

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK MORAN and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-288; Submitted on the Record;
Issued July 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than a 27 percent permanent loss of use of the left arm and a 19 percent permanent loss of use of the right arm.

On January 2, 1992 appellant, then a 41-year-old pipefitter, filed a claim for an injury to the fingers of his left hand sustained on December 22, 1991 when they were caught between a pipe and a bulkhead. His fifth finger was amputated at the metacarpophalangeal joint on December 23, 1991. On March 27, 1992 appellant filed a claim for a schedule award and on August 3, 1992 the Office of Workers' Compensation Programs issued a schedule award for an 11 percent permanent loss of use of the left hand.

On January 25, 1993 appellant filed a claim for bilateral ulnar nerve entrapment at the elbows and right cubital tunnel syndrome. The Office accepted entrapments of the ulnar nerves, and authorized surgery. On August 26, 1993 Dr. Paul W. Jackson performed a surgical release of appellant's left Guyon's canal with neurolysis of the ulnar nerve and on November 8, 1993 Dr. Jackson performed a transposition of the ulnar nerve at appellant's right elbow to correct his cubital tunnel syndrome. On May 8, 1995 Dr. Jackson performed a left carpal tunnel release, also authorized by the Office.

On July 12, 1998 appellant filed a claim for a schedule award. In support of this claim, he submitted a report dated April 30, 1998 from Dr. David Weiss, an osteopath, who noted that appellant complained of daily left hand pain and stiffness that waxed and waned, numbness and pins and needles sensation in both hands, and weakness of the left hand. On examination appellant had decreased grip in both hands, a "perceived sensory deficit over the ulnar nerve distribution in the forearm involving the bilateral upper extremities and a sensory loss of the digital ulnar nerve over the 4th digit" and decreased motor strength rated at 4/5 for both upper extremities.

Using Table 16 of Chapter 3 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Weiss assigned, for the left arm, 30

percent for entrapment of the ulnar nerve at the elbow, 30 percent for entrapment of the ulnar nerve at the wrist and 20 percent for entrapment of the median nerve at the wrist, for a combined 65 percent permanent loss of use of the left arm. For the right arm, Dr. Weiss assigned 30 percent for entrapment of the ulnar nerve at the elbow.

On July 30, 1998 an Office medical adviser reviewed Dr. Weiss' report and stated:

"I cannot agree with Dr. Weiss' estimate of severity based on other medical records in the file. I also do not agree with his interpretation of the A.M.A., *Guides*.

"Dr. Weiss considers [appellant's] symptoms as moderate due to nerve entrapment. Dr. Grossinger, who had performed numerous EMG/NCV [electromyography/nerve conduction velocity studies] on February 10, 1998 found objective evidence of MILD bilateral median nerve neuropathy at the level of the carpal tunnel. The ulnar nerves were normal -- no permanent ulnar neuropathy was found.

"[Appellant] reported intermittent numbness and tingling in his hands, dropping objects and being limited on recreational activities, such as a gun range.

"Dr. Weiss found the Tinel's sign positive for the ulnar nerve bilaterally caused pins and needles sensation. A.M.A., *Guides* (4th ed.) lists transient episodes of numbness as mild, page 56.

"Finally, if ulnar nerve entrapment at the elbow is used, it includes entrapment lower down the nerve. They are not calculated separately."

The Office medical adviser then assigned, for the left arm, 10 percent for entrapment neuropathy of the median nerve at the wrist, stating that the electromyogram (EMG), nerve conduction velocity (NCV) showed this was mild; and 10 percent for entrapment neuropathy of the ulnar nerve at the elbow, stating this was mild due to the EMG/NCV findings of no motor or sensory impairment, and that it included the findings at the wrist.

Noting that Table 2 indicated the previously awarded 11 percent for the left hand was equivalent to 10 percent of the arm, the Office medical adviser combined the three 10 percent impairments for a combined total of a 27 percent permanent loss of use of the left arm, and noted that 10 percent had already been awarded. For the right arm, the Office medical adviser assigned 10 percent for ulnar nerve entrapment at the elbow, based on mild symptoms, and 10 percent for median nerve entrapment at the wrist, stating this was mild based on the EMG/NCV findings. Using the Combined Values Chart, the Office medical adviser concluded that appellant had a 19 percent permanent loss of use of the right arm.

On August 31, 1998 the Office issued a schedule award for a 19 percent permanent loss of use of the right arm and for a 27 percent permanent loss of use of the left arm, less the number of weeks previously awarded for the left hand.

Appellant requested a hearing, which was held on March 23, 1999. By decision dated July 19, 1999, an Office hearing representative found that the Office medical adviser properly applied the A.M.A., *Guides* to Dr. Weiss' findings, and provided rationale for his conclusion that Dr. Weiss' ratings were not properly calculated. The Office hearing representative affirmed the August 31, 1998 schedule award.

The Board finds that the case is not in posture for decision, due to an unresolved conflict of medical opinion.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Both Dr. Weiss and an Office medical adviser who reviewed Dr. Weiss' report used Table 16, titled "upper extremity impairment due to entrapment neuropathy," of Chapter 3 of the fourth edition of the A.M.A., *Guides* to rate permanent impairments of appellant's arms. Dr. Weiss concluded that appellant had a 65 percent permanent impairment of the right arm and a 30 percent permanent impairment of the left arm, while an Office medical adviser concluded that appellant had a 27 percent permanent impairment of the left arm and a 19 percent permanent impairment of the right arm. The primary reason for these widely different impairment ratings is that Dr. Weiss, using Table 16, rated the degree of severity of appellant's entrapments as moderate and an Office medical adviser, using the same table, rated the degree of severity as mild.

The Office's procedures provide: "The attending physician should make the evaluation whenever possible."³ The Board has recognized that an attending physician, who, unlike an Office medical adviser, has physically examined the employee, is often in a better position to make judgments within allowable ranges in the tables of the A.M.A., *Guides*.⁴ Dr. Weiss' judgment, based on his examination of appellant, was that the degree of severity of appellant's entrapment neuropathies was moderate.

The Office medical adviser explained why he considered the severity of these entrapment neuropathies to be only mild, relying primarily on the results of an electromyogram and nerve

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (March 1995).

⁴ *Joseph H. Stuart*, 44 ECAB 583 (1993) (the Board used the percentage of the attending physician, selected from a range under a table for arthritis, rather than the lower percentage of an Office medical adviser).

conduction velocity study done on February 10, 1998. The Office medical adviser also characterized the degree of severity as mild on the basis that appellant had only intermittent numbness and tingling in his hands. Dr. Weiss reported “numbness and pins and needles sensation in both hands,” and indicated that this was intermittent in the right hand.

The reports of Dr. Weiss and the Office medical adviser are of roughly equivalent probative value, and clearly conflict on the degree of permanent impairment of appellant’s arms.⁵ The case will therefore be remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate medical specialist to resolve the conflict of medical opinion on the degree of permanent impairment of appellant’s arms.

The decision of the Office of Workers’ Compensation Programs dated July 19, 1999 is set aside and the case is remanded to the Office for action consistent with this decision.

Dated, Washington, DC
July 26, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁵ See *Melvina Jackson*, 38 ECAB 443 (1987) (for a discussion of the relative probative values of reports of examining versus nonexamining physicians).