

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE A. KELLY and DEPARTMENT OF THE ARMY,
PROVING GROUND, Aberdeen, MD

*Docket No. 98-1120; Submitted on the Record;
Issued November 8, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he has more than a 10 percent permanent impairment of his right arm for which he received a schedule award.

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 10 percent permanent impairment of his right arm for which he received a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³

Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ 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 Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107(a).

(fourth edition 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

On May 10, 1994 appellant, then a 45-year-old electrician, sustained rotator cuff tendinitis with impingement. The Office of Workers' Compensation Programs authorized the performance of an open decompression of the right shoulder with manipulation and a right rotator cuff repair on March 10, 1995. By award of compensation dated February 26, 1997, the Office granted appellant a schedule award for a 10 percent permanent impairment of his right arm.⁶ The Office based its award on the February 1997 calculations of the Office medical adviser as applied to findings obtained on October 28, 1996 by Dr. Louis Elias, a Board-certified orthopedic surgeon to whom the Office referred appellant. By decision dated and finalized January 7, 1998, an Office hearing representative denied modification of the Office's February 26, 1997 decision.

In his February 1997 report, the Office medical adviser properly applied the standards of the A.M.A., *Guides* to determine that appellant had a 10 percent permanent impairment of his right arm due to loss of motion consisting of a 3 percent impairment rating for 110 degrees of abduction, a 4 percent rating for 120 degrees of forward flexion, a 1 percent rating for 45 degrees of external rotation and a 2 percent rating for 50 degrees of internal rotation.⁷

The record also contains an October 30, 1995 report in which Dr. Allan Macht, an attending Board-certified surgeon, determined that appellant had a 25 percent permanent impairment of his right arm. The opinion of Dr. Macht is of limited probative value in that Dr. Macht failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.⁸ Dr. Macht noted that appellant was entitled to a 12 percent rating for moderate crepitation of his right shoulder, but he did not adequately detail how he arrived at this calculation or sufficiently explain why this impairment would not be better accounted for by the ratings for loss of motion.⁹ Dr. Macht indicated that appellant was entitled to an eight percent rating for weakness of his right shoulder, but he did not specify the peripheral nerve disorder causing such weakness as required by the appropriate standards of the A.M.A., *Guides* or otherwise adequately describe how he arrived at this calculation.¹⁰

⁵ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁶ The award ran for 31.20 weeks from October 28, 1996 to June 3, 1997.

⁷ See A.M.A., *Guides* 43-45, Figures 38, 41, 44.

⁸ See *James Kennedy, Jr.*, *supra* note 5 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

⁹ See A.M.A., *Guides* 58-59.

¹⁰ *Id.* at 49, 54. Nor did Dr. Macht explain how his 12 percent and 8 percent impairment ratings added up to a total impairment rating of 25 percent.

In his report dated October 28, 1996, Dr. Elias indicated that appellant was entitled to a nine percent impairment rating due to loss of motion and a six percent rating due to “pain in the right shoulder and lack of dexterity, due to inability to fully abduct and work overhead with the right arm and lack of endurance.” With respect to the rating for pain and lack of endurance, included within the six percent rating, Dr. Elias did not specify the peripheral nerve disorder causing such pain or weakness as required by the appropriate standards of the A.M.A., *Guides* or otherwise adequately describe how he arrived at this calculation.¹¹ Moreover, the rating for lack of dexterity included within the six percent rating would duplicate the nine percent rating for loss of motion.

As the report of the Office medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.¹² Therefore, the Office properly determined that appellant did not meet his burden of proof to establish that he has more than a 10 percent permanent impairment of his right arm for which he received a schedule award.

The decisions of the Office of Workers’ Compensation Programs dated and finalized January 7, 1998 and dated February 26, 1997 are affirmed.

Dated, Washington, D.C.
November 8, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ *Id.* at 48-49, 54.

¹² *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).