

**United States Department of Labor  
Employees' Compensation Appeals Board**

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JEFFREY L. BENNETT, Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE  
LOGISTICS AGENCY, HILL AIR FORCE  
BASE, UT, Employer**

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**Docket No. 04-737  
Issued: June 10, 2004**

*Appearances:*

*Jeffrey L. Bennett, pro se  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On January 26, 2004 appellant filed a timely appeal from a July 3, 2003 decision of the Office of Workers' Compensation Programs. A review of the case record, however, does not reveal that the Office had issued a decision on or about July 3, 2003. The record reflects that the Office had issued a May 6, 2003 decision granting a schedule award and a January 5, 2004 decision denying a disability claim for the period commencing July 3, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the schedule award and the denial of appellant's compensation commencing July 3, 2003.

**ISSUES**

The issues are: (1) whether appellant has more than a six percent permanent impairment to the right upper extremity, for which he received a schedule award; and (2) whether appellant is entitled to compensation for the period commencing July 3, 2003 on.

## **FACTUAL HISTORY**

On June 13, 2002 appellant, then a 48-year-old packer, filed a traumatic injury claim alleging that he heard a snap in his right elbow while in the performance of duty on June 12, 2002. By letter dated June 28, 2002, the Office accepted the claim for right acute distal biceps tendon rupture and tendon repair, which appellant had undergone on June 20, 2002. Appellant returned to light-duty work on July 15, 2002 for approximately one month and was laid off.

On April 2, 2003 appellant filed a Form CA-7 claim for a schedule award. Submitted with his claim was a February 14, 2003 report from Dr. Corey D. Anden, a Board-certified physiatrist, who provided an impression of right distal biceps tendon rupture status post repair June 20, 2002 and a mild residual restriction in elbow range of motion with residual post-traumatic lateral epicondylitis. On palpation, tenderness was noted on the right lateral epicondyle at the posterior epicondyle and at the right anterior elbow distal biceps tendon. Bilateral upper extremity active/passive range of motion was within functional limits with right elbow flexion of 110 degrees and extension full below the shoulder but with 10 degrees overhead; forearm supination was 65 degrees with full pronation. Motor movement was within functional limits with giveaway weakness throughout the right arm. Right elbow flexion and extension was 4+/5 and right wrist extension 4/5 with complaint of increased right lateral elbow pain. Dr. Anden advised that appellant had reached maximum medical improvement for the right biceps tendon injury under the criteria established under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Anden noted that there was no chart or values specifically attributed to a right distal biceps tendon rupture. The physician also noted that there were no focal neurological deficits or joint subluxation for which additional impairment could be assigned. Utilizing Figure 16-34, page 472, Dr. Anden assessed a four percent right elbow flexion and a one percent right elbow extension impairment for a five percent upper extremity impairment. Utilizing Figure 16-37, page 474, the physician assessed a one percent impairment with regard to right forearm supination. This figure was added to the five percent flexion and extension impairment for a total six percent upper extremity impairment, which translated into a four percent whole person impairment. Dr. Anden noted that, if additional abnormalities of the right elbow were found on the magnetic resonance imaging (MRI) scan, an additional impairment may be assessed.

On May 2, 2003 an Office medical adviser reviewed Dr. Anden's February 14, 2003 report along with the medical evidence of file and assessed a six percent right upper extremity impairment with maximum medical improvement reached February 14, 2003.

By decision dated May 6, 2003, the Office issued a schedule award for a six percent permanent impairment of the right arm. The period of the award ran from February 14 to April 19, 2003.

In a Form CA-20, attending physician's report, dated August 5, 2003, Dr. Norman C. Bos, II, a Board-certified orthopedic surgeon, advised that appellant was discharged from treatment on April 1, 2003 and was able to resume regular work the same day. A four percent whole person impairment was also noted.

On August 6, 2003 appellant filed a Form CA-7 claim for compensation for "disability" and noted that he was released to light duty on April 1, 2003. By letter dated August 14, 2003, the Office advised appellant that more information was required before the Form CA-7 could be processed. Appellant was specifically asked to advise what kind of compensation benefits he was claiming.

On August 18, 2003 appellant filed another Form CA-7 claim for compensation claiming disability compensation from "July 03 to present" and resubmitted a copy of Dr. Bos' August 5, 2003 attending physician's report.

By letter dated August 27, 2003, the Office advised appellant that Federal Employees' Compensation Act regulations require that any claim for compensation benefits be fully documented with medical rationale which established that he is either totally disabled and unable to perform any kind of work due to his work injury or that he had medical work restrictions which his employing establishment could not accommodate. The Office noted that appellant had not submitted any such documentation and allowed appellant 30 days to provide such medical documentation.

In an October 28, 2003 report of a telephone call, the Office indicated that appellant wanted a higher disability rating. He was advised to follow his appeal rights.

By decision dated January 5, 2004, the Office denied appellant's claim for disability compensation for the period commencing July 3, 2003 onward.

#### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Act,<sup>1</sup> and its implementing federal regulation,<sup>2</sup> 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>3</sup> Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.<sup>4</sup>

#### **ANALYSIS -- ISSUE 1**

In this case, both Dr. Anden and the Office medical adviser reported that appellant had a six percent impairment to his right upper extremity. The Office medical adviser applied the findings of Dr. Anden to the fifth edition of the A.M.A., *Guides* to find that appellant had a total

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404.

<sup>3</sup> 20 C.F.R. § 10.404(a).

<sup>4</sup> See FECA Bulletin No. 01-5 (issued January 29, 2001).

impairment of six percent to his right upper extremity for loss of range of motion. This was based on 4 percent for 110 degrees of forward flexion and 1 percent for 10 degrees of extension<sup>5</sup>; and 1 percent for a 65 degree supination and 0 percent for a 80 degree or full pronation.<sup>6</sup> There is no other medical evidence of record, based on a correct application of the A.M.A., *Guides*, to establish that appellant has more than a six percent permanent impairment of the right upper extremity for which he received a schedule award.<sup>7</sup> Accordingly, the Board finds that the Office followed standardized procedures for determining the extent of appellant's permanent impairment and properly determined that he had no more than a six percent permanent impairment of the right upper extremity.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, 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.<sup>8</sup> Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.<sup>9</sup> Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

In this case, appellant claimed disability compensation commencing July 3, 2003. The only medical evidence submitted in support of his disability compensation was the August 5, 2003 attending physician's report of Dr. Bos, who indicated that appellant could return to light-duty work on April 1, 2003. The report does not contain any findings of disability or that appellant was unable to perform the light-duty work he was released to perform on April 1, 2003. In an August 27, 2003 letter, the Office had advised appellant of the information necessary to

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<sup>5</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001) Figure 16-34 at 472; *Joseph Lawrence, Jr.*, 53 ECAB \_\_\_\_ (Docket No. 01-1361, issued February 4, 2002).

<sup>6</sup> *Id.*, Figure 16-37 at 474.

<sup>7</sup> Although the record contains an August 5, 2003 attending physician's report from Dr. Bos noting a four percent whole person impairment, this evidence was not before the Office at the time it issued its May 6, 2003 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422 (1997).

<sup>8</sup> *Thomas M. Petroski*, 53 ECAB \_\_\_\_ (Docket No. 01-1667, issued April 5, 2002).

<sup>9</sup> *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>10</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

establish a claim for compensation and provided him 30 days in which to provide medical support for his claim. Appellant, however, failed to submit any medical documentation to support his claim for disability compensation commencing July 3, 2003. As appellant failed to submit rationalized medical opinion evidence to establish that his current condition or disability is causally related to his accepted employment injury, he failed to meet his burden of proof and the Office properly denied his claim.

**CONCLUSION**

The Board finds that there is no evidence of record that appellant has more than a six percent upper extremity impairment. Furthermore, the Board finds that appellant has not met his burden of proof to establish entitlement to compensation for the period commencing July 3, 2003.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2004 and May 6, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 10, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member