

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. BLACK and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

*Docket No. 99-2160; Submitted on the Record;
Issued January 3, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant is entitled to more than a four percent permanent impairment for the loss of use of his right arm and a four percent permanent impairment for his left arm for which he has already received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing on the grounds that it was untimely filed.

On January 20, 1997 appellant, then a 46-year-old carrier, filed a claim for an occupational disease alleging that his hypertension was exacerbated by five months of chronic shoulder pain while in the performance of duty. Appellant's claim was accompanied by factual and medical evidence.

In a January 28, 1997 letter, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant to submit additional factual and medical evidence in support of his claim. In a March 7, 1997 response letter, appellant noted that he had received treatment for an employment-related repetitive stress injury he sustained on August 23, 1996 and resultant high blood pressure.¹

On November 19, 1997 appellant filed a claim (Form CA-7), for a schedule award.

The Office received a June 16, 1997 report from Dr. Brian D. Lambden, a Board-certified physiatrist, and appellant's treating physician, finding that appellant had an eight percent impairment of the upper extremity based on the fourth edition of the American Medical

¹ Appellant filed a claim assigned number 12-164600 for an August 23, 1996 injury. By letter dated December 18, 1996, the Office accepted appellant's claim for bilateral lateral epicondylitis. Subsequently, the Office expanded the acceptance of appellant's claim to include tenosynovitis bilateral shoulders. In a March 13, 1997 internal memorandum, the Office doubled the instant claim assigned 12-166325 into appellant's claim assigned 12-164600. On April 14, 1998 appellant filed a claim (Form CA-2a), alleging that he sustained a recurrence of disability on April 14, 1998 causally related to his August 23, 1996 employment injury.

Association, (A.M.A.) *Guides to the Evaluation of Permanent Impairment*. On November 10, 1997 an Office medical adviser concluded that Dr. Lambden's report was not useful in the calculation of impairment of appellant's arms and recommended that appellant be referred for a second opinion.

By letter dated April 9, 1998, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. J. Scott Bainbridge, a Board-certified physiatrist, for a second opinion examination.

Dr. Bainbridge submitted an April 30, 1998 medical report, finding that appellant had a four percent impairment of the left upper extremity and a four percent impairment of the right upper extremity based on the fourth edition of the A.M.A., *Guides*.

On August 10, 1998 an Office medical adviser reviewed appellant's records and concurred with Dr. Bainbridge's findings.

In an August 17, 1998 decision, the Office granted appellant a schedule award for a four percent permanent loss of use of his right arm and a four percent permanent loss of use of his left arm. In a September 7, 1998 letter, appellant requested an oral hearing before an Office hearing representative.

By decision dated November 23, 1998, the hearing representative remanded the case to the Office to obtain clarification from Dr. Bainbridge regarding his findings.

In a December 10, 1998 letter, the Office advised Dr. Bainbridge to consider the pain in appellant's elbow in recomputing his impairment rating. In response, Dr. Bainbridge submitted a December 16, 1998 medical report providing that the A.M.A., *Guides* did not allow assignment of impairment for pain as he had "made use of range of motion as the basis for [appellant's] impairment." On December 21, 1998 an Office medical adviser agreed with Dr. Bainbridge's interpretation of the A.M.A., *Guides*.

In a December 22, 1998 decision, the Office affirmed its August 17, 1998 decision.

In a January 25, 1999 letter, appellant again requested an oral hearing before an Office representative.

By decision dated March 8, 1999, the Office denied appellant's request for a hearing as untimely pursuant to section 8124 of the Federal Employees' Compensation Act. The Office further denied the request stating that a reconsideration request best resolves the issue.

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

The schedule award provision of the Act² and its implementing regulations³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.304.

of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁴ 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 under the law for 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. The A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁵

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.⁶ In fact, the element of pain may serve as the sole basis for determining the degree of impairment for schedule compensation purposes.⁷ Chapter 3.1k of the A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the upper extremity due to pain, discomfort, loss of sensation, or loss of strength.⁸

The Office's procedure manual also provides that the Office should advise any physician evaluating permanent impairment to use the A.M.A., *Guides* and to report findings in accordance with those guidelines. The procedure manual notes that some objective and subjective impairments, such as pain, atrophy, loss of sensation and scarring, cannot easily be measured by the A.M.A., *Guides*, but the effects of any such factors should be explicitly considered along with measurable impairments and correlated as closely as possible with factors set forth in the A.M.A., *Guides*.⁹ This correlation requires some medical explanation, especially where a rating differs from that supported by the objective medical evidence.

In determining appellant's impairment rating, the Office relied on the April 30, 1998 report of Dr. Bainbridge and the opinion of an Office medical adviser. In his report, Dr. Bainbridge provided a history of appellant's shoulder and elbow conditions, medical treatment, family and social background and employment. Dr. Bainbridge also provided a description of appellant's pain. Specifically, Dr. Bainbridge stated:

“[Appellant] describes pain that ranges from three to ten out of ten in intensity. His chief complaint is that of left anterior shoulder and chest pain, which is worse

⁴ 5 U.S.C. § 8107(c)(19).

⁵ See *James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁶ See *Paul A. Toms*, 38 ECAB 403 (1987).

⁷ *Paul A. Toms*, *supra* note 6; *Robin L. McClain*, 38 ECAB 398 (1987).

⁸ A.M.A., *Guides*, pp. 46-57 (4th ed. 1993).

⁹ See generally, Federal (FECA) Procedure Manual, Chapter 2.808, *Schedule Awards and Permanent Disability Claims* (March 1995).

with abduction. [Appellant] states that he can do some light dumbbell curls with three pounds but otherwise has pain at the shoulder with heavier activities. He also notes left lateral epicondylar pain, which is worse with grasping or lifting. [Appellant] has lesser symptoms at the right elbow. He also has right shoulder pain, which is also aggravated by abduction. [Appellant] has some neck crepitus and daily right upper trap region pain. He notes that his symptoms are worse with weather changes, in the evenings and with increased stress. [Appellant] denies numbness and tingling into the extremities and specifically denies symptoms at the hands other than that they get cold on occasion. He denies lower extremity symptoms, bowel or bladder dysfunction or low back pain. [Appellant] has been independently exercising and dieting. He uses a headset at work.”

Further, Dr. Bainbridge provided his findings on physical, neurological and musculoskeletal examination. He diagnosed bilateral shoulder impingement syndrome accompanied by left bicipital tendinitis on the left and bilateral lateral epicondylitis. Dr. Bainbridge determined:

“Left elbow flexion to 135 degrees receives no impairment and extension to 5 degrees receives no impairment as per [F]igure 32 on page 40. Pronation and supination were both to beyond 80 degrees and receive no impairment per [F]igure 35 on page 41. There is thus no impairment at the left elbow. Left shoulder flexion to 162 degrees receives 1 percent impairment and extension to 42 degrees receives a 1 percent impairment per [F]igure 38 on page 43. Shoulder adduction to 20 degrees receives a 1 percent impairment and abduction to 180 degrees receives no impairment per [F]igure 41 on page 44. Internal rotation at the left shoulder to 73 degrees receives a 1 percent impairment and external rotation to 60 degrees receives no impairment per [F]igure 44 on page 45. There is thus a 4 percent impairment at the left shoulder. This 4 percent upper extremity impairment converts to a 2 percent whole person impairment per Table 3 on page 20. Right elbow flexion to 140 degrees and extension to 0 degrees receive no impairment and pronation and supination to 80+ degrees receive no impairment. There is thus a 0 percent impairment of the right elbow. Right shoulder flexion to 160 degrees a 1 percent impairment and extension to 50 degrees receives no impairment. Adduction to 22 degrees receives a 1 percent impairment and abduction to 180 degrees receives no impairment. Internal rotation to 50 degrees receives a 2 percent impairment and external rotation to 90 degrees receives no impairment. There is thus a four percent impairment at the right shoulder, which also converts to a two percent whole person impairment rating. These combine for a four percent whole person impairment rating. There is no apportionment.”

Dr. Bainbridge concluded that appellant had reached maximum medical improvement in approximately June 1997. He further concluded that his examination findings were consistent with his history and supported the above diagnoses, which were related to appellant’s employment.

In his December 16, 1998 supplemental medical report, regarding an impairment rating for appellant's pain, Dr. Bainbridge stated:

"I am well versed in the A.M.A., *Guides* and in performing impairment ratings. The [A.M.A.,] *Guides* do not promote the arbitrary assignment of impairment for 'pain' because this is such a subjective complaint. Whenever possible, the recommendation is for the use of the various methods outlined in the [A.M.A.,] *Guides* to provide an impairment rating based on more objective criteria. In this case, as is the case with many tendinitis type problems, I made use of range of motion as the basis for [appellant's] impairment. This is considered standard of care in the Colorado community and is in keeping with the directives of the A.M.A., *Guides*. It is considered to be duplicative if one assigns impairment based on the objective guidelines as well as the subjective report of pain."

Upon review of Dr. Bainbridge's report, an Office medical adviser stated "I am in complete agreement with Dr. Bainbridge and his interpretation of A.M.A., *Guides*. His reiterations of the directions in the [A.M.A.,] *Guides* appears in every edition."

Although Dr. Bainbridge properly utilized the figures in the fourth edition of the A.M.A., *Guides* in determining appellant's loss of range of motion, he failed to determine whether appellant had any impairment of the right and left upper extremities due to pain, which is set forth in the A.M.A., *Guides*. For this reason, the case will be remanded to the Office for the proper evaluation of any employment-related permanent impairment following the proper protocols of the fourth edition of the A.M.A., *Guides*. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to schedule compensation.¹⁰

¹⁰ In view of the disposition of this case the issue concerning appellant's untimely request for a hearing is moot.

The December 22, November 23 and August 17, 1998 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
January 3, 2001

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member