

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS S. JOHNSON and DEPARTMENT OF JUSTICE,
U.S. BORDER PATROL, Chula Vista, CA

*Docket No. 00-2204; Submitted on the Record;
Issued June 7, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has greater than an eight percent schedule award to his left upper extremity.

The Office of Workers' Compensation Programs accepted appellant's claim for a right rotator cuff, thoracic strain and herniated nucleus pulposus, aggravation of cervical spondylosis and degenerative disc disease.

By decision dated June 23, 1999, the Office issued appellant a schedule award for a permanent impairment to the right arm of 27 percent and to the right leg for 2 percent.

By letter dated September 29, 1999, appellant requested reconsideration of the Office's decision, requesting that his award be recalculated to include his left upper extremity. He enclosed reports from his treating physicians, Dr. Thomas W. Harris, an orthopedic surgeon, dated January 7 and September 23, 1999.

In his January 7, 1999 report, Dr. Harris considered appellant's history of injury, performed a physical examination and reviewed an electromyogram (EMG) and nerve conduction studies performed on September 11, 1998, which showed cervical radiculopathy, multiple level especially on the left C6-7 but also C5 and right C5-6. He also reviewed a thoracic spine magnetic resonance imaging (MRI) scan dated August 25, 1998, which was positive for a T6-7 bulge to the right lateral access and reviewed a right shoulder MRI scan dated August 26, 1998, which showed supraspinatus tendinopathy and risk factors for biomechanical impingement. Dr. Harris diagnosed cervical radiculopathy, secondary to multilevel spondylosis, thoracic T6-7 disc injury and right shoulder impingement syndrome. Using the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), page 104, Paragraph 3.3h, he stated that due to the degree of appellant's loss of use of his upper extremity due to his multilevel radiculopathy, appellant had a 41 percent impairment to the right upper extremity.

In his September 23, 1999 report, Dr. Harris stated that it was “his fault” he did not address the rating for appellant’s left upper extremity in his prior report because he did not rate the left upper extremity secondary to appellant’s neuropathy. He stated that the September 11, 1998 electrodiagnostic studies showed chronic bilateral cervical radiculopathy. Dr. Harris stated that appellant had “findings and factors consistent with DRG [stet, apparently meant DRE, diagnosis-related estimates, p. 104 of the A.M.A., *Guides* (4th ed. 1994)] category 4 on the left upper extremity as well.” He opined that appellant had a 14 percent impairment to the left upper extremity in addition to the impairment to his right upper extremity and to the right leg.

In a report dated November 1, 1999, a referral physician, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, diagnosed left cervical radiculopathy at C6-7. Apparently using the A.M.A., *Guides* (4th ed. 1994), he found that appellant had Grade 3 pain/decreased sensation which, using Table 11, page 48, interfered 60 percent of the C6 nerve root, Table 13, page 51, resulting in a 5 percent impairment for pain interfering with function from left C6 radiculopathy. Dr. Harris stated that appellant had Grade 3 pain/decreased sensation which, using Table 11, page 48, interfered with 60 percent of the C7 nerve root, Table 13, page 51, resulting in a 3 percent impairment for pain interfering with function from the left C7 cervical radiculopathy. He stated that utilizing the combined values resulted in an eight percent impairment of appellant’s left upper extremity for pain interfering with function. Dr. Harris stated that appellant did not have an additional impairment as a result of loss of motion or sensory deficit. He concluded that appellant had an eight percent impairment to his left upper extremity.

Addressing Dr. Thomas Harris’ 14 percent rating to appellant’s left upper extremity, Dr. Arthur Harris stated that Dr. Thomas Harris’ rating was based on the “DRE Category IV” [diagnosis-related estimates] from the A.M.A., *Guides* (4th ed. 1994), page 104, category IV. He stated that the DRE Category IV “takes into account residual problems with the cervical spine as well as impairment in the left upper extremity.” Dr. Arthur Harris stated that the Federal Employees’ Compensation Act allows for schedule awards to be made on the basis of impairment only to the left upper extremity, not to the cervical spine and, therefore, he felt that the eight percent impairment represented appellant’s impairment to his left upper extremity resulted from the August 17, 1998 employment injury.

By decision dated November 29, 1999, the Office issued appellant a schedule award for an eight percent permanent impairment to his left arm.

The Board finds that appellant does not have greater than an eight percent permanent impairment to his left upper extremity.

The schedule award provision of the Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act’s compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in

¹ 5 U.S.C. § 8107 *et seq.*

the sound discretion of the Office.² 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.³ The schedule award provisions provide for an award for an impairment to a member of the body covered by the schedule, regardless of whether the cause of the disability originates in a schedule or nonschedule member.⁴ As the schedule award provisions include the extremities, a claimant may be entitled to a schedule award for an employment-related permanent impairment to the left upper extremity if the cause of the impairment originated in the spine.⁵

Using page 104, Category IV of the A.M.A., *Guides* (4th ed. 1994), appellant's treating physician, Dr. Thomas Harris, opined that appellant had a 14 percent impairment to his left upper extremity. Claiming that the DRE category of the A.M.A., *Guides* used by Dr. Harris included impairment to the cervical spine as well as to the left upper extremity, the second opinion physician, Dr. Arthur Harris, found appellant had an 8 percent impairment to his left upper extremity using Table 11, page 48 and Table 13, page 51 and represented a total of a 5 percent impairment due to left C6 radiculopathy and a 3 percent impairment to left C7 radiculopathy. A review of "DRE cervicothoracic Category IV" under the A.M.A., *Guides* (4th ed. 1994), indicates that it does include impairment to the cervicothoracic spine and the Act does not include impairment to the spine as it is a nonscheduled body part. Thus, Dr. Thomas Harris erroneously used that category to assess the extent of appellant's impairment to his left upper extremity. Dr. Arthur Harris calculation that appellant had an 8 percent impairment to his left upper extremity pursuant to Tables 11 and 13 of the A.M.A., *Guides* (4th ed. 1994) is rational and proper. Appellant has, therefore, not established that he is entitled to greater than an eight percent impairment to his left upper extremity.

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Daniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁴ *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

⁵ *See Skinner*, *supra* note 4.

The decision of the Office of Workers' Compensation Programs dated November 29, 1999 is hereby affirmed.

Dated, Washington, DC
June 7, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member