

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ACHIEL G. LAMPO and DEPARTMENT OF THE ARMY,
ROCK ISLAND ARSENAL, Rock Arsenal, IL

*Docket No. 01-2264; Submitted on the Record;
Issued August 20, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether appellant has greater than a 23 percent permanent impairment of each upper extremity, for which he has received schedule awards.

The Office of Workers' Compensation Programs accepted that on November 17, 1973 appellant, then a 52-year-old molding laborer, sustained permanent aggravation of cervical stenosis and cervical spondylosis which resulted in a C6-7 cervical decompression and laminectomy, causally related to his employment duties working overhead. Appellant stopped work and received appropriate compensation benefits; he retired voluntarily on January 13, 1984.

By report dated October 20, 1994, Dr. Harry Honda, a Board-certified neurosurgeon, noted that appellant had an "80 to 90 percent loss of use of his arms" due to his degenerative disc disease and cervical spondylosis affecting C3-7.

On April 11, 1995 appellant filed a Form CA-7 claim for a schedule award.

On February 15, 1996 Dr. Honda provided appellant's range of motion measurements and strength testing results.

By report dated July 1, 1996, Dr. A.H. Conley, an Office medical adviser, reviewed Dr. Honda's February 15, 1996 report and calculated, in accordance with the diagnosis-related estimates model 3.3d, page 99, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, that appellant had a 23 percent permanent impairment of each upper extremity.

On August 2, 1996 the Office granted appellant schedule awards for 23 percent permanent impairment of each upper extremity for the period June 27, 1995 to March 27, 1998, a total of 143.2 weeks of compensation.

On November 23, 1999 appellant filed a Form CA-7 requesting an additional schedule award.

By report dated May 12, 1999, appellant's treating physician, Dr. Honda noted that appellant had ongoing bilateral upper extremity symptoms which radiated both proximally and distally. He diagnosed weakness and atrophy of both arms and legs, and a left frozen shoulder.

By letter dated January 4, 2000, the Office requested that Dr. Honda examine appellant and provide an opinion as to the degree of his upper extremity impairment in accordance with the A.M.A., *Guides*, fourth edition. The Office enclosed Form CA-1303-09 for Dr. Honda's completion.

In a report dated January 20, 2000, Dr. Honda restated the opinions and comments from his May 12, 1999 report, noted appellant's complaints of shoulder weakness and numbness, and restricted range of motion on the left. He noted that appellant had bilateral deltoid weakness, worse on the left, triceps weakness on the right and wrist flexor weakness. Dr. Honda noted that appellant had pain radiating to the right upper extremity and was positive for radicular compression at C5 bilaterally and at C7 on the right. He completed the Form CA-1303-09 indicating the date of appellant's maximum medical improvement as January 20, 2000. Dr. Honda noted that appellant had severe weakness of both arms and hands, and he rated appellant as having a 20 percent permanent impairment of each upper extremity.

In an August 21, 2000 report, an Office medical adviser, Dr. David H. Garelick, an orthopedic surgeon, noted that appellant's right shoulder had full range of motion, but that the left demonstrated deltoid, infraspinatus and supraspinatus atrophy. He noted that elbow and wrist range of motion were relatively normal but that grip strength on the right was decreased. Dr. Garelick noted that x-rays demonstrated cervical spondylosis from C3-7 and he opined that appellant had a 23 percent permanent impairment of each upper extremity. He opined that appellant's date of maximum medical improvement occurred one year postoperatively on February 20, 1991.

By decision dated August 31, 2000, the Office denied appellant's claim for an additional schedule award finding that Dr. Honda had recommended a lower impairment rating for each upper extremity that which appellant had already received. The Office found that Dr. Garelick properly relied upon the A.M.A., *Guides* and determined that appellant had a 23 percent impairment of each upper extremity. The Office found that no medical evidence of record established that appellant had any greater impairment than previously awarded.

On January 4, 2001 the Office received an October 10, 1994 letter from appellant in which he alleged that Dr. J.R. Lee, specialty unknown, verbally told him that he had a 70 percent permanent loss of use of his left arm. On that same date appellant submitted an undated statement in which he alleged that Dr. Honda opined that he had a 90 percent loss of both arms and that Dr. Lee said he had a 75 percent loss of both arms. These letters were accompanied by another copy of the October 20, 1994 report from Dr. Honda in which he opined that appellant had permanent disability due to irreversible nerve damage which resulted in a 80 to 90 percent loss of use of his arms.

Additionally submitted on January 4, 2001 was a Form CA-1303-09 from Dr. Honda which noted that appellant's C4, C5, C6 and C7 nerve roots were involved and that he had a 50 percent permanent loss of function of each upper extremity. Appellant alleged that he did not understand how the Office arrived at the 23 permanent impairment rating for each upper extremity, in light of Dr. Honda's and Dr. Lee's opinions.

Appellant requested a review of the written record, which was conducted on March 26, 2001. By decision dated May 2, 2001, the hearing representative noted that appellant had permanent impairment of his upper extremities due to pain, sensory deficit and decreased strength, which could be traced back to nerve root impairment in his cervical spine. He noted that in his January 20, 2000 report Dr. Honda rated appellant's upper extremity impairment at 20 percent bilaterally, which was less than the amount previously awarded him. The hearing representative also noted that Dr. Honda did not refer to the A.M.A., *Guides* or provide an impairment rating in accordance with their rating schemes. He further noted that the Office medical adviser properly referred to the A.M.A., *Guides* and determined that appellant had no greater than a 23 percent bilateral upper extremity impairment, for which he had received a schedule award. The hearing representative explained the procedure for calculating a schedule award and concluded that the opinion of the Office medical adviser properly utilized the A.M.A., *Guides* and constituted the weight of the medical evidence. He affirmed the August 31, 2000 decision

The Board finds that appellant has no greater than a 23 percent permanent impairment of each upper extremity, for which he has received a schedule award.

The Federal Employees' Compensation Act¹ provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.² In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.³ As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.⁴

The schedule award provision of the Act and its implementing regulation⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

¹ 5 U.S.C. §§ 8101-8193.

² *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

³ 5 U.S.C. § 8107(a); see *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

⁴ See *Raymond E. Gwynn*, 35 ECAB 247 (1983).

⁵ 20 C.F.R. § 10.404 (1999).

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.

In 1960, amendments to the Federal Employees' Compensation Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or unscheduled member such as the back.⁶ As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an upper extremity even though the cause of the impairment originated in the spine.⁷ As appellant has upper extremity impairment due to his cervical conditions, he is therefore entitled to bilateral schedule awards on that basis.

The A.M.A., *Guides* has standards for evaluating the impairment of extremities which are based primarily on loss of range of motion.⁸ However, all factors that prevent a limb from functioning normally, including pain or discomfort, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.⁹ The A.M.A., *Guides* Chapter 3.1a through 3.1o provides multiple grading schemes and procedures for determining the impairment of the upper extremities due to finger, wrist, elbow and shoulder range of motion, due to peripheral nerve involvement and nerve deficits,¹⁰ due to other specific pathologies,¹¹ and with diagnosis-related estimates.¹² The evaluator should, in general, use only one approach for each anatomic part, however, there are certain exceptions in which elements from both diagnostic and examination approaches will apply.

In his July 1, 1996 report, Dr. Conley, an Office medical adviser, reviewed Dr. Honda's February 15, 1996 report and calculated, in accordance with the diagnosis-related estimates model 3.3d, p. 99, of the A.M.A., *Guides*, that appellant had a 23 percent permanent impairment of each upper extremity. Appellant was granted a schedule award accordingly, for a 23 percent permanent impairment of each upper extremity. In a much more current report dated August 21, 2000, Dr. Garelick, another Office medical adviser, noted normal ranges of motion and grip strength on the left, but some righted-sided grip weakness and left-sided muscular atrophy and

⁶ See *George E. Williams*, 44 ECAB 530 (1993).

⁷ See *Rozella L. Skinner*, 37 ECAB 398 (1986) (cervical spine injury).

⁸ See *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

⁹ See *Paul A. Toms*, 28 ECAB 403 (1987).

¹⁰ See Chapter 3.1k and Figure 45, pp.3-50.

¹¹ See Chapter 3.11 through 3.1o, pp. 57-74.

¹² See Chapter 3.3d, pp. 99-100, Chapter 3.3h, pp.103-05.

concluded that appellant had no greater than a 23 percent permanent impairment of each upper extremity. As these reports were based upon the A.M.A., *Guides*, they are entitled to great probative value.

However, appellant has not submitted medical evidence which establishes that he has any greater bilateral upper extremity impairment.¹³

Dr. Honda's subsequent January 2, 2001 report noting appellant's ongoing upper extremity symptoms rated appellant at 20 percent permanent impairment of each upper extremity, which is less than the 23 percent impairments for which he has already been compensated. Therefore, Dr. Honda's January 2, 2001 report does not establish entitlement to a greater schedule award.

Appellant claimed that Dr. Lee verbally told him that he had a 70 percent loss of use of his upper extremities, but no factual, signed report stating such an opinion is included in the case record. Therefore, this opinion cannot be substantiated, and is not probative. In another statement appellant claimed that Dr. Lee said he had a 75 percent loss of use of both arms, but again, as no such opinion by Dr. Lee is submitted to the case record, this opinion cannot be substantiated, and is not probative.¹⁴

Appellant also submitted an October 20, 1994 report from Dr. Honda, which had been previously submitted to the record and considered by the Office in its granting of the 23 percent bilateral permanent impairment award. As this report is repetitious, it has no new probative value, and cannot support an increased schedule award claim, particularly as more recent reports from Dr. Honda rate appellant at a 20 percent impairment of each upper extremity. In a newer January 4, 2001 form report from Dr. Honda, he indicated that appellant had a 50 percent permanent loss of function of each upper extremity, however, he does not explain why this opinion differs from his narrative report made two days earlier. Moreover, Dr. Honda provides no reference to the A.M.A., *Guides* in this determination, nor does he explain how he arrived at this 50 percent impairment rating. It is therefore of diminished probative value.

As the Office medical adviser's report properly used the diagnosis-based estimates model found in the A.M.A., *Guides* at Chapter 3.3d, p. 99, to determine that appellant had a 23 percent permanent impairment of each upper extremity, as the more recent report from Dr. Garelick agrees with this determination, and as none of the medical evidence submitted since properly refers to or follows the rating instructions of the A.M.A., *Guides*, the reports from the Office medical advisers remain the weight of the medical evidence, and appellant has failed to establish that he has greater than a 23 percent permanent impairment of each upper extremity.

¹³ Previously submitted evidence had already been considered by the Office in making its 23 percent bilateral impairment awards.

¹⁴ The Board also notes that this rating disagrees with the 70 percent impairment appellant claimed Dr. Lee found in a separate letter.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 31, 2000 and May 2, 2001 are hereby affirmed.

Dated, Washington, DC
August 20, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member