

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES F. KEGLEY and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Colts Neck, NJ

*Docket No. 00-2554; Submitted on the Record;
Issued July 23, 2001*

DECISION and ORDER

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

The issue is whether appellant has established that he has more than a three percent impairment for his right upper extremity for which he had received a schedule award.

In this case, the Office of Workers' Compensation Programs accepted appellant's claim for bruised right elbow which he injured on November 27, 1985, and a subsequent infection of the right elbow olecranon bursa which was initially diagnosed on January 27, 1986.

On March 11, 1999 appellant, through counsel, filed a claim for a schedule award.

In support of his claim, appellant submitted a medical report dated February 6, 1999 from Dr. Jack Haberman, Board-certified in family practice, who noted a familiarity with appellant's history of injuries and reported findings. Upon examination, the doctor noted a large right elbow deformity related to synovial membrane, effusion of the synovial membrane, and olecranon and epicondyle tenderness. Tinel's sign was positive. He noted appellant's range of motion findings of 135 to 145 degrees flexion, pronation of 60 to 80 degrees, and 50 to 80 degrees supination. Grip strength revealed 15 kilograms of force strength of the right hand versus 35 kilograms of force strength of the left hand. Dr. Haberman diagnosed traumatic deformity and entrapment neuropathy of the right elbow.

Based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Haberman noted the following impairment ratings: 10 percent impairment for right ulnar entrapment at the elbow,¹ 1 percent for loss of range motion, pronation,² and 1 percent of loss of range of motion, supination.³ He also noted a 20 percent loss

¹ A.M.A., *Guides*, 57, Table 16.

² *Id.* at 41, Figure 35.

³ *Id.*

of right hand grip strength.⁴ Dr. Haberman then combined the impairment losses and determined that appellant had a 29 percent impairment rating for his right upper extremity.

By letter dated July 12, 1999, the Office referred appellant to Dr. Irving D. Strouse, Board-certified in orthopedic surgery, for a second opinion. In his report dated July 21, 1999, Dr. Strouse found that appellant retained active flexion of his right elbow to 135 degrees, lacked 15 degrees of extension of the right elbow, and had 90 degrees pronation and supination of both elbows. He then rated appellant with ½ percent for a loss of 5 degrees of flexion of the right elbow and with 1½ percent impairment for loss of 15 degrees of extension. He also rated a five percent impairment for a calcified olecranon mass at the right elbow for a total award of seven percent for the right upper extremity.⁵

In a report dated July 21, 1999, the Office medical adviser reviewed Dr. Strouse's report and found that appellant had a three percent impairment of the right upper extremity. The Office medical adviser relied on Dr. Strouse's data to find: range of motion, flexion at 135 degrees for a 1 percent impairment,⁶ extension of 15 degrees for a 2 percent impairment,⁷ and 90 degrees loss of motion, pronation and supination.⁸

By decision dated September 2, 1999, the Office awarded appellant a three percent impairment for the right upper extremity.⁹

By letter dated September 14, 1999, appellant, through counsel, requested an oral hearing. A hearing was held on February 15, 2000 and the hearing representative affirmed the Office's September 2, 1999 decision awarding appellant a three percent impairment of the right upper extremity.

The Board finds that this case is not in posture for decision due to a conflict in the medical opinion evidence.

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹⁰ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to

⁴ *Id.* at 65, Table 34.

⁵ Dr. Haberman also noted "a large deformity related to synovial membrane pathology extending over the lateral and medial aspect of the elbow." Dr. Haberman did not rate this condition in his evaluation.

⁶ *Id.* at 40, Table 32.

⁷ *Id.* at 40, Table 32.

⁸ *Id.* at 41, Table 35.

⁹ 5 U.S.C. § 8107(c)(1); *Glen L. Yager, Jr.*, 31 ECAB 1152 (1980) (the elbow is only a part of the arm and for schedule award purposes, the whole arm is the proper point of reference).

¹⁰ 5 U.S.C. § 8123(a).

an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹¹

The probative medical evidence consists of Dr. Haberman's opinion that appellant had a 10 percent permanent impairment based on ulnar entrapment of the right elbow, and the second opinion physician, Dr. Strouse, who found no ulnar entrapment.

Since there is a disagreement between a treating physician, Dr. Haberman, and a second opinion physician, Dr. Strouse, as to the exact degree of permanent impairment to the right upper extremity, a conflict under 5 U.S.C. § 8123(a) is created. On remand, the Office should refer appellant to an appropriate impartial specialist for a reasoned opinion as to the degree of permanent impairment to the right upper extremity under the A.M.A., *Guides*.¹² After such further development as the Office deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated April 25, 2000 and September 2, 1999 are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
July 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹¹ *Robert W. Blaine*, 42 ECAB 474 (1991).

¹² *William C. Bush*, 40 ECAB 1064 (1989).