

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PHILLIP LEMBO and DEPARTMENT OF THE NAVY, NAVAL AIR  
WARFARE CENTER AIRCRAFT DIVISION, Lakehurst, NJ

*Docket No. 00-2216; Submitted on the Record;  
Issued August 21, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has a greater than 19 percent impairment of his left upper extremity for which he had received a schedule award.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

On March 13, 1997 appellant, then a 68-year-old machinist, filed a claim alleging that on March 12, 1997 he injured the fifth metacarpal bone of the left hand while in the performance of duty.

The Office of Workers' Compensation Programs accepted appellant's claim for fracture of the left metacarpal bone and authorized left carpal tunnel release on April 16, 1997. The Office subsequently accepted a recurrence of disability sustained on August 18, 1997.

By letter dated April 29, 1998, appellant, through counsel, filed a claim for a schedule award. In a decision dated April 16, 1999, the Office awarded appellant a 19 percent impairment rating for the left upper extremity. By letter dated April 30, 1999, appellant, through counsel, requested an oral hearing. In a decision issued and finalized on January 13, 2000, the hearing representative found that appellant had a 24 percent left upper extremity impairment.

Section 8107 of the Federal Employees' Compensation Act provides that, if there is a permanent impairment 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.<sup>1</sup> 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*

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<sup>1</sup> 5 U.S.C. § 8107.

*Evaluation of Permanent Impairment* as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>2</sup>

In a report dated September 4, 1997, Dr. George M. Gabuzda, appellant's treating physician and a Board-certified orthopedic surgeon, stated that he had examined appellant on March 13, 1997, a day after he injured his hand at work. Subsequent physical examination, electromyography (EMG) test and nerve conduction tests revealed compression of the ulnar and median nerves. Appellant had swelling of the olecranon prominence of the left elbow which "was also present for roughly the same amount of time since his fracture had occurred." Dr. Gabuzda diagnosed olecranon bursitis and opined that it may have been set off by a low-level chronic trauma. He also noted that appellant's carpal tunnel syndrome could have been caused by the trauma associated with his injury.

In a report dated February 13, 1998, Dr. David Weiss, appellant's treating osteopath, noted that range of motion of the 5<sup>th</sup> metacarpal phalangeal joint revealed extension/flexion of 0 to 75 by 90 degrees. Left wrist range of motion studies revealed pain on dorsiflexion, palmar flexion, radial deviation and ulnar deviation. Tinel's sign was positive, and thenar atrophy was noted in the left hand. Neurological examination revealed gross motor testing of 4 by 5, grip strength, measured using the Jamar Hand Dynamometer at level III, revealed 30 kilograms of force strength in the right versus 25 kilograms of strength in the left hand. Dr. Weiss concluded that correlating his findings with the A.M.A., *Guides* (4<sup>th</sup> ed. 1993) appellant had abnormal range of motion findings of the metacarpal phalangeal joint which was a 1 percent impairment of the left upper extremity;<sup>3</sup> for entrapment of the left ulnar nerve at the elbow, 30 percent;<sup>4</sup> for entrapment of the left median nerve at the wrist, 20 percent,<sup>5</sup> for a total combined rating of 45 percent of the left upper extremity.

On June 26, 1998 the Office referred appellant's medical record, a statement of accepted facts and appellant to Dr. Paul Rossi for an impartial medical examination to resolve the conflict of medical opinion between Drs. Gabuzda and Weiss.<sup>6</sup>

In a report dated July 24, 1998, Dr. Rossi stated that appellant had a 19 percent left upper extremity impairment. Based on a physical examination and review of appellant's records, Dr. Rossi stated that appellant can perform his usual job of machinist and had reached maximum medical improvement. In his evaluations, he noted 70 degrees loss of flexion at the metacarpophalangeal joint which was an 11 percent impairment due to loss of flexion; and that

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<sup>2</sup> *James J. Hjort*, 45 ECAB 595 (1994).

<sup>3</sup> A.M.A., *Guides*, 34, Figure 23.

<sup>4</sup> *Id.* at 57, Table 16.

<sup>5</sup> *Id.*

<sup>6</sup> The Board notes that the record included an unsigned annotation to Dr. Weiss' impairment rating indicating that Dr. Gabuzda concurs with a 45 percent rating. Further, appellant's counsel noted in a letter dated June 8, 1998 that Dr. Gabuzda declined to fill out the Office's form letter in which it requested that Dr. Gabuzda evaluate appellant for a schedule award. Appellant's counsel further noted that Dr. Gabuzda "is deferring to the (sic) Dr. Weiss with regard to the impairment rating."

appellant had 80 percent flexion of each metacarpophalangeal joint at each other finger which equaled 6 percent flexion for each finger; and that, based on appellant's impairment from digit rotational deformity, rated at between 15 and 30 degrees, he had a 40 percent impairment for the 4<sup>th</sup> finger. He then relied on the Combined Values Chart to find that appellant had a 47 percent impairment of the 4<sup>th</sup> finger. Dr. Rossi also noted that appellant had an eight percent hand impairment which was the equivalent to a seven percent impairment of the left upper extremity which could be added to the impairment rating.

In a report dated April 14, 1998, the Office medical adviser stated that he had reviewed the medical report of Dr. Rossi "and concur with his calculations." The Office medical adviser noted that Dr. Rossi determined that appellant had a 7 percent impairment of the upper extremity based on an 8 percent left hand impairment which, when added to the 19 percent impairment based on the Combined Values Chart, resulted in a 24 percent impairment rating.

A hearing was held on October 25, 1999 and on December 30, 1999 the hearing representative noted to the Office that the Office medical adviser did not explain why he agreed with Dr. Rossi, whom the hearing representative noted was a second opinion physician. The hearing representative asked for a review of the records "and insuring that the most beneficial method of assessment is used, please indicate the percentage of impairment to the left upper extremity was as a result of the accepted work injury and subsequent surgeries."

In a report dated January 13, 2000, the Office medical adviser stated that the principle differences between Drs. Rossi and Weiss' ratings were that Dr. Rossi rated appellant's residual carpal tunnel syndrome and cubital tunnel syndrome as mild while Dr. Weiss rated them as moderate. The Office medical adviser then reviewed the data and determined that appellant's conditions were mild<sup>7</sup> and that each condition warranted a 10 percent left upper extremity impairment. He then added Dr. Rossi's additional eight percent impairment of the left hand which is a seven percent left upper extremity impairment.<sup>8</sup> Using the Combined Values Chart the Office medical adviser determined that appellant had a 24 percent left upper extremity impairment.

In a decision issued and finalized on January 13, 2000, the hearing representative modified the Office's decision by finding that there was no conflict in the medical evidence, and that Dr. Rossi was a second opinion physician. The hearing representative noted that the Office medical adviser, based on the hearing representative's request, reviewed the medical record and determined that appellant had a 19 percent left upper extremity impairment and an additional 7 percent impairment to the left upper extremity based on appellant's hand trauma.

As a conflict in medical opinion exists between appellant's treating physician, Dr. Weiss, who found that appellant's residual carpal tunnel syndrome and cubital tunnel syndrome were moderate and Dr. Rossi who found that appellant's conditions were mild, this case must be remanded for further development of the medical evidence. Upon remand, the Office shall refer appellant to an impartial medical specialist to resolve whether appellant has a permanent

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<sup>7</sup> *Id.* at 57, Table 16.

<sup>8</sup> *Id.* at 19, Table 2.

impairment of the right upper extremity due to his accepted medical conditions, pursuant to the A.M.A., *Guides*. After such further development as necessary, the Office shall issue a *de novo* decision.

The January 13, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC  
August 21, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member