

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNIE BROWN and DEPARTMENT OF THE NAVY,
MARINE RECURIT DEPOT, Parris, NC

*Docket No. 02-648; Submitted on the Record;
Issued September 10, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has more than a 44 percent permanent impairment of the right arm.

On June 27, 1951 appellant, then a 26-year-old laborer, sustained a fracture of the right radius when he fell from a truck. In a January 20, 1965 decision, the Bureau of Workers' Compensation Programs¹ issued a schedule award for a seven percent permanent impairment of the right hand. In an April 15, 1969 decision, the Bureau issued a schedule award for a six percent permanent impairment of the right arm, instead of the previously awarded schedule award.

In a December 19, 1997 report, Dr. Gerald Shealy, Jr., stated that appellant underwent surgery with the insertion of pins at the time of the employment injury. In 1968 he underwent surgery for removal of the pin. Dr. Shealy noted that appellant had persistent numbness and tingling in his hand, progressively worsening and swelling in the wrist with limitation of motion. He indicated that appellant had a history of hypertension and diabetes, diagnosed in 1967. Dr. Shealy reported that appellant showed synovitis of the right wrist with limitation of motion. He indicated that appellant had atrophy of the abductor pollicis brevis muscle in the right hand and decreased sensibility in the hand. Dr. Shealy stated that the range of motion of the fingers was normal. He reported that in the right shoulder appellant had the following ranges of motion; extension 55 degrees, flexion 100 degrees, abduction 100 degrees, internal rotation 50 degrees, external rotation 15 degrees. In the elbow, appellant's ranges of motion were 0 degrees extension, 90 degrees flexion, 75 degrees supination and 70 degrees pronation. In the wrist, his ranges of motion were 35 degrees extension, 15 degrees flexion, 7 degrees radial deviation and 15 degrees ulnar deviation. Dr. Shealy indicated that x-rays showed an old fracture of the distal third of the radius, which had healed with volar angulation. He noted calcification of the radial

¹ The name Bureau of Employees' Compensation was subsequently changed to the Office of Workers' Compensation Programs.

artery, consistent with diabetes. Dr. Shealy reported appellant also had significant radial carpal changes in the wrist, primarily at the radial scaphoid articulation and significant arthritis at the distal radioulnar joint. He concluded that appellant had a 17 percent permanent impairment of the right wrist, a 9 percent permanent impairment of the right elbow, a 13 percent permanent impairment of the right shoulder and an additional 15 permanent impairment due to median neuropathy.

In a February 17, 1998 decision, the Office of Workers' Compensation Programs issued a schedule award for a 44 percent permanent impairment of the right arm.

On June 5, 2001 appellant filed a claim for an increased schedule award. He submitted a May 6, 2001 report from Dr. Shealy, who stated that an electromyogram (EMG) showed a right median and ulnar neuropathy which was probably an underlying diabetic sensory motor polyneuropathy. He commented that appellant might have a superimposed median or ulnar nerve compression as well. Dr. Shealy pointed out that the studies showed appellant had a significant limitation of function in the median nerve as well as the ulnar nerve in the right arm. He reported that ranges of motion in the wrist were extension 40 degrees, flexion 15 degrees, radial deviation 10 degrees and ulnar deviation 17 degrees. Dr. Shealy indicated that the ranges of motion in the elbow were extension 10 degrees, flexion 120 degrees, pronation 60 degrees and supination 60 degrees. He reported that the ranges of motion in the shoulder were 30 degrees extension, 65 degrees flexion, abduction 60 degrees, internal rotation 45 degrees and external rotation 10 degrees. He concluded that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had an 80 percent permanent impairment of the right arm due to neuropathy, a 25 percent permanent impairment due to loss of motion in the shoulder and elbow and a 15 percent permanent impairment due to loss of motion in the wrist. Dr. Shealy indicated that loss of function in the median and ulnar nerves would be a 45 percent and a 40 percent permanent impairment respectively. He concluded that, combining all these impairments, appellant had a 79 percent permanent impairment of the right arm.

In a September 4, 2001 memorandum, an Office medical adviser reviewed Dr. Shealy's report. He stated that the permanent impairment resulting from appellant's fracture of the radius would be based on the impairment of the right wrist, radial carpal arthritis and status post fracture distal radius. Dr. Shealy noted that appellant had residual swelling in the wrist with limitation of motion and weakness of the wrist. He indicated that, under the A.M.A., *Guides*, appellant had a 4 percent permanent impairment of the right arm due to 35 degrees extension, an 8 percent permanent impairment due to 15 degrees flexion, a 3 percent permanent impairment for radial deviation and a 3 percent permanent impairment due to 15 degrees ulnar deviation. Dr. Shealy noted that appellant's weakness in the right wrist was a Grade 4, complete active range of motion with some resistance, which equaled a 25 percent rating. He indicated that 100 percent weakness in the middle trunk, C7, nerve, equaled a 35 percent permanent impairment of the arm. He multiplied the 25 percent weakness rating by the 35 percent rating for total permanent impairment and concluded that appellant had a 9 percent permanent impairment for weakness in the right wrist. The Office medical adviser concluded that appellant had a 26 percent permanent impairment of the right arm. He noted that Dr. Shealy appeared to be calculating the weakness due to nonaccepted diabetes.

The Office sent Dr. Shealy a copy of the Office medical adviser's analysis of his report and asked whether he agreed with the medical adviser's assessment. In an October 17, 2001 note, Dr. Shealy expressed agreement with the 26 percent permanent impairment rating.

In an October 20, 2001 decision, the Office found that appellant was not entitled to an increased schedule award for the right arm.

The Board finds that appellant has not shown that he has more than a 44 percent permanent impairment of the right arm.

The schedule award provision of the Act² and its implementing regulation³ 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*⁴ has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

The Office medical adviser properly restricted the review of the extent of appellant's permanent impairment to the conditions arising out of his employment injury. It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the member of the body are to be included.⁵ In this case, the Office medical adviser properly excluded any consideration of appellant's ranges of motion in the shoulder and elbow because there was no medical evidence that appellant's ranges of motion in the shoulder and elbow were caused by the employment injury or by a condition that preexisted the employment injury. Similarly, the Office medical adviser properly excluded any consideration of the effects of appellant's diabetes on his right arm as the diabetes was diagnosed in 1967, 16 years after the employment injury. The Office medical adviser properly used the A.M.A., *Guides* to evaluate appellant's loss of motion and weakness in the wrist to conclude that appellant's most recent evaluation by Dr. Shealy showed he had a 26 percent permanent impairment of the right arm.⁶ As this impairment rating did not exceed the previous schedule award for a 44 percent permanent

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ (5th ed. 2001).

⁵ *Dale B. Larson*, 41 ECAB 481 (1990).

⁶ The Board notes that under the A.M.A., *Guides*, a 30 degree extension of the wrist equals a 5 percent permanent impairment of the right arm while a 40 degree extension would equal a 4 percent permanent impairment of the right arm. As appellant had a 35 degree extension, the Office medical adviser should have round upward and found that appellant had a 5 percent permanent impairment of the right arm due to the limitation in the extension of his wrist. However, this would have raised the permanent impairment at most to 27 degrees, which would still be less than the 44 percent permanent impairment previously awarded. Therefore, the failure to give a five percent permanent impairment rating to the loss of extension in the wrist was harmless error.

impairment of the right arm, appellant has not shown that he has an increased permanent impairment of the right arm.

The decision of the Office of Workers' Compensation Programs, dated October 20, 2001, is hereby affirmed.

Dated, Washington, DC
September 10, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member