

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RAY TAYLOR and DEPARTMENT OF THE NAVY,  
NAVAL WEAPONS STATION, Louisville, Ky.

*Docket No. 96-2570; Submitted on the Record;  
Issued September 14, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has established that he has more than a 24 percent permanent impairment of the left upper extremity for which he has received a schedule award.

The Board finds that this case is not in posture for decision.

In the present case, the Office of Workers' Compensation Programs has accepted that appellant, an ordnance worker, sustained a comminuted fracture of the left arm as a result of a fall from a ladder on October 11, 1989. Appellant underwent surgery to the left elbow on November and December 1989, and February 1990. Appellant received appropriate payment of wage-loss benefits during the periods he was unable to work. On October 4, 1991 the Office granted appellant a schedule award for 16 percent permanent impairment of the left arm.

Appellant requested reconsideration, followed by an appeal of the schedule award decision. By decision dated November 10, 1993,<sup>1</sup> the Board remanded the case for the Office to obtain a supplemental report from appellant's treating physician, Dr. Joseph E. Kutz, a Board-certified orthopedic surgeon, addressing the extent of permanent impairment if any, due to pain and loss of strength. The Board also stated that Dr. Kutz should address whether appellant had any loss of motion of the left shoulder and whether there was any impairment of the elbow due to the resection of the radial head of the left elbow on February 20, 1990. In a report dated February 24, 1994, Dr. Kutz reported that appellant had an 11 percent permanent impairment of the left arm. By decision dated March 2, 1994, the Office denied an additional schedule award. Appellant thereafter submitted additional reports from Dr. William Moss. An Office medical adviser reviewed Dr. Moss' reports and found that appellant had a 24 percent permanent impairment of the left arm. The Office granted appellant an additional schedule award for an 8 percent permanent impairment of the left arm, for a total impairment of 24 percent.

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<sup>1</sup> Docket No. 93-150 (issued November 10, 1993).

Appellant requested a hearing before an Office hearing representative. By decision dated June 6, 1996, the Office hearing representative remanded the case to the Office for further development. The hearing representative noted that essentially none of the information requested by the Board had been obtained and the question of whether or not there was any impairment due to the surgical procedure of resection of the radial head of the left elbow had never been addressed.

Appellant was thereafter referred to Dr. C.M. Hargadon, a Board-certified orthopedic surgeon, for evaluation. In a report dated July 16, 1996, Dr. Hargadon stated that physical examination revealed that the left elbow lacked 55 degrees extension and 5 degrees of flexion; with full supination and pronation. Appellant had grip strength of 100 pounds of the right hand and 80 pounds of the left hand. Dr. Hargadon stated that appellant's neurological examination of the left elbow was negative with good deep tendon reflexes, equal and bilateral; and no areas of paresthesia, weakness, or atrophy. Dr. Hargadon stated that he had reviewed a left elbow x-ray dated May 17, 1993, which revealed complete radial head excision and moderate degenerative changes of the ulnar humeral joint. Dr. Hargadon concluded that based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., Guides,) for excision of the radial head, appellant had a 5 percent impairment to the body as a whole, as shown in Table 27; for the loss of elbow extension, a 21 percent impairment as shown in figure 32; and utilizing the combined table, a 25 percent permanent impairment to the body as a whole for the elbow injury. As a schedule award is not payable under the Federal Employees' Compensation Act for an impairment of the whole person, the Office, therefore, requested that an Office medical adviser review the findings from Dr. Hargadon's report and determine the degree of impairment to appellant's left upper extremity.<sup>2</sup> In a report dated July 23, 1996, the Office medical adviser stated that appellant's left elbow retention of flexion of 135 degrees equaled a 1 percent impairment and loss of extension of 44 degrees equaled a 5 percent impairment, pursuant to figure 32 at page 40. The Office medical adviser stated that pursuant to figure 35, page 41 as appellant had full retention of pronation and supination of the left elbow he had no impairment of these motions. The Office medical adviser stated that appellant has weakness due to loss of grip of 10 percent, pursuant to Table 32 page 65 and he noted that appellant had no complaints of pain according to Dr. Hargadon. The Office medical adviser also noted that appellant had undergone open reduction and internal fixation with excision of the radial head. The Office medical adviser concluded that appellant had a 15 percent permanent impairment of the left upper extremity, but that he would still accept the 24 percent permanent impairment which had been previously granted. By decision dated July 24, 1996, the Office denied an increase in the previous schedule award.

Section 8107 of the Act provides that if there is a permanent impairment involving the loss or loss of use of a member of function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither the Act nor the regulations specify the manner, in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the

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<sup>2</sup> *Gordon G. McNeill*, 42 ECAB 140 (1990).

<sup>3</sup> 5 U.S.C. § 8107.

Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>4</sup>

The Board notes that on appeal appellant alleges that he is entitled to a schedule award for his cervical spine impairment. The Act, however, does not provide for payment of a schedule award for the permanent loss of use of the cervical spine.<sup>5</sup>

Regarding appellant's left arm impairment, the Board finds that the medical evidence of record still requires further development. Following the Office hearing representative's June 6, 1996 remand of this case, appellant was referred to Dr. Hargadon for a second opinion evaluation. Dr. Hargadon provided appropriate physical examination findings, however, he calculated appellant's whole body impairment rather than the left upper extremity impairment. The Office then requested that an Office medical adviser review Dr. Hargadon's examination findings and calculate appellant's left upper extremity impairment pursuant to the A.M.A., *Guides*. The Board notes that while Dr. Hargadon reported that appellant's left elbow lacked 55 degrees extension, the medical adviser indicated that appellant had lost 44 degrees of extension. Pursuant to figure 32, page 40 of the A.M.A., *Guides*, normal extension of the elbow is 140 degrees. If appellant lacks 55 degrees of extension, he has retained extension of 85 degrees. Pursuant to figure 32, elbow extension of 85 degrees equals an upper extremity impairment of 14 percent, not 5 percent as calculated by the Office medical adviser. The record indicates that the medical adviser's calculation regarding appellant's left upper extremity impairment due to loss of elbow extension was incorrect. Furthermore, the Board notes that while the Office was instructed to determine whether appellant was entitled to an additional schedule award for his radial head excision, and while Dr. Hargadon indicated that appellant was entitled to additional impairment value pursuant to Table 27, for impairment of the upper extremity due to arthroplasty of the radial head, it is unclear as to why the Office medical adviser did not assign an impairment value pursuant to Table 27. Upon remand, the Office shall request that the Office medical adviser recalculate the degree of impairment due to loss of extension of the left elbow. The Office medical adviser shall also specifically address whether appellant is entitled to an additional award for excision of the radial head. After such further development as necessary, the Office shall issue a *de novo* decision.

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<sup>4</sup> *James J. Hjort*, 45 ECAB 595 (1994).

<sup>5</sup> 5 U.S.C. § 8107.

The decision of the Office of Workers' Compensation Programs dated July 24, 1996 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
September 14, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member