

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH J. BANDERA and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-311; Submitted on the Record;
Issued April 19, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award as a result of his accepted employment injury.

On January 26, 1988 appellant, a sheet metal mechanic, sustained an employment injury when he struck his head while walking through a compartment door aboard ship. The Office of Workers' Compensation Programs accepted his claim for cervical strain and temporary aggravation of thoracic outlet syndrome.

On January 14, 1994 appellant filed a claim for a schedule award. As a result of a conflict in medical opinion, the Office referred appellant, together with a statement of accepted facts and the medical record to Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon. In a report dated March 8, 1995, Dr. Fabiani stated that appellant had absolutely no evidence of any neurological problems. He stated that he had reviewed the records and that all clinical examinations were essentially within normal limits. Dr. Fabiani added: "There is no objective findings really to justify his subjective complaints, however, the mechanism of injury and some of the earlier findings may indicate that this man may have some injury to his cervical discopathy and because of his complaints I can protect him from work that is done with the neck in hyperextension position."

In a supplemental report dated February 13, 1996, Dr. Fabiani explained that the mechanism of injury would cause a compression of the cervical spine. All x-rays at the time were normal, however, he suspected that they would still be the same. Dr. Fabiani stated that the only positive finding was a lack of full extension of the cervical spine. The mechanism of injury and some of appellant's complaints suggested he had a cervical sprain at the probable level of C4-5, which left a slight area of weakness. He stated that the bases for his recommendation were appellant's suggested complaints and the lack of approximately 20 degrees of full extension of the cervical spine.

Electrodiagnostic studies on December 5, 1996 were reported to be compatible with bilateral C5 radiculopathies, appearing chronic; left carpal tunnel syndrome, appearing mild and no electrical evidence of an acute cervical radicular process or brachial plexitis.

An Office medical adviser observed that electrodiagnostic studies on April 4, 1988 also showed chronic C5 radiculopathy. He reported that testing only two months after the work injury would have shown acute changes if they were due to the work injury. Chronic changes show a condition preceded the work injury. Thus, while chronic C5 radiculopathy was still present, it was not due to the work injury. The Office referred the electrodiagnostic studies to Dr. Fabiani and requested his opinion on appellant's entitlement to a schedule award.

In a report dated September 7, 1998, Dr. Fabiani stated that appellant had no loss of range of motion of the joints or arms. There was no motor or sensory impairment involving the arms and nerves. He noted that the electrodiagnostic studies performed on April 4, 1988 and December 5, 1996 "just showed some chronic C5 radiculopathy." Dr. Fabiani saw no instability or arthritis or any other factor involving the arms that contributed to impairment. The work injury, in his opinion, had no relationship to the left carpal tunnel syndrome. Referring to Table 76 of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), he reported that appellant had only a two percent impairment of the whole person.¹

In a decision dated July 13, 1999, the Office found that Dr. Fabiani's opinion together with the prior medical records were conclusive in establishing that appellant had no residual impairment for which an award of permanent impairment would be paid.

The Board finds that the weight of the evidence fails to establish that appellant is entitled to a schedule award as a result of his accepted employment injury

Section 8107 of the Federal Employees' Compensation Act² authorizes the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body. The Office evaluates the degree of impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

¹ Table 76, page 118, of the A.M.A., *Guides* describes cervical region impairment due to abnormal motion. No schedule award is payable, however, for a member, function or organ of the body not specified in the Act or in the regulations. *William Edwin Muir*, 27 ECAB 579 (1976). Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award. *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982). The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19). Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the spine. *Rozella L. Skinner*, 37 ECAB 398 (1986).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

The impartial medical specialist, Dr. Fabiani, reported no loss of range of motion of the joints or arms, no motor or sensory impairment involving the arms and nerves and no instability or arthritis or any other factor involving the arms that contributed to impairment. When there exist 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 upon a proper factual background, must be given special weight.⁴ The Board finds that Dr. Fabiani's report is entitled to such weight. As his opinion fails to establish that appellant has any permanent impairment due to his accepted cervical strain or temporary aggravation of thoracic outlet syndrome, the Office properly denied appellant's claim for a schedule award.

The July 13, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 19, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).