

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. POMPIZZI and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 01-2016; Submitted on the Record;
Issued June 3, 2002*

DECISION and ORDER

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

The issue is whether appellant has more than a 15 percent permanent impairment of both arms, for which he received a schedule award.

This is the second appeal in the present case. In a July 10, 2000 decision, the Board set aside the Office of Workers' Compensation Programs' decision dated October 22, 1998. The Board found that the impartial medical examiner did not adequately explain how his determination of appellant's impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (Fourth edition 1993). The Board remanded the case for further development by the Office. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.¹

In a letter dated July 31, 2000, the Office requested a supplemental report from Dr. Lawrence Schneider, an orthopedic surgeon. The Office sought clarification from Dr. Schneider with regard to his determination that appellant sustained a 15 percent loss of use of both upper extremities in accordance with the A.M.A., *Guides*.²

In a letter dated September 8, 2000, the Office referred appellant to Dr. F. William Bora, a Board-certified orthopedic surgeon, to resolve the medical conflict regarding the extent of permanent impairment arising from appellant's accepted employment injury. The Office provided Dr. Bora with a complete case record and a statement of accepted facts.

In a medical report dated September 23, 2000, Dr. Bora indicated that he reviewed the medical records provided to him and performed a physical examination of appellant. Dr. Bora's

¹ Docket No. 99-1012 (issued July 10, 2000).

² In a note dated September 1, 2000, the Office indicated that Dr. Schneider retired. Appellant was subsequently sent to another impartial medical examiner.

findings upon physical examination revealed flexion of 70 degrees; ulnar deviation of 20 degrees; and radial deviation of 20 degrees. He noted the results were within normal limits. Dr. Bora indicated that appellant's preoperative and postoperative electromyographic (EMG) studies revealed mild median nerve entrapment at the wrist. He noted that appellant reached maximum medical improvement. Dr. Bora indicated that appellant sustained a 15 percent permanent impairment of the upper extremities citing to page 57, Table 16 of the A.M.A., *Guides*.

In a decision dated October 10, 2000, the Office granted appellant a schedule award for a 15 percent permanent impairment of both upper extremities.

In an October 13, 2000 letter, appellant requested an oral hearing before an Office hearing representative. The hearing was held on March 8, 2001. Appellant was not present, however, his attorney appeared on his behalf. Appellant's attorney disputed the validity of Dr. Bora's report noting that he determined that appellant sustained a 15 percent permanent impairment of both upper extremities citing to page 57, Table 16 of the A.M.A., *Guides*. Appellant's attorney indicated that the A.M.A., *Guides* provide for mild median nerve entrapment at the wrist of 10 percent; moderate at 20 percent; and severe at 40 percent, however, Dr. Bora's rating did not coincide with these ratings and, therefore, could not carry the weight of the medical evidence. After the hearing, appellant submitted an EMG report revealing distal median neuropathy of both wrists consistent with carpal tunnel syndrome.

In a decision dated May 1, 2001, the Office affirmed the decision of the Office dated October 10, 2000, finding that appellant sustained no more than a 15 percent permanent impairment of both upper extremities.

The Board finds that this case is not in posture for decision regarding appellant's entitlement to a schedule award

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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.

On the first appeal in this case the Board determined that Dr. Schneider, the impartial medical examiner, failed to provide an adequate explanation in accordance with the A.M.A., *Guides* to support his impairment rating of 15 percent and remanded the case for a supplemental report. Due to Dr. Schneider's retirement appellant was referred to a second impartial medical examiner, Dr. Bora, who found a 15 percent permanent impairment in each upper extremity.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

The Board has carefully reviewed Dr. Bora's report dated September 23, 2000, which determined appellant's left and right upper extremity impairment rating and notes that Dr. Bora did not adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides*. Specifically, Dr. Bora noted normal readings for flexion; extension; ulnar deviation; and radial deviation. He determined that appellant sustained a 15 percent impairment of both upper extremities and cited to page 57, Table 16 of the A.M.A., *Guides*. However, this figure did not conform to the figures listed in the A.M.A., *Guides*.⁵ The Board finds that Dr. Bora did not properly follow the procedures as set forth in the A.M.A., *Guides*.⁶ Consequently, the medical conflict remains unresolved as it is not clear how Dr. Bora's findings correlate to the A.M.A., *Guides*.

In a situation where the Office secures an opinion from an impartial medical specialist for the purposes of resolving a conflict in the medical evidence and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report and have a proper evaluation done.⁷

Therefore, in order to resolve the conflict in the medical opinions, the case will be remanded to the Office for referral of the case record, including a statement of accepted facts and, if necessary, appellant, to Dr. Bora for a supplemental report regarding the extent of his left and right upper extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*. If the physician is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.⁸ After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left and right upper extremity impairment.

⁵ The A.M.A., *Guides* provided a degree of severity and percentage of upper extremity impairment for the median entrapped nerve of the wrist of 10 percent for mild; 20 percent for moderate and 40 percent for severe, however, Dr. Bora provided a figure for mild median neuropathy of the wrist of 15 percent, which did not appear in the fourth edition of the A.M.A., *Guides*. See page 57, Table 16 of the A.M.A., *Guides*.

⁶ *John Constantin*, 39 ECAB 1090 (1988).

⁷ *Albert Vervalde*, 36 ECAB 233 (1984).

⁸ See *Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

The May 1, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
June 3, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member