United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH S. SILVA, Appellant	)	
and	)	**Docket No. 04-299**
	)	**Issued: April 23, 2004**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

Appearances:
Joseph Silva, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 14, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 24, 2003 finding appellant entitled to a schedule award for a 32 percent permanent impairment of his right upper extremity. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to a schedule award greater than 32 percent for the permanent impairment to his right upper extremity.

FACTUAL HISTORY

On August 23, 2002 appellant, then a 55-year-old retired heavy equipment mechanic, filed an occupational disease claim alleging that his federal employment resulted in permanent damage to his right arm. Appellant, who elected disability retirement effective February 17, 2000 after 30 years of service, stated that he first became aware of the causal relationship

between his former employment and the tingling and numbness in his right arm and hand on August 8, 2001 after seeking medical attention.

In support of his claim appellant submitted an October 4, 2002 report from Dr. David Surdyka, an orthopedic surgeon, who stated that he first treated appellant on August 8, 2001 for upper extremity pain and tingling in the little and ring fingers of his right hand. He diagnosed right upper extremity radiculopathy, cervical degenerative disc disease, right upper extremity peripheral neuropathy with ulnar nerve compression at the elbow. Due to the advanced nature of appellant's symptoms, Dr. Surdyka recommended ulnar nerve transposition and release of the nerve at the wrist. On January 31, 2002 appellant underwent right elbow anterior subcutaneous ulnar transposition and Guyon ulnar nerve release of the wrist on January 31, 2002. According to Dr. Surdyka appellant reported no improvement from the surgery. On December 13, 2002 the Office accepted appellant's claim for acceleration of cervical degenerative disc disease with radiculopathy and right elbow ulnar nerve entrapment. The January 31, 2002 surgery was also approved.

On December 26, 2002 appellant requested a schedule award. In a May 28, 2003 letter, appellant was referred to Dr. Bunsri Sophon, a Board-certified orthopedic surgeon. In a July 7, 2003 report, Dr. Sophon stated that appellant presented with primarily right wrist pain and numbness of the right hand that was made worse by lifting. He noted that appellant's arm and forearm circumferences were the same for his right and left hand but appellant's grip strength was significantly less on the right than the left. A Jamar Dynamometer test showed appellant's left hand strength at 90/85/85 while the strength in his right hand was 40/20/20. Dr. Sophon noted that appellant is right hand dominant. On examination he found appellant's right elbow to be nontender and a nondisfiguring scar with no evidence of deformity, tenderness swelling or palpable mass. Dr. Sophon found no impairment for loss of range of motion in the elbow and wrist joints. He noted that appellant's wrist dorsiflexion is 60 degrees on the right and left. His palmar flexion is 70 degrees on the right and left. The radial deviation was 20 degrees bilaterally and the ulnar deviation was 30 degrees bilaterally. Appellant's elbow flexion was 150 degrees on the right and left. The extension was zero degrees, right and left. The forearm pronation and supination were both 80 degrees bilaterally. Examination of appellant's right wrist revealed sensory loss, loss of strength and mild pain localized to the flexor, adductor and opponens muscles of the right hand. He noted that appellant's sensation is diminished to touch and to pin prick in the ulnar nerve distribution involving the ring and little fingers as well as the ulnar side of the palm. Dr. Sophon opined that appellant does not have any interference with daily activities due to the condition of his right elbow and wrist and stated the date of maximum medical improvement was July 7, 2003.

In an August 28, 2003 letter, the Office referred Dr. Sophon's report to Dr. Lawrence Simpson, acting as the district medical adviser. In a September 1, 2003 report, Dr. Simpson stated after applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A, *Guides*) (5th ed.) he found that appellant's subjective complaints of pain to be a Grade 3 based on a Table 16-10, page 482, which he translated to between a 26 and 60 percent impairment. Dr. Simpson recommended the mean within Grade 3, or 43 percent and multiplied the maximal value of 7 percent for the ulnar nerve, based on Table 16-15 and concluded that appellant had a 3 percent impairment resulting from numbness and discomfort.

Dr. Simpson noted that appellant's ranges of motion for the right wrist and elbow were full, equating to zero percent impairment. He noted that appellant had a full pronation and supination of the forearm also equating to zero percent impairment. Dr. Sophon stated that appellant's right hand grip was diminished compared to the left and there was weakness and atrophy of the flexor adductors and opponens muscles of the right hand and that grip strength was diminished by approximately 70 percent of predicted, which according to Table 16-34 reflects a 30 percent impairment. Using the Combined Values Chart, Dr. Sophon found that appellant had a 32 percent impairment of the right upper extremity. He set the date of maximum medical improvement as July 7, 2003. In an October 24, 2003 decision, the Office found appellant entitled to a schedule award for 32 percent impairment to his right upper extremity.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3]

The schedule award provision of the Act[4] and its implementing regulation[5] 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.[6]

ANALYSIS

The Board finds the medical evidence does not support a schedule award greater than 32 percent for appellant's permanent impairment to his right upper extremity. In the present case, the Office referred appellant to Dr. Sophon, a Board-certified orthopedic surgeon, who conducted a physical examination and found no loss of motion in the wrist or elbow, but a sensory loss and loss of strength and mild pain localized to the flexor, adductor and opponens muscles of the right hand. As no loss of motion was found for the wrist and elbow, the Board finds that appellant has no permanent partial impairment due to loss of range of motion.

[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

Applying the of the A.M.A. *Guides* (5th ed.) Table 16-31, page 469, a 20 degree radial deviation represents 0 percent impairment, as does a 30 degree ulnar deviation.

Dr. Sophon found appellant's strength in his right significantly diminished; noting a Jamar Dynamometer test showed appellant's left-hand strength measured 90/85/85 while his right hand measured 40/20/20. The Office referred Dr. Sophon's results to Dr. Simpson acting as the district medical adviser who applied the A.M.A., *Guides* (5th ed.).

The Board notes that in his September 1, 2003 report, Dr. Simpson properly applied Table 16-10, page 482 of the A.M.A., *Guides* to find appellant's complaints of mild pain and loss of sensation to be a Grade 3 and assigned a 43 percent sensory deficit. He then applied Table 16-15, page 492 and multiplied 43 percent deficit by the maximal 7 percent for the ulnar nerve, to find a 3 percent impairment for numbness and discomfort.

Dr. Sophon stated that appellant's right sided grip strength was diminished compared to the left by approximately 70 percent. Using Table 16-34, page 508 of the A.M.A., *Guides*, Dr. Simpson assessed this loss as a 30 percent impairment. Using the Combined Values Chart on page 604, Dr. Sophon found appellant had a 32 percent impairment of the right upper extremity.[7] He set the date of maximum medical improvement as July 7, 2003.

The Board finds that the medical evidence does not support greater than a 32 percent impairment and as the September 1, 2003 report of Dr. Simpson is the only evaluation that conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[8]

CONCLUSION

Appellant has not met his burden of proof to establish entitlement to a schedule award greater than a 32 percent permanent impairment to his right upper extremity.

[7] The Board notes that the A.M.A., *Guides* specifically provides that strength deficits, as measured by grip testing, should only rarely be included in the calculation of an upper extremity impairment and the facts do not support the inclusion of a loss of strength impairment rating in the present case.[7]

[8] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member