U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALLEN M. GATES and DEPARTMENT OF THE NAVY, SEA SYSTEMS COMMAND, Vallejo, CA

*Docket No. 99-795; Submitted on the Record;*
*Issued June 13, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant has greater than a 12 percent permanent impairment to each upper extremity.

The Office of Workers' Compensation Programs accepted appellant's claim for bilateral lateral epicondylitis, bilateral carpal tunnel syndrome and cervical strain. The Office issued him a schedule award for a 12 percent permanent impairment for the right and left arm from June 9, 1993 through November 15, 1994. On December 20, 1995 appellant filed a claim for an additional schedule award which was denied by decision dated June 7, 1996. On December 14, 1997 he filed for an additional schedule award.

In a report dated March 6, 1996, appellant's treating physician, Dr. Peter V. Ciani, a Board-certified family practitioner, noted that he had been treating appellant for acute tendinitis and carpal tunnel syndrome. He found that appellant's grip strength tested with a dynamometer averaged 44.4 kilograms on the right and 43.2 kilograms on the left. Dr. Ciani stated that the lateral pinch test averaged 3.8 kilograms on the right and 3.4 kilograms on the left and noted that the greater loss was calculated in the lateral pinch test. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), he found that pinch loss equated to a 49 percent and 52 percent strength loss index which in turn equated to a 2 percent upper extremity impairment relative to amputation at the shoulder level in each arm.

In a report dated March 15, 1996, the district medical adviser, Dr. Karl J. May, referring to Dr. Ciani's March 6, 1996 report and the A.M.A., *Guides* (4th ed. 1994), agreed with Dr. Ciani's rating of a two percent permanent impairment in each upper extremity.

In a report dated April 28, 1998, Dr. Ciani reiterated his diagnosis of chronic bilateral forearm tendinitis and lateral epicondylitis. On physical examination he found that appellant's pinch which he measured three times averaged 6 kilograms on the right and 4 kilograms on the left. Dr. Ciani measured appellant's grip strength three times and found it averaged 50

kilograms on the right and 40 kilograms on the left. Using the A.M.A., *Guides* (4th ed. 1994), he determined that, based on Tables 31 and 33 [and apparently Table 34 as well], pages 64 and 65, appellant had a 10 percent upper extremity deficit for loss of his left grip strength and a 20 percent deficit for lateral pinch. Dr. Ciani stated that averaging the 10 percent and 20 percent figures yielded a 15 percent impairment to the left upper extremity based on lost grip strength. He stated that using the same technique on the right side yielded a five percent lost grip strength.

In a report dated May 12, 1998, another district medical adviser considered Dr. May's March 15, 1996 report and Dr. Ciani's April 28, 1998 report. He concluded that Dr. Ciani's determination that appellant had a 15 percent permanent impairment in his left upper extremity based on weakness of grip and lateral pinch lacked credibility because those measurements were subjective being subject to voluntarily control by the patient. The district medical adviser stated that, "Since neither grip strength [n]or lateral pinch strength have [anything] to do with the extensor muscle insertion which is affected by lateral epicondylitis, there is no reasonable medical rationale to support any relationship between these strength ratings and the work[-]related conditions." He stated that he agreed with Dr. May's rating.

To resolve the conflict in the evidence between Dr. Ciani's opinion that appellant had a 15 percent permanent impairment in his left upper extremity and the district medical adviser's May 12, 1998 opinion that appellant had a 2 percent permanent impairment in his upper extremities, the Office referred appellant to an impartial medical specialist, Dr. Leland E. Rogge, a Board-certified orthopedic surgeon. In his report dated July 14, 1998, he considered appellant's history of injury and performed a physical examination in which he found that appellant had full range of motion of the right shoulder, elbow and wrist and normal grasp in the right hand. Dr. Rogge opined that appellant's right shoulder did not have limitations. He found that appellant could abduct to only 90 degrees on the left shoulder but had full motion of the left elbow, wrist and normal grasp in the left hand. Dr. Rogge diagnosed chronic tendinitis in the left shoulder, chronic epicondylitis bilaterally and status postoperative treatment for carpal tunnel syndrome bilaterally. Using the A.M.A., *Guides* (4th ed. 1994), he found that appellant's 90 degree loss of abduction in the left shoulder resulted in a 4 percent permanent impairment. Dr. Rogge stated that appellant had a five percent impairment of the left upper extremity due to chronic pain in the sensory C5 distribution. He added the four percent permanent impairment due to loss of abduction to the five percent impairment due to pain to obtain a total permanent impairment to the left upper extremity of nine percent.

By decision dated September 23, 1998, the Office denied appellant's claim, stating that the medical evidence did not establish that the degree of permanent impairment to appellant's upper extremities had increased.

The Board finds that the Office properly determined that appellant did not have more than a 12 percent permanent impairment to each upper extremity.

The schedule award provision of the Federal Employees' Compensation Act[1] provides for compensation to employees sustaining permanent impairment from loss or loss of use of

[1] 5 U.S.C. § 8107 *et seq.*

specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[2] For consistent results and to ensure equal justice under the law to 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.[3]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4] In the present case, the Office referred appellant to Dr. Rogge, an impartial medical specialist, to resolve the conflict between Dr. Ciani and the district medical adviser as to the degree of appellant's impairment to his upper extremities. In his July 14, 1998 report, Dr. Rogge found on physical examination that appellant had no limitations in his right shoulder and had full range of motion of the elbow, wrist and normal grasp of the right hand. He found that appellant had 90 degrees abduction in his left shoulder and properly used the A.M.A., *Guides* (4th ed. 1994), Table 41, page 44 to obtain an upper left extremity impairment of 4 percent. Although Dr. Rogge did not specifically refer to the A.M.A., *Guides* (4th ed. 1994) in determining the degree of appellant's impairment due to pain, because Dr. Rogge stated that he based his finding of 5 percent chronic pain in the sensory C5 distribution, it would appear that he used Tables 10 and 11, pages 47 and 48. His conclusion that appellant had a total permanent impairment of 9 percent to his left upper extremity is reasonable and consistent with the A.M.A., *Guides* (4th ed. 1994) and therefore constitutes the weight of the evidence. Appellant has therefore failed to establish that he is entitled to an additional schedule award.

[2] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[3] *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

[4] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

The decision of the Office of Workers' Compensation Programs dated September 23, 1998 is hereby affirmed.

Dated, Washington, D.C.
June 13, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member