

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL D. PRESSON and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, CRIMINAL INVESTIGATION UNIT,  
ACI PROJECT OFFICE, Florence, Ky.

*Docket No. 96-1291; Submitted on the Record;  
Issued March 11, 1998*

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DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained greater than a 10 percent impairment of each upper extremity, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs used an appropriate pay rate in calculating the June 23, 1995 schedule award; and (3) whether the Office abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's January 2, 1996 request for a merit review.

The Office accepted that appellant, then a 45-year-old senior analyst and special agent, sustained bilateral carpal tunnel syndrome on or before July 19, 1993, due to keyboarding in the performance of duty.<sup>1</sup> Appellant underwent a right carpal tunnel release on October 19, 1993, and a left carpal tunnel release with flexor tenosynovectomy on January 13, 1994.

In a July 8, 1994 report, Dr. T. Greg Sommerkamp, an attending Board-certified orthopedic surgeon, specializing in hand surgery who treated appellant since September 1993, advised appellant to "minimize repetitive motion-type work and get away from the keyboard if possible."<sup>2</sup>

In a February 16, 1995 letter, the Office requested that Dr. Sommerkamp evaluate the degree of any permanent impairment related to appellant's accepted bilateral carpal tunnel syndrome using the appropriate tables and grading schemes of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> edition) (hereinafter, "the

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<sup>1</sup> The Office initially denied appellant's claim by December 3, 1993 decision, which was vacated on April 15, 1994, and appellant's claim accepted for bilateral carpal tunnel syndrome.

<sup>2</sup> The Office accepted a recurrence of disability beginning July 8, 1994, allowing buy back of sick leave taken from July 20, 1994 to March 30, 1995.

A.M.A., *Guides*). Dr. Sommerkamp responded on April 12, 1995, stating that appellant had reached maximum medical improvement in January 1995, and that he had a zero percent impairment due to loss of strength. Dr. Sommerkamp found that appellant had a three percent permanent impairment of each upper extremity due to sensory deficit, pain or discomfort, and used the combined values table of the A.M.A., *Guides* to arrive at a six percent impairment.

The Office then referred Dr. Sommerkamp's report, a statement of accepted facts and the medical record, to Dr. Phillip Horn, an Office medical adviser, for calculation of a schedule award. Dr. Horn submitted a June 20, 1995 report, finding a 10 percent impairment of the right and left upper extremities due to mild median nerve entrapment of the wrist, using Table 16 of the A.M.A., *Guides*, entitled "Upper Extremity Impairment Due to Entrapment Neuropathy."

By decision dated June 23, 1995, the Office awarded appellant a schedule award for a 10 percent permanent impairment of the right upper extremity and a 10 percent permanent impairment of the left upper extremity. The award, equivalent to 62.40 weeks of compensation to run from January 15, 1995 to March 26, 1996, was based on a weekly pay rate of \$1,515.29. The record indicates that appellant's pay rate as of October 19, 1993, the date that disability began, was \$1,515.29 per week.<sup>3</sup>

In a July 7, 1995 letter, appellant requested reconsideration, contending that the Office's schedule award was "deficient." He contended that the tests used to determine loss of hand strength did not measure neurologic damage, loss of dexterity, or "hand/wrist usefulness," and were appropriate only in cases of dismemberment. Appellant listed what he believed to be financial losses of one million dollars due to his plan of taking early retirement due to his carpal tunnel syndrome. He described difficulty with lifting more than 15 pounds, mowing the lawn, shoveling snow, playing golf and racquetball, fishing, opening jars and bottles, carrying a suitcase, and lifting his grandchildren. He also noted that numbness, pain and tingling from carpal tunnel syndrome often awakened him from sleep. Appellant offered to "settle" the claim for monetary compensation equivalent to a 25 percent permanent impairment of each upper extremity. He enclosed copies of financial calculations, and letters from co-workers describing appellant's activity limitations.<sup>4</sup>

By decision dated December 6, 1995, the Office denied modification, finding that appellant's contention that factors other than those set forth in the A.M.A., *Guides* should be used to determine percentages of permanent impairment were without merit. The Office noted that compensation was not payable for health problems anticipated by appellant, or for alteration of his lifestyle in activities not encompassed by the A.M.A., *Guides*.

In a January 2, 1996 letter, appellant requested reconsideration. He contended that the monetary amount of his schedule award compensation should have been based on his current pay

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<sup>3</sup> The Office issued a June 23, 1995 decision, finding that appellant was not entitled to continuation of pay for work absences from October 19, 1993 to February 8, 1994 "or other," as continuation of pay was not payable for disability caused by an occupational disease condition.

<sup>4</sup> The Office allowed appellant to buy back leave for the period August 25, 1993 to July 22, 1994, totaling 349 hours.

rate, and not his pay rate on the date that disability began. Appellant also contended that he sustained greater than the “20 percent” permanent impairment determined by the Office. He stated that as he was restricted to using a keyboard for only three hours per day, he could not use a computer for over 60 percent of his 10-hour work day, and that therefore he had a 60 percent permanent impairment. Appellant offered that as he could not grasp or pull for more than 2 hours per day out of 10, this represented an 80 percent impairment. He enclosed a summary symptoms chart for the period June 21, 1994 to December 31, 1995<sup>5</sup> and a July 7, 1995 work restriction report from Dr. Sommerkamp limiting grasping, pulling and pushing to two hours per day, keyboarding to three hours per day, and proscribing “firearms due to vibratory effect.”

By decision dated January 8, 1996, the Office denied appellant’s request for a merit review on the grounds that his January 2, 1996 letter did not raise substantive legal questions or include new and relevant evidence. The Office noted that the pay rate used to calculate the amount of the schedule award was “the pay rate in effect when disability began on October 19, 1993,” and that schedule awards were not based on current pay rate as appellant had contended.<sup>6</sup>

The Board finds that appellant has not established that he sustained greater than a 10 percent permanent impairment of each upper extremity, for which he received a schedule award.

Under section 8107 of the Act<sup>7</sup> and section 10.304 of the implementing regulations,<sup>8</sup> 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 for all claimants, the Office has adopted the A.M.A., *Guides* (4th ed.) as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.<sup>9</sup>

The A.M.A., *Guides* lists specific procedures for determining impairment of affected body parts. A physician must first determine the effect of the medical condition on life activities and determine the date of maximum medical improvement.<sup>10</sup> When the effect of impairment is pain or loss of sensation, the physician must identify the area of involvement and the nerve or

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<sup>5</sup> There is no indication that this symptoms chart, apparently prepared by appellant, was reviewed or signed by a physician.

<sup>6</sup> In a January 24, 1996 letter, appellant requested to buy back sick leave used from July 20, 1994 to March 30, 1995. He submitted leave records, copies of Office correspondence, and copies of medical reports previously of record. By decision dated February 17, 1996, the Office denied appellant’s claim for compensation for the period July 20, 1994 to March 30, 1995 on the grounds that he submitted insufficient medical evidence to establish that he was totally disabled for work due to work factors for that period. Appellant does not appeal the February 17, 1996 decision. Therefore, this decision is not before the Board on the present appeal.

<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.304.

<sup>9</sup> *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

<sup>10</sup> A.M.A., *Guides*, 9.

nerves that enervate the area of involvement.<sup>11</sup> The physician then finds the value for maximum loss of function of the nerve or nerves due to pain or loss of sensation, using the appropriate table.<sup>12</sup> The physician next grades the degree of decreased sensation or pain according to a 6-level grading scheme ranging from level 1, “[n]o loss of sensation or no spontaneous abnormal sensations” equal to 0 percent degree of decreased sensation or pain, to level 6, “[d]ecreased sensation with pain, which may prevent all activity” equal to between 96 and 100 percent degree of decreased sensation or pain.<sup>13</sup> Finally, a physician multiplies the value of the nerve, gleaned from the appropriate table, by the degree of decreased sensation or pain to reach the percentage of impairment due to pain or loss of sensation.<sup>14</sup> Similar guidelines exist for evaluating impairment due to loss of motion or impairment due to motor deficits.

In the present case, Dr. Horn, an Office medical adviser, used the appropriate tables and grading schemes of the A.M.A., *Guides* in determining that appellant had a 10 percent permanent impairment of each upper extremity. His opinion is based on a statement of accepted facts, and a review of the medical record.

In support of his contention that the schedule award was improperly calculated, appellant did not offer medical evidence from a physician, referring to the appropriate tables and grading schemes of the A.M.A., *Guides*, explaining how and why such calculation was in error. Instead, appellant proposed a percentage of impairment based on a rating system of his own invention, based on time spent at work doing various tasks later restricted by his physician. These calculations and their conclusions are of no probative value whatsoever.<sup>15</sup> The Board notes that appellant’s attending Board-certified orthopedic surgeon, Dr. Sommerkamp, calculated a schedule award on April 12, 1995 lower than that arrived at by Dr. Horn, the Office medical adviser.

Consequently, appellant has not established that he sustained greater than a 10 percent impairment of each upper extremity due to work factors.

Regarding the second issue, the Board finds that the Office used the appropriate pay rate in calculating the amount of monetary compensation associated with the schedule award.

Section 8101(4) of the Act<sup>16</sup> provides, in pertinent part, that in compensation cases, a claimant’s monthly compensation rate will be based on the monthly pay rate “at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time

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<sup>11</sup> A.M.A., *Guides*, 40, Table 10.

<sup>12</sup> A.M.A., *Guides*, 40, 70, Tables 10 and 47.

<sup>13</sup> *Id.*, *supra* note 9.

<sup>14</sup> *Id.*, *supra* note 10. See A.M.A., *Guides*, 70.

<sup>15</sup> See *James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is of not competent evidence on the issue of causal relationship).

<sup>16</sup> 5 U.S.C. § 8101(4).

compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater, except when otherwise determined under section 8113 of this title with respect to any period.” The Office’s procedures contain a similar provision.<sup>17</sup>

Appellant contends that the schedule award should have been based on his current pay rate at the time the award began on January 15, 1995. The Act and the Office’s procedures do not contain a provision allowing for the payment of schedule awards based on current pay rate. Therefore, appellant’s contention is without merit. The Board notes that there is no indication of record that the Office erred in calculating the pay rate for the June 23, 1995 schedule award. Consequently, appellant has failed to establish that the Office used an incorrect pay rate in determining the monetary amount of his schedule award.

Regarding the third issue, the Board finds that the Office did not abuse its discretion in refusing to reopen appellant’s case for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by “showing that the Office erroneously applied or interpreted a point of law,” or “[a]dvancing a point of law or fact not previously considered by the Office,” or “[s]ubmitting relevant and pertinent evidence not previously considered by the Office.”<sup>18</sup> Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>19</sup>

In support of his request for reconsideration, he enclosed his January 2, 1996 letter, containing his novel method of schedule award calculation, his symptoms chart and the July 7, 1995 work restriction report from Dr. Sommerkamp. The relevant issues in this case, are the calculation of the percentage, of permanent impairment and the amount of monetary compensation of the June 23, 1995 schedule award. Therefore, in order to be considered relevant, any evidence submitted on reconsideration would have to demonstrate that the Office had committed error in calculating appellant’s pay rate for the purposes of the schedule award, or contain medical evidence, referring to the appropriate tables and grading schemes of the A.M.A., *Guides*, explaining how and why the percentages of permanent impairment calculated by the Office were incorrect. Appellant’s letter does not contain relevant evidence on either issue. His symptoms chart does not appear to have been reviewed by a physician and therefore does not constitute medical evidence. Dr. Sommerkamp’s July 7, 1995 work restriction report does not

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<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Benefits and Fees, Effective Date of Pay Rate*, Chapter 2.900.4(a) (Jan. 1991)

<sup>18</sup> 20 C.F.R. § 10.138(b)(1).

<sup>19</sup> 20 C.F.R. § 10.138(b)(2).

refer to the A.M.A., *Guides*, or contain comments regarding the schedule award. Therefore, Dr. Sommerkamp's report, although it is new, is not relevant to the schedule award issue.

Consequently, the Office did not abuse its discretion by denying appellant's request for a merit review, as he did not submit new, relevant evidence, demonstrate that the Office committed an error, or advance a new point of law or fact not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated January 8, 1996 and June 23, 1995 are hereby affirmed.

Dated, Washington, D.C.  
March 11, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member