

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL L. CONLEY and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Kansas City, MO

*Docket No. 97-2450; Submitted on the Record;  
Issued October 13, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has established greater than a two percent permanent loss of use of the left arm.

On February 3, 1994 appellant, then a 41-year-old motor vehicle operator, filed a claim for compensation alleging that he injured his left arm and elbow on January 24, 1994 while in the performance of duty.

On August 1, 1995 the Office of Workers' Compensation Programs accepted appellant's claim for left lateral epicondylitis and left epicondylectomy performed on January 6, 1995.

In a medical report dated November 16, 1995, Dr. Dana R. Towle, appellant's treating physician with specialties in hand and plastic surgery, stated that appellant had reached maximum medical improvement on that date and was released from further medical care.

On December 8, 1995 appellant filed a claim for a schedule award.

On April 1, 1996 the Office referred appellant, his medical records and a statement of accepted facts, to Dr. M. George Varghese, Board-certified in physical medicine and rehabilitation, for an evaluation to determine appellant's schedule award rating.

In a medical report dated April 29, 1996, Dr. Varghese stated that appellant had a two percent permanent impairment rating as a result of his work-related left elbow epicondylitis and consequent surgery. He noted subjective complaints of pain upon activity with occasional swelling. Dr. Varghese reported findings on range of motion evaluations, noting that appellant had flexion extension of 0 to 150 degrees, supination of 80 degrees, pronation of 85 degrees, with tenderness in the lateral epicondyle area. He also noted that strength in the forearm extensors and flexors were within normal limits and that the neurological examination showed normal strength, reflex and sensory findings. Based on the American Medical Association,

*Guides to the Evaluation of Permanent Impairment*, Dr. Varghese found that appellant had a 30 percent grade of pain which he then converted into a 2 percent impairment rating.<sup>1</sup>

In a May 13, 1996 medical report, Dr. Daniel Zimmerman, the Office medical adviser, reviewed Dr. Varghese's findings and noted that he relied on the A.M.A., *Guides* in assessing range of motion, chronic pain, sensory deficit, discomfort and chronic weakness in support of his recommended rating of two percent impairment rating. The Office medical adviser concurred with Dr. Varghese's rating.

On May 28, 1996 the Office awarded appellant a two percent permanent impairment for left upper extremity.<sup>2</sup>

On June 8, 1996 appellant requested an oral hearing. He also submitted an August 30, 1996 medical report from Dr. Towle who stated that appellant had full range of motion in his left elbow, 125 degrees of flexion and 90 degrees of pronation and supination, both within normal limits. Grip strengths were 125 on the right side and 47 on the left side which gave appellant a grip strength index of 62 percent. Using the A.M.A., *Guides*, (3<sup>d</sup> ed. rev., 1991), Dr. Towle stated that appellant had a 1 percent impairment due to decreased flexion and a 31 percent impairment of the left upper extremity at the level of the elbow.

On October 22, 1996 appellant notified the Office that he opted to have a review of the written record in lieu of a hearing.

In a decision dated January 9, 1997 and finalized on January 13, 1997, the hearing representative remanded the case to the Office for a reevaluation by Dr. Towle, appellant's treating physician. The hearing representative found that Dr. Varghese not only failed to adequately address appellant's loss of strength but also failed to offer a clear explanation for the percentage of impairment loss that he recommended. Further, the Office noted that Dr. Towle's report was insufficient to establish that appellant had a 31 percent impairment rating because he did not use the applicable edition of the A.M.A., *Guides*, and did not conform his evaluations to its procedures relative to strength evaluation.

On February 4, 1997 the Office referred appellant to Dr. Towle with an instruction to evaluate appellant's left upper extremity impairment due to loss of strength with reference to the procedures set forth in the A.M.A., *Guides*, (4th ed., 1993).

In a medical report dated March 17, 1997, Dr. Towle stated that appellant's range of motion findings for flexion was now 123 degrees of motion and that his right-sided grip strength right side was 122, 125 and 100 in rapid exchange finding a virtual doubling of appellant's left grip strength in the past year. He then noted that appellant had an impairment of the elbow of one percent due to decreased motion for flexion. Dr. Towle stated that appellant had a grip index of 32 percent, converted to a 20 percent impairment of the left upper extremity due to loss

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<sup>1</sup> A.M.A., *Guides* (4th ed., 1993), 48, Table 11.

<sup>2</sup> Appellant resigned effective March 31, 1996.

of strength. He then added the 1 percent for decreased motion to the 20 percent for loss of strength to arrive at a total of 21 percent permanent impairment.

On April 22, 1997 the Office medical adviser reviewed Dr. Towle's March 17, 1997 medical report and stated that he did not provide persuasive evidence that appellant's prior award should be modified. The Office medical adviser noted that Dr. Towle's report could not be relied on to establish appellant's impairment rating because he had not shown that maximum medical improvement had been reached, noting that Dr. Towle reported that appellant's left arm strength had doubled since August 30, 1996,<sup>3</sup> that he did not indicate whether appellant's left arm was dominant,<sup>4</sup> that it was probable that the strength index applicability was incorrectly applied and that Dr. Towle failed to address the issue of residual pain.

On May 23, 1997 the Office awarded appellant a two percent permanent impairment rating for loss of use of his left upper extremity.

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

Under section 8107 of the Federal Employees' Compensation Act<sup>5</sup> and section 10.304 of the implementing federal regulations,<sup>6</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 adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment, and the Board has concurred in such adoption.<sup>7</sup>

In the present case, Dr. Towle, appellant's treating physician, rated appellant with a 21 percent permanent impairment of the left upper extremity based on the A.M.A., *Guides* (4th ed., 1993). He stated that appellant's range of motion findings were the same as his April 26, 1996 evaluation except for flexion which was now 123 degrees of motion. Dr. Towle then stated that appellant's left grip strength, measured at 75, 79 and 85, was almost a doubling of his grip strength in the past year. He noted that his right-sided grip strength measurements were virtually the same as the year prior. Dr. Towle noted that appellant had an impairment of the elbow of one percent due to decreased motion for flexion. He stated that appellant had a grip index of 32 percent, converted to a 20 percent impairment of the left upper extremity due to loss of strength and added 1 percent for decreased motion to arrive at a total of 21 percent permanent impairment. On the other hand, in an April 29, 1996 medical report, Dr. Varghese, the Office's referral physician, stated that appellant had a two percent permanent impairment rating as a

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<sup>3</sup> The Board notes that Dr. Towle initially stated that appellant had reached maximum medical improvement on November 16, 1995.

<sup>4</sup> The statement of accepted facts notes that appellant was right-hand dominant.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 20 C.F.R. § 10.304.

<sup>7</sup> *James A. England*, 47 ECAB 115 (1995).

result of his work-related left elbow epicondylitis and consequent surgery. He noted appellant's flexion-extension was 0 to 150 degrees, supination was 80 degrees and pronation was 85 degrees. Based on the A.M.A., *Guides* (4th ed., 1993) he rated appellant at a 30 percent grade of pain which converted into a 2 percent impairment rating.

A conflict exists between the opinions of Dr. Towle which supports a 21 percent permanent impairment of appellant's left arm, and Dr. Varghese which supports a 2 percent permanent impairment. When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical opinion. Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence. On remand, the Office should refer appellant, along with the case record and a statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized medical opinion on this matter. After such further development as the Office deems necessary, the Office should issue a *de novo* decision regarding appellant's claim.

The decision of the Office of Workers' Compensation Programs dated May 23, 1997 is set aside and the case remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
October 13, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member