

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH F. GONDOLA and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 02-341; Submitted on the Record;
Issued July 1, 2002*

DECISION and ORDER

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

The issue is whether appellant has more than a three percent permanent impairment of his right arm, for which he received a schedule award.

On March 29, 1994 appellant, then a 38-year-old boilermaker, filed an occupational disease claim asserting that his carpal tunnel syndrome was a result of his federal employment. The Office of Workers' Compensation Programs accepted his claim for the condition of right brachioradialis tendinitis. The Office also accepted right carpal tunnel syndrome and approved a surgical release performed on April 21, 2000.

On July 7, 2000 appellant filed a claim for a schedule award.

A conflict in medical opinion subsequently arose between appellant's physician, who calculated a 19 percent permanent impairment of the right arm, and the Office referral physician, who determined that appellant had no permanent impairment, given the lack of sensory loss in the median nerve distribution and appellant's entirely functional response on Jamar grip testing. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Charles A. Peterson, a Board-certified orthopedic surgeon.

In a report dated October 23, 2001, Dr. Peterson related appellant's history, complaints and medical treatment. He described his findings on physical examination and diagnosed the following: (1) Right hand carpal tunnel syndrome by history and by electromyogram (EMG), postoperative decompression; and (2) Nonphysiologic response to examination of right hand with (a) right hand glove-type hypesthesia, (b) the absence of vibratory sensory response and (c) absence of normal sensation involving radial, ulnar and median nerves in the hand. Dr. Peterson explained that appellant's main findings were all nonphysiologic. Although appellant's responses on examination would indicate a 39 percent impairment due to median nerve deficit, a 5 percent impairment due to radial nerve deficit, a 7 percent impairment due to

ulnar nerve deficit and a 10 percent impairment due to motor deficit of the flexors of the fingers and wrist, Dr. Peterson reported the following:

“However, it is my impression that all of these findings are factitious and/or nonphysiologic. It is my impression that this man does not have true motor weakness. It is my impression that this man does not have true sensory deficit in the median, ulnar or radial nerve to the extent that he expresses.

“Therefore, I think all of the above findings are not appropriate, are not reliable and should not be accepted.

“He has reached maximum improvement from back at the time when Dr. Wicks released him.

“My final suggested rating of the claimant’s right arm impairment is three percent to the right upper extremity as a result of minor sensory loss. I feel that essentially all of my findings were nonphysiologic and factitious and should not be accepted as the basis for his impairment. He has absence of any good objective findings. There is a lack of true weakness that is physiologic. There is lack of true hypesthesia that is physiologic. There is lack of response to the usual stimulation. There is no sign of muscle wasting in the upper extremity.

“The only way that I would want to rate this man with anything higher than a three percent impairment would be on the basis of an EMG that showed that he had severe damage to his median nerve, either as a result of his job or as a result of his surgery.

“Therefore, I would recommend a new EMG be done if the above rating is not acceptable.”

On November 20, 2001 the Office issued a schedule award for a three percent permanent impairment of the right arm.

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

Section 8107 of the Federal Employees’ Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.²

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999). The Office began using the fifth edition of the A.M.A., *Guides* effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001).

A conflict in medical opinion arose on the extent of appellant's permanent impairment. Appellant's physician calculated a 19 percent permanent impairment of the right arm. The Office referral physician reported no permanent impairment because there was a lack of sensory loss in the median nerve distribution and because appellant's response to grip testing was entirely functional.

Section 8123(a) of the Act provides in part: "If there is 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."³

The Office properly referred appellant to a referee medical specialist to resolve the conflict. The Office provided Dr. Peterson, a Board-certified orthopedic surgeon, the medical record and a statement of accepted facts to give him a proper medical and factual background. Dr. Peterson related his findings on examination but explained that all of appellant's responses to examination of the right hand were factitious and nonphysiologic. Appellant had no true motor weakness and no true sensory deficit in the median, ulnar or radial nerve to the extent that he expressed on examination. Dr. Peterson concluded that all of appellant's findings on examination were not appropriate, not reliable and should not be accepted as the basis for an impairment rating.

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to a referee medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

The Board finds that Dr. Peterson's opinion is based on a proper factual background and is sufficiently well reasoned that it must be accorded special weight in resolving the conflict on the extent of appellant's permanent impairment. Dr. Peterson suggested a three percent impairment due to minor sensory loss. The Board notes, however, that Dr. Peterson's finding of factitious responses on examination justifies a denial of a schedule award in this case. He had no clinical basis for suggesting a three percent impairment, given his opinion that none of appellant's findings should be accepted as a basis for an impairment rating. Nonetheless, the Office issued a schedule award for the three percent suggested impairment.

Because the weight of the medical evidence, as represented by the opinion of Dr. Peterson, the referee medical specialist, fails to establish that appellant has more than a three percent permanent impairment of the right arm, the Board will affirm the November 20, 2001 schedule award.

³ 5 U.S.C. § 8123(a).

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The November 20, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member