

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

E.G., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
OGDEN AIR LOGISTICS CENTER,)
HILL AIR FORCE BASE, UT, Employer)

Docket No. 06-1088
Issued: November 30, 2006

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 4, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 7, 2006 merit decision regarding his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than an eight percent impairment of his right arm and a seven percent impairment of his left arm, for which he received schedule awards.

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal,¹ the Board issued a decision on December 15, 2003 setting aside an Office schedule award determination and remanding the case for further development. The Board found that the case was not in posture for decision regarding whether appellant had more than a four percent impairment of his right arm and a three percent impairment of his left arm, for which he received a schedule award. The Board noted that the Office properly determined that there was a conflict in the medical evidence regarding appellant's upper extremity impairment between Dr. Vermon S. Esplin, an attending Board-certified orthopedic surgeon, and Dr. Hugh Macaulay, a Board-certified orthopedic surgeon, who served as an Office medical adviser. The Board indicated that the Office properly referred appellant to Dr. Robert P. Hanson, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

The Board determined that Dr. Hanson properly analyzed appellant's limited wrist motion in his July 8, 2003 report to determine that he had a four percent impairment of his right arm and a three percent impairment of his left arm based on these particular limitations. The Board further found that Dr. Hanson and Dr. Macaulay applied an improper standard when they categorically stated that limitations of appellant's elbow motion could not be included in the calculations of his upper extremity impairment.² The Board remanded the case to the Office for referral of appellant to another impartial medical specialist for a complete evaluation of his upper extremity impairment to be followed by an appropriate decision.³

On remand, the Office referred appellant to Dr. Anthony Fenison, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding the extent of the impairment of his upper extremities. In a report dated March 24, 2004, Dr. Fenison stated that appellant exhibited the following findings upon range of motion testing of his elbows: extension of 180 degrees; flexion of 135 degrees; supination of 85 degrees; and pronation of 75 degrees in each elbow. He stated that appellant had right wrist extension of 60 degrees, flexion of 70 degrees, radial deviation of 10 degrees and ulnar deviation of 20 degrees. Dr. Fenison further reported that appellant had left wrist extension of 65 degrees, flexion of 70 degrees, radial deviation of 20 degrees and ulnar deviation of 40 degrees. He found that for the distal interphalangeal joints (IPJ) of the index, middle and little fingers of each hand appellant had 180 degrees of extension and 70 degrees of flexion. Dr. Fenison reported that for the proximal interphalangeal joints of the index, middle and little fingers of each hand appellant had 180 degrees of extension and 100 degrees of flexion. He further noted that for the

¹ Docket No. 03-1994 (issued December 15, 2003).

² The Board noted that it is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments of the body are to be included. See *Dale B. Larson*, 41 ECAB 481, 490 (1990); *Pedro M. DeLeon, Jr.*, 35 ECAB 487, 492 (1983). The Board indicated that the evidence suggested that appellant had some impairment due to limited elbow motion.

³ The Board also found that Dr. Esplin's July 25, 2002 determination that appellant had a 30 percent impairment was improper because he included an unsupported rating for weakness upon grip strength testing, did not clearly indicate that the strength rating applied equally to both extremities and made additional calculation errors when he added the rating figures for motion and strength limitations.

metacarpophalangeal joints of the index fingers of each hand appellant had 180 degrees of extension and 85 degrees of flexion; for the metacarpophalangeal joints (MPJ) of the middle and little fingers of each hand, he had 180 degrees of extension and 90 degrees of flexion. Dr. Fenison also found that he had 50 degrees of flexion in each MPJ of the thumbs, 0 degrees of extension in each MPJ, 75 degrees of flexion in each interphalangeal joint (IPJ) and 20 degrees of extension in each IPJ. He concluded that appellant had no more than a four percent impairment of his right arm and a three percent impairment of his left arm.

On April 14, 2004 Dr. Macaulay, the district medical adviser for the Office, reviewed the findings of Dr. Fenison and determined that appellant had a 4 percent impairment of his right arm based on a 2 percent impairment for 10 degrees of radial deviation of the right wrist and a 2 percent impairment for 20 degrees of ulnar deviation of the right wrist. By decisions dated May 6, 2004 and March 4, 2005, the Office determined that appellant did not establish that he had more than a four percent impairment of his right arm and a three percent impairment of his left arm, for which he received a schedule award.

In the second appeal,⁴ the Board issued a decision on September 7, 2005 finding that the Office did not fully evaluate appellant's entitlement to schedule award compensation for his upper extremities. The Board determined that the Office properly found that Dr. Macaulay, who reviewed the findings of Dr. Fenison, correctly calculated that appellant had a 4 percent impairment of his right arm based on a 2 percent impairment for 10 degrees of radial deviation of the right wrist and a 2 percent impairment for 20 degrees of ulnar deviation of the right wrist.⁵ The Board further found that the Office did not adequately evaluate whether appellant had entitlement to schedule award compensation for limited elbow motion. The Board noted that Dr. Fenison provided examination findings for elbow motion, but Dr. Macaulay did not provide any indication that he considered whether appellant was entitled to an impairment rating for limited elbow motion.⁶ The Board also found that the Office did not adequately consider whether he was entitled to schedule award compensation for limited finger motion.⁷ The Board remanded the case to the Office for further development to be followed by the issuance of an appropriate decision.

⁴ Docket No. 05-987 (issued September 7, 2005).

⁵ See A.M.A., *Guides* 469, Figure 16-31. The Board noted that it did not appear that appellant would be entitled to any other impairment ratings for limited wrist motion upon flexion, extension, radial deviation or ulnar deviation. See A.M.A., *Guides* 467, Figure 16-28.

⁶ The Board indicated that the findings of Dr. Fenison suggested that appellant would be entitled to a one percent impairment rating for each of the following elbow motions: 135 degrees of right elbow flexion, 75 degrees of right elbow pronation, 135 degrees of left elbow flexion and 75 degrees of left elbow pronation. See A.M.A., *Guides* 472, 474, Figures 16-34 and 16-37. The Board stated that it did not appear that appellant would be entitled to any other impairment ratings for limited elbow motion. See *id.*

⁷ The Board stated that Dr. Fenison's finding that appellant had 85 degrees of extension of the MPJ of both index fingers suggested a 3 percent impairment rating for each index finger. See A.M.A., *Guides* 464, Figure 16-25. The Board noted that it did not appear that appellant would be entitled to any other impairment ratings for limited motion of the distal IPJ, proximal interphalangeal or MPJ. See A.M.A., *Guides* 461, 463, Figures 16-21 and 16-23.

On remand the Office referred the case record to Dr. Morley Slutsky, a Board-certified orthopedic surgeon, for evaluation of appellant's impairment.

In a report dated September 22, 2006, Dr. Slutsky provided an extensive description of the medical reports in the record and indicated that he had evaluated the impairment testing conducted by Dr. Fenison. Dr. Slutsky indicated that he used normal values for range of motion testing which were derived from the A.M.A., *Guides* and which were slightly different from those used by Dr. Fenison. He stated that his calculations showed that appellant was entitled to compensation for a four percent impairment rating of each arm, in addition to the schedule award compensation already received, such that he was due compensation for a total right arm impairment of eight percent and a total left arm impairment of seven percent. Dr. Slutsky attached calculation sheets which showed that, for each hand appellant had the following impairments: 1 percent for 50 degrees of flexion of the MPJ of each thumb; 1 percent for 75 degrees of flexion of the IPJ of each thumb; and 3 percent for 85 degrees of the MPJ of each index finger. Dr. Slutsky also attached calculation sheets which showed that, for each elbow, appellant had the following impairments: 1 percent for 135 degrees of flexion and 1 percent for 75 degrees of pronation.

By decision dated October 4, 2006, the Office granted appellant a schedule award for an eight percent impairment of his right arm (four percent added to the four percent already received) and for a seven percent impairment of his left arm (four percent added to the three percent already received).

Appellant requested a review of the written record by an Office hearing representative. He claimed that he should received a schedule award for an upper extremity impairment of at least 30 percent.

By decision dated and finalized March 7, 2006, the Office hearing representative affirmed the Office's October 4, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁸ and its implementing regulation⁹ sets 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.¹⁰

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ *Id.*

ANALYSIS

The Office accepted that appellant sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand and wrist. After extensive development of the medical evidence, it determined that he had an eight percent impairment of his right arm and a seven percent impairment of his left arm and it paid him schedule award compensation for such impairment.

The Board finds that the medical evidence shows that appellant has an 11 percent impairment of his right arm and a 7 percent impairment of his left arm.

By decision dated September 7, 2005, the Board directed the Office to conduct further development of the medical evidence. As part of this development, the Office referred the case record to Dr. Slutsky, a Board-certified orthopedic surgeon, for evaluation of appellant's impairment. It was appropriate for Dr. Slutsky to analyze the medical assessment of Dr. Fenison, a Board-certified orthopedic surgeon, as the case was properly referred to Dr. Fenison for an impartial medical examination and he provided a detailed account of the extensive impairment testing he carried out.¹¹

In his September 22, 2006 report, Dr. Slutsky concluded that appellant had a total right arm impairment of eight percent and a total left arm impairment of seven percent. However, some of his own calculation sheets show that appellant would be entitled to additional compensation for right arm impairment. Dr. Slutsky properly determined in these calculation sheets that appellant has the following impairments of the right hand: 1 percent for 50 degrees of flexion of the MPJ of the right thumb; 1 percent for 75 degrees of flexion of the IPJ of the right thumb; and 3 percent for 85 degrees of the metacarpophalangeal joint of the right index finger.¹² These figures would be added together to equal a five percent impairment of the right hand due to limited digit motion.¹³ Dr. Slutsky also attached calculation sheets which properly show that appellant has the following impairments of the right elbow: 1 percent for 135 degrees of flexion and 1 percent for 75 degrees of pronation.¹⁴ Adding these figures together shows that appellant has a two percent impairment of the right arm due to limited elbow motion.

¹¹ The Board previously determined that appellant was properly referred to Dr. Fenison for an impartial medical examination. Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

¹² See A.M.A., *Guides* 456-57, 464, Figures 16-12, 16-13, 16-25. With respect to the 1 percent rating for 75 degrees of flexion of the IPJ of the right thumb, Dr. Slutsky properly reached this value by rounding up from the 0.5 percent value derived from the Figure 16-12. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 2003); *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999). Appellant would not be entitled to any other impairment ratings for limited motion of his thumbs or fingers. See A.M.A., *Guides* 456-57, 461, 463-64, Figures 16-12, 16-13, 16-21, 16-23 and 16-25.

¹³ Reference should be made to pages 515 through 517 of the A.M.A., *Guides* for instructions regarding when to add impairment ratings for the upper extremities and when to combine them using the Combined Values Chart on pages 604 through 606.

¹⁴ See A.M.A., *Guides* 472, 474, Figures 16-34 and 16-37. Appellant would be entitled to any other impairment ratings for limited elbow motion. See *id.*

Although Dr. Slutsky did not provide a calculation sheet regarding right wrist motion, evaluation of the findings of Dr. Fenison establishes that appellant has the following impairments of the right wrist: 2 percent for 10 degrees of radial deviation and 2 percent for 20 degrees of ulnar deviation.¹⁵ Adding these figures together shows that appellant has a four percent impairment of the right arm due to limited wrist motion. The Board notes that the medical evidence of record does not show that appellant has any other form of right arm impairment such as that caused by sensory loss or weakness.¹⁶ Using the Combined Values Charts to combine the values for limited motion of the right hand digits (5 percent), elbow (2 percent) and wrist (4 percent) shows that appellant has a total impairment of the right arm of 11 percent.

With respect to the left arm, Dr. Slutsky properly determined in his calculation sheets that appellant has the following impairments of the left hand: 1 percent for 50 degrees of flexion of the MPJ of the left thumb; 1 percent for 75 degrees of flexion of the IPJ of the left thumb; and 3 percent for 85 degrees of the MPJ of the left index finger.¹⁷ These figures would be added together to equal a five percent impairment of the left hand due to limited digit motion. Dr. Slutsky also attached calculation sheets which properly show that appellant has the following impairments of the left elbow: 1 percent for 135 degrees of flexion and 1 percent for 75 degrees of pronation.¹⁸ Adding these figures together shows that appellant has a two percent impairment of the left arm due to limited elbow motion. Evaluation of the findings of Dr. Fenison shows that appellant does not have any impairment due to limited left wrist motion.¹⁹ The Board notes that the medical evidence of record does not show that appellant has any other form of left arm impairment such as that caused by sensory loss or weakness. Using the Combined Values Charts to combine the values for limited motion of the left hand digits (five percent) and the left elbow (two percent) shows that appellant has a total impairment of the left arm of seven percent.

Appellant suggested that a July 25, 2002 report of Dr. Esplin, an attending Board-certified orthopedic surgeon, showed that he had an upper extremity impairment of at least 30 percent. However, the Board noted in its December 15, 2003 decision that Dr. Esplin's calculation was improper because he included an unsupported rating for weakness upon grip strength testing, did not clearly indicate that the strength rating applied equally to both extremities and made additional calculation errors when he added the rating figures for motion and strength limitations.²⁰

¹⁵ See A.M.A., *Guides* 469, Figure 16-31. Appellant would not be entitled to any other impairment ratings for limited wrist motion. See A.M.A., *Guides* 467, Figure 16-28.

¹⁶ See generally A.M.A., *Guides* 480-514.

¹⁷ See A.M.A., *Guides* 456-57, 461, 463-64, Figures 16-12, 16-13, 16-21, 16-23 and 16-25.

¹⁸ See A.M.A., *Guides* 472, 474, Figures 16-34 and 16-37. Appellant would be entitled to any other impairment ratings for limited elbow motion. See *id.*

¹⁹ See A.M.A., *Guides* 467, 469, Figures 16-28, 16-31.

²⁰ 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. See A.M.A., *Guides* 508, section 16.8a.

The medical evidence shows that appellant has an 11 percent impairment of his right arm and a 7 percent impairment of his left arm; he was previously compensated for an 8 percent impairment of his right arm and a 7 percent impairment of his left arm. Therefore, he should receive additional schedule award compensation to reflect that he has an 11 percent impairment of his right arm.

CONCLUSION

The Board finds that appellant has an 11 percent impairment of his right arm and a 7 percent impairment of his left arm. He should receive additional appropriate schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 7, 2006 decision is affirmed, as modified to reflect that appellant has an 11 percent impairment of his right arm and a 7 percent impairment of his left arm.

Issued: November 30, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board