimant's subjective symptoms. He noted that appellant had reached maximum medical improvement prior to his examination and that, based on Table 16-10 and 16-13 of the A.M.A., *Guides*, appellant had a Grade 4 sensory deficit which was between 1 to 25 percent;⁹ that the impairment was a 10 percent sensory deficit involving the C7 nerve root on the right and when multiplied and then rounded by 5 percent (maximum upper extremity impairment for sensory deficit of C5) his impairment of the upper extremity equaled 1 percent.¹⁰ In a form report dated March 5, 2003, Dr. Gallo noted that appellant's impairment was caused by a C7 nerve and that he had a one percent impairment of the upper extremity due to loss of function from sensory deficit, pain or discomfort.

The Office medical adviser reviewed Dr. Gallo's report and found that it conformed to the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant has not established an impairment of his right arm greater than one percent, as the weight of the medical evidence rests with the report provided by Dr. Gallo, in reaching his conclusion that appellant had a one percent impairment to the right arm. Dr. Gallo based that opinion on the applicable tables of the A.M.A., *Guides*. As Dr. Feanny's report did not conform to the A.M.A., *Guides* in finding a whole person impairment, his report is insufficient to establish that appellant had greater than that a one percent right arm impairment.

The Board finds that appellant has not demonstrated entitlement to a schedule award for an impairment of his upper extremity greater than one percent which he received previously.

⁹ A.M.A., *Guides*, *supra* note 7 at 482.

¹⁰ *Id.* at page 489, Table 16-13.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2003 is affirmed.¹¹

Issued: February 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ The date of maximum medical improvement in this case is March 5, 2003, the date of Dr. Gallo's evaluation. The Office incorrectly listed June 22, 1997, the date of appellant's work-related injury, as the date of his maximum medical improvement. The Board noted that Dr. Gallo stated that appellant had reached maximum medical improvement prior to his examination.