U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of RICHARD F. BURGER and DEPARTMENT OF THE NAVY, NAVAL AIR REWORK FACILITY, Jacksonville, Fla.

*Docket No. 96-408; Submitted on the Record;*
*Issued January 7, 1998*

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DECISION and ORDER

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

The issues are: (1) whether appellant has more than a 10 percent permanent impairment of his right and left arms for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to compensation under section 8106(c) of the Federal Employees' Compensation Act beginning August 10, 1995 on the grounds that appellant refused suitable employment.

On April 30, 1993 appellant, then a 48-year-old sheet metal worker, filed a claim for bilateral carpal tunnel syndrome. The Office accepted that appellant sustained tendinitis of both wrists and bilateral carpal tunnel syndrome, authorized bilateral carpal tunnel releases which were performed on August 6 and October 1, 1993, and paid appellant the appropriate compensation for wage-loss disability.

On January 6, 1994 appellant filed a claim for a schedule award.

By letter dated February 7, 1994, the Office requested that Dr. Albert L. Henry, a Board-certified orthopedic surgeon and appellant's attending physician, evaluate appellant to determine whether he had any permanent impairment from his bilateral carpal tunnel syndrome in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

In a report received by the Office on February 18, 1994, Dr. Henry indicated that appellant had reached maximum medical improvement on December 1, 1993, and that he had no impairment of his upper extremities.

By decision dated March 22, 1994, the Office denied appellant's claim for a schedule award on the grounds that he had not established that he had a permanent impairment of his wrists.

By letter dated July 22, 1994, appellant requested reconsideration. In support of his request, appellant submitted a report dated March 15, 1994 from Dr. Henry, who diagnosed "bilateral carpal tunnel syndrome status post surgery with residual pain but relief of numbness." Dr. Henry noted that appellant could not perform heavy lifting or activities involving repeated trauma or vibration without pain. Dr. Henry opined that appellant could perform repetitive lifting of 10 pounds but not 50 pounds.

In a report dated May 13, 1994, Dr. James Lovett, who is Board-certified in emergency medicine, discussed appellant's history of bilateral carpal tunnel releases and his current complaints of numbness and pain in his left hand. Dr. Lovett found the following range of motion for appellant's left wrist: 75 degrees dorsi extension, 65 degrees palmar flexion, 35 degrees ulnar deviation, 25 degrees radial deviation, and tenderness of the left carpometacarpal joint on palpitation. For the right wrist Dr. Lovett found 75 degrees of dorsi extension, 67 degrees of palmer flexion, 40 degrees of ulnar deviation, and 30 degrees of radial deviation. He further found that appellant had a weaker grip on his right side, mild atrophy of the thenar area and a tremor at the lateral aspect of the fourth finger. Dr. Lovett opined that, according to Table 3 on page 20 of the A.M.A., *Guides*, appellant had a 6 percent impairment of the whole person from the right hand impairment and a 7 percent impairment of the whole person from the left hand impairment, for a total whole person impairment of 13 percent.

In a report dated August 2, 1994, an Office medical adviser recommended that the Office refer appellant to a specialist to determine whether he had any impairment to his right and/or left hand due to his employment injury.

By letter dated August 16, 1994, the Office referred appellant, together with a statement of accepted facts, to Dr. Mark Lemel, a hand surgeon, for an independent medical examination.[1]

In a report dated September 6, 1994, Dr. Lemel discussed appellant's history of injury and medical treatment received, his complaints of pain and loss of strength in both hands, cramping in the right hand, and numbness and tingling in the left hand. On physical examination, Dr. Lemel found:

> "[Appellant] has full range of motion in the elbows, forearms, wrists and digits, but has some slight pain with finger flexion bilaterally. He has well-healed carpal tunnel release scars measuring approximately five [centimeters] on both the right and left wrists, which are tender to palpation. He has 1+ wasting in the thenar musculature and slightly decreased strength with thumb opposition on the right side."

Dr. Lemel found that appellant had negative Tinel's and Phalen's tests, no evidence of tendinitis or instability of the wrists and normal sensory testing. Dr. Lemel measured appellant's grip strength as 33, 26 and 18 kilograms on the right, and 22, 34 and 14 kilograms on the left.

[1] Although the Office found a conflict in the medical opinion evidence between Dr. Henry and Dr. Lovett, as both of these physicians are appellant's attending physicians, there is no conflict of medical opinion pursuant to section 8123. *See John H. Taylor*, 40 ECAB 1228 (1989). Therefore, Dr. Lemel is a second opinion referral physician rather than an impartial medical specialist.

Dr. Lemel found that, pursuant to page 57 of the A.M.A., *Guides*, appellant had a 10 percent impairment of both upper extremities due to entrapment of the median nerve with mild residual symptoms.

In a report dated November 30, 1994, an Office medical adviser reviewed Dr. Lemel's September 6, 1994 report and opined that his findings were consistent with the A.M.A., *Guides*.

By decision dated December 2, 1994, the Office vacated its March 22, 1994 decision.

By decision dated December 6, 1994, the Office granted appellant a schedule award for a 10 percent permanent loss of use of the left arm and a 10 percent permanent loss of use of the right arm. The period of the award ran from September 6, 1994 to November 16, 1995 for a total of 62.40 weeks of compensation.

In a letter dated January 11, 1995, the employing establishment offered appellant a position as a data management specialist in accordance with the limitations described in Dr. Henry's November 15, 1994 report.

On February 6, 1995 appellant declined the job offer.

In a duty status report dated November 15, 1994, Dr. Henry indicated that appellant was able to perform the described data management specialist position.

By letter dated June 26, 1995, the Office informed appellant that it had determined that the position of data management specialist constituted suitable employment and provided him 30 days within which to either accept the position or explain his refusal. The Office informed appellant that he would not be entitled to compensation if he refused to perform a suitable position.

Appellant did not respond within the time allotted.

By decision dated August 10, 1995, the Office terminated appellant's compensation benefits on the grounds that he refused to work after an offer of suitable employment.

The Board finds that appellant has no more than a 10 percent permanent impairment of both the right and left arms.

Under section 8107 of the Act,[2] and section 10.304 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.304.

The A.M.A., *Guides* have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

Appellant's attending physician, Dr. Henry, a Board-certified orthopedic surgeon, found that appellant had no permanent impairment due to his accepted injury of bilateral carpal tunnel syndrome. In a report dated May 13, 1994, Dr. Lovett, who is Board-certified in emergency medicine, opined that appellant had a 13 percent whole person impairment due to his bilateral carpal tunnel syndrome. However, the Act does not provide a schedule award for a whole person impairment.[5] Thus, Dr. Lovett's opinion is of limited probative value because it was not derived in accordance with the standards of the A.M.A., *Guides*. The Office, therefore, properly referred appellant to Dr. Lemel, a hand surgeon, for a second opinion evaluation.

In a report dated September 6, 1994, Dr. Lemel found that appellant had full range of motion in his elbows, forearms, wrists and digits. Dr. Lemel further found that appellant had complaints of pain and loss of strength in his hands. Dr. Lemel properly applied the A.M.A., *Guides* to his findings and determined that appellant had a 10 percent impairment of both upper extremities due to mild entrapment of the median nerve of the wrists.[6] The Office medical adviser reviewed Dr. Lemel's report and concurred with his finding of a 10 percent impairment of the right and left upper extremity. As the report of Dr. Lemel conforms to the A.M.A., *Guides* and is supported by the opinion of the Office medical adviser, it constitutes the weight of the medical evidence.

The Board further finds that the Office improperly terminated appellant's entitlement to compensation under section 8106(c) of the Act beginning August 10, 1995 on the grounds that appellant refused suitable employment.

Section 8106(c) of the Act[7] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. However, the regulations governing the Act and the Office's procedure manual provide several steps which must be followed prior to a determination that the position offered was suitable and that, therefore, an employee refused or neglected to work after suitable work was secured for him.

The Office's procedure manual states that to be valid, an offer of light duty must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the work load or unusual working conditions; (3) the organizational and geographical location of the

[4] *James J. Hjort*, 45 ECAB 595 (1994).

[5] 5 U.S.C. § 8107(c).

[6] A.M.A., *Guides* 57, Table 16.

[7] 5 U.S.C. § 8106(c).

job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer is required.[8]

In this case, the Office found that appellant was not entitled to wage-loss compensation for the period beginning on August 10, 1995 on the grounds that he refused to work after suitable work had been procured for him. However, the record does not contain a description of the light-duty position offered to appellant and thus the Office did not follow its established procedures in finding that the position procured for appellant was suitable.

The decision of the Office of Workers' Compensation Programs dated January 26, 1995 is reversed, and the decision dated December 6, 1994 is hereby affirmed.

Dated, Washington, D.C.
January 7, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (December 1993).