

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH J. HORAN and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION EARLE, Colts Neck, N.J.

*Docket No. 95-925; Submitted on the Record;
Issued February 10, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has greater than a two percent impairment of the right upper extremity, for which he received a schedule award.

On January 31, 1992 appellant, then a 42-year-old blocker and bracer, filed a claim alleging that he injured his right elbow while lifting heavy lumber in the course of his employment.

Appellant requested a schedule award on June 24, 1992. In support, he submitted a June 18, 1992 report from Dr. Jay P. Bosniak, a Board-certified orthopedic surgeon, who estimated that appellant had approximately a 10 percent disability at his right elbow. Upon reviewing this report, the Office of Workers' Compensation Programs told appellant to submit a detailed, narrative medical report pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (third edition revised 1990). It stated that the report should not rely on estimates or approximations.

On August 13, 1992 Dr. Bosniak noted that appellant experienced severe pain on the lateral elbow, due to heavy lifting on the job and that this decreased his lifting ability. He found that appellant's range of motion with respect to flexion, extension, forearm pronation and supination were within normal limits. Dr. Bosniak found that June 18, 1992 was the date of maximum medical improvement, unless surgery occurred and that there was a 10 percent disability of the right elbow.

On August 27, 1992 the Office accepted the claim for right lateral epicondylitis. On the same date, the Office found that Dr. Bosniak's August 1992 report failed to comply with the A.M.A., *Guides*, and that, unless the report was cured, the claim for a schedule award would be denied.

On September 10, 1992 Dr. Bosniak addressed appellant's loss of function due to pain, discomfort and sensory alteration. He found that appellant experienced severe pain, in his lateral elbow location, on heavy lifting causing decreased lifting ability, but no loss of sensation. Dr. Bosniak found a loss of five degrees for normal extension and a loss of five degrees for normal pronation. He noted no ankylosis at the elbow or forearm. Dr. Bosniak also found no atrophy, except that power grip was moderately decreased when the elbow was painful. He again found that, barring surgery, June 18, 1992 was the date of maximum medical improvement.

On October 19, 1992 an Office medical adviser reviewed Dr. Bosniak's records and determined that appellant had a one percent permanent impairment due to loss of extension and a one percent impairment due to loss of pronation. Accordingly, he determined that appellant had a two percent impairment for the right upper extremity based on the A.M.A., *Guides*.

On December 17, 1992 the Office granted a schedule award for a 2 percent permanent impairment of the right upper extremity for the period of May 15 through July 31, 1992, for a total of 6.24 weeks of compensation.

Appellant requested an oral hearing on January 2, 1993

On June 1, 1993 Dr. Bosniak stated that appellant could do his job as a blocker and bracer, including heavy lifting, despite his injuries. Dr. Robert Dennis, a Board-certified orthopedic surgeon, found on June 4, 1993, that appellant was capable of performing his work duties.

On July 1, 1993 Dr. Floyd Kregel, a Board-certified family practitioner, found that appellant's ability to lift was reduced because of the severe pain in his elbow. He found a 5 degree loss for flexion and a 15 degree loss for extension. Dr. Kregel found no ankylosis at the elbow or forearm. He found weakness in grip strength, noting that appellant's dominant right hand grip strength was limited to 45 kilograms with an average expected normal of 49. Dr. Kregel found that June 1992 was the date of maximum medical improvement and that appellant had a 10 percent disability of the right upper extremity based on the A.M.A., *Guides*.

At his July 26, 1993 hearing, appellant testified that he experienced loss of power in his right arm, when holding heavy weights and that he feels constant pain in his right elbow which is sometimes sharp and severe. He further testified that these problems did not interfere with his job performance. Finally, he stated that he received a five percent impairment rating for left elbow lateral epicondylitis even though that elbow troubled him less than his right elbow which the Office determined merited only a two percent impairment rating.

In a decision dated October 13, 1993, the Office hearing representative affirmed, the Office's December 17, 1992 decision, finding that the evidence failed to demonstrate an impairment of the right upper extremity in excess of two percent. The hearing representative found, that the Office medical adviser properly applied the A.M.A., *Guides* in finding that appellant had a two percent impairment of the right upper extremity due to loss of extension and pronation. The hearing representative discredited the opinions of Drs. Bosniak and Kregel, finding a 10 percent impairment, because neither physician provided specific objective findings to support their conclusions. The hearing representative further discredited these opinions

inasmuch as neither physician explained on what specific findings their impairment ratings were based or how such a rating was computed with respect to the specific tables and pages in the A.M.A., *Guides*. The hearing representative determined that both Drs. Bosniak and Kregel failed to support appellant's complaints of pain with reference to specific objective findings on examination. He also discredited Dr. Dennis' opinion for failing to provide specific objective findings. The hearing representative further noted that Dr. Bosniak's 10 percent impairment rating provided on September 10, 1992, was inconsistent with his August 13, 1992 report, finding that claimant's range of motion with respect to flexion, extension and pronation were within normal limits. He indicated that Dr. Kregel's findings with regard to range of motion were inconsistent with Dr. Bosniak's conclusion, because Dr. Kregel found a 15 degree loss of normal extension and no loss of pronation, while Dr. Bosniak concluded that appellant suffered a 5 degree loss of normal extension and pronation. The hearing representative concluded that it was questionable whether appellant had any objective loss of range of motion in the right upper extremity. Finally, he noted that the conclusions of Drs. Bosniak and Kregel, that severe pain on heavy lifting impairs appellant's ability to lift, were inconsistent with Dr. Bosniak's conclusion that appellant was capable of performing his usual duties, including heavy lifting.

On September 19, 1994 appellant filed a timely request for reconsideration. On December 16, 1994 the Office found that the request was insufficient to warrant a merit review because appellant failed to present new evidence or make an arguable case for error in fact or law. It, therefore, denied the request for reconsideration.

In a letter dated November 22, 1994, appellant informed the Office that the medical evidence supporting his September 19, 1994 request for reconsideration was inadvertently sent to New York. The new evidence was the October 5, 1994 report of Dr. David Weiss, a Board-certified orthopedic surgeon. Dr. Weiss found that, in the course of his employment, appellant sustained a post-traumatic ganglion of the right wrist, right carpal tunnel syndrome and lateral epicondylitis of the right elbow. Dr. Weiss attributed the two latter diagnoses to repetitive heavy lifting and use of the right arm, including the use of a pneumatic nail gun, over a period of 12 years. Dr. Weiss found that appellant had a 38 percent total impairment rating of the right upper extremity based upon his findings of impairment of the right hand and upper extremity secondary to entrapment neuropathy.

In a decision dated January 31, 1995, the Office found that appellant submitted medical evidence with his September 19, 1994 request for reconsideration, but noted that the evidence was inadvertently sent to the wrong office. The Office, therefore, conducted a merit review of the request for reconsideration.

Initially, the Office discredited Dr. Weiss' opinion because he based his impairment rating on appellant having carpal tunnel syndrome, a condition that the Office has not accepted. Moreover, the Office found Dr. Weiss' opinion unreliable, because his impairment rating was based on the previously accepted condition of right wrist ganglion¹ which according to the reports of Dr. Ralph Kuhn² and Dr. Bosniak had been resolved. The Office further found that

¹ The Office previously accepted appellant's separated claim for right wrist ganglion.

² Dr. Kuhn's report was part of a previous claim and, therefore, not a part of this record.

because Dr. Weiss' report showed that appellant's forearm pronation and supination both changed from 75 degrees in 1992 to 80 degrees in 1994, the previous physician erred in determining the date of maximum medical improvement. Finally, the Office noted that Dr. Weiss' opinion is entitled to less weight because he was not a treating physician. Accordingly, the Office found that his opinion failed to outweigh the other medical evidence establishing a two percent impairment of the right upper extremity.

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

The schedule award provisions of the Federal Employees' Compensation Act³ and its implementing regulation⁴ set forth the number of weeks of compensation to be paid for permanent loss, or loss of the 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.⁵ However, neither the Act nor its regulations specify the manner in which the percentage of loss 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.

In the instant case, the Office medical adviser indicated that he relied on the objective findings of Dr. Bosniak, appellant's attending physician and a Board-certified orthopedic surgeon, to determine that appellant had no greater than a two percent impairment of the right upper extremity according to the A.M.A., *Guides*. Dr. Bosniak had previously indicated that appellant had a ten percent impairment of the right upper extremity. Dr. Kregel, a Board-certified family practitioner and Dr. Weiss, a Board-certified orthopedic surgeon, however, also provided objective findings of impairment indicating a 10 percent and 38 percent impairment of the right upper extremity, respectively. Because the Office medical adviser failed to explain why he selected the objective findings of Dr. Bosniak over the objective findings of Drs. Kregel and Weiss in reaching his impairment rating, the case must be remanded for further evidentiary development.⁶ Moreover, the opinion of the Office medical adviser indicating that appellant has no more than a 2 percent impairment is contradicted by the rationalized opinions of Drs. Bosniak, Kregel and Weiss which indicated that appellant's impairment of the right upper extremity is 10, 10, and 28 percent, respectively. When there are opposing medical reports of virtual equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act⁷ to resolve the conflict in the medical opinion. As an unresolved conflict exists in the medical evidence, this case must be remanded to the Office for referral to an impartial medical specialist. After such further development as necessary, the Office shall issue a *de novo* decision.

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107 (c).

⁴ 20 C.F.R. § 10.304.

⁵ 5 U.S.C. § 8107(c)(19).

⁶ *Herman L. Henson*, 40 ECAB 341 (1988)

⁷ 5 U.S.C. § 8123(a); *see Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).

The decisions of the Office of Workers' Compensation Programs dated January 31, 1995, October 13, 1993 and December 17, 1992 are hereby set aside and the case is remanded to the Office for further development consistent with this opinion.

Dated, Washington, D.C.
February 10, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member