

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP H. CONTE and U.S. POSTAL SERVICE,
POST OFFICE, Southwestern, PA

*Docket No. 00-2187; Submitted on the Record;
Issued July 3, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has more than a 35 percent permanent impairment of his right upper extremity and more than a 34 percent permanent impairment of his left upper extremity for which he received schedule awards.

Appellant, a 39-year-old clerk, filed a notice of occupational disease alleging that he developed bilateral thoracic outlet syndrome due to factors of his federal employment. The Office of Workers' Compensation Programs accepted his claim for bilateral thoracic outlet syndrome on October 31, 1994. Appellant underwent surgery on his right shoulder on January 26, 1996 and his left shoulder on February 9, 1996.

By decision dated July 22, 1997, the Office granted appellant a schedule award for a six percent permanent impairment of his right upper extremity and a five percent permanent impairment of his left upper extremity. He requested an oral hearing and by decision dated December 22, 1997, the hearing representative set aside the Office's July 22, 1997 determination and remanded for further development. The hearing representative noted that appellant had previously received a schedule award for a 10 percent permanent impairment of each of his upper extremities due to the accepted condition of carpal tunnel syndrome.

Appellant underwent an additional surgical arthroscopy of the right shoulder with shaving and debridement of the rotator cuff tear and slap lesion with subacromial decompression on March 6, 1998. By decision dated August 9, 1999, the Office granted him a schedule award for an additional 19 percent permanent impairment of each of his upper extremities. Appellant requested an oral hearing and by decision dated March 13, 2000, the hearing representative affirmed the August 9, 1999 decision.

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

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. 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 for all claimants the Office adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

Appellant's attending physician, Dr. David Weiss, an osteopath, completed a report on November 19, 1998 and found that appellant had a 52 percent impairment of his right upper extremity and a 34 percent impairment of his left upper extremity. Dr. Weiss provided his findings on physical examination and correlated these findings with the A.M.A., *Guides*. He noted that in the right shoulder appellant had 140 degrees of flexion and abduction. The A.M.A., *Guides* provide that this loss of flexion is a three percent impairment.⁵ The loss of abduction is a two percent impairment.⁶ Dr. Weiss found that appellant had motor strength deficit in the supraspinatus equivalent to four percent impairment.⁷ He noted that appellant had surgical arthroscopy of the right shoulder with shaving and debridement of the rotator cuff tear and slap lesion with subacromial decompression. Dr. Weiss concluded that the A.M.A., *Guides* provided a 24 percent impairment due to the arthroplasty.⁸ He also found that appellant had 30 percent impairment of the upper extremity due to median nerve entrapment at the wrist.⁹ Dr. Weiss combined these values to reach a 52 percent impairment of the right shoulder.

In regard to appellant's left shoulder, Dr. Weiss found a 20 percent impairment of the median nerve at the wrist.¹⁰ He also noted motor strength deficits in the supraspinatus, biceps and deltoid muscle for a total of 17 percent impairment due to loss of strength.¹¹ Dr. Weiss found that appellant had a 34 percent impairment of his left upper extremity.

Dr. Weiss completed a supplemental report on December 30, 1998 finding that appellant had a 90 percent impairment of his right upper extremity and an 85 percent impairment of his left

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ A.M.A., *Guides* (4th ed. 1993).

⁴ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ A.M.A., *Guides*, 43, Figure 38.

⁶ A.M.A., *Guides*, 44, Figure 41.

⁷ A.M.A., *Guides*, 54, Table 15; 49, Table 12.

⁸ A.M.A., *Guides*, 61, Table 27.

⁹ A.M.A., *Guides*, 57, Table 16.

¹⁰ *Id.*

¹¹ A.M.A., *Guides*, 54, Table 15; 49, Table 12.

upper extremity. In this report, Dr. Weiss indicated that appellant had an 80 percent impairment of his brachial plexus neuropathy bilaterally due to positive numbness and negative sensory. He applied Table 14 of the A.M.A., *Guides*¹² which indicates that the maximum upper extremity impairment due to the brachial plexus is 100 percent due to pain and concluded that appellant had a Grade 4 impairment, with decreased sensibility with or without abnormal sensation or pain which may prevent activity and/or minor causalgia, a 61 to 80 percent impairment.¹³ Multiplying the values, Dr. Weiss reached the 80 percent impairment of the upper extremity. He no longer provided for loss of strength, but continued to provide consistent loss of range of motion and medial nerve entrapment impairment ratings.

The district medical adviser reviewed Dr. Weiss' reports on July 6, 1999. He noted that Dr. Weiss had awarded appellant impairment based on a resection of the glenohumeral joint rather than the acromial joint. The district medical adviser found that appellant therefore had a 10 percent impairment rather than a 24 percent impairment. He also concluded that appellant had no loss of sensation and that therefore appellant had a Grade 1 not Grade 4 percent impairment of his brachial plexus for no impairment. The district medical adviser also disagreed with Dr. Weiss' assessment of appellant's median nerve impairment finding that appellant's impairment was not severe and that therefore he had no more than a 20 percent impairment of that nerve bilaterally.

Section 8123(a) of the Act,¹⁴ provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In this case, appellant's attending physician, Dr. Weiss examined appellant personally and provided his impairment rating correlating his findings with the A.M.A., *Guides*. Dr. Weiss concluded that appellant's surgery impacted his entire right shoulder joint, that he had more than moderate but less than severe impairment of the median nerve at the wrist and that he had significant impairment of the brachial plexus due to numbness. The district medical adviser reviewed the medical evidence of record and concluded that appellant's right shoulder surgery impacted only the clavicle joint, that appellant did not have more than moderate impairment due to median nerve compression at the wrist and that appellant had no impairment of his brachial plexus due to numbness. He accordingly reduced appellant's impairment rating.

Due to these disagreements, the Board finds that the Office should refer appellant, his medical records, a list of specific questions and a statement of accepted facts to an appropriate Board-certified physician, to determine the extent appellant's bilateral upper extremity impairments due to all of his accepted conditions, after this and such additional development as the Office deems necessary, the Office should issue an appropriate decision.

¹² A.M.A., *Guides*, 52, Table 14.

¹³ A.M.A., *Guides*, 48, Table 11.

¹⁴ 5 U.S.C. §§ 8101-8193, 8123(a).

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

Dated, Washington, DC
July 3, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member