

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL R. WOLITITCH and DEPARTMENT OF THE AIR FORCE,
AIR FORCE SPACE COMMAND, FE WARREN AIR FORCE BASE, Cheyenne, WY

*Docket No. 03-1828; Submitted on the Record;
Issued September 15, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has more than a five percent permanent impairment of the left upper extremity, for which he received a schedule award.

On September 26, 2001 appellant, then a 51-year-old industrial controls mechanic, filed a notice of traumatic injury alleging that he hurt his left arm on September 19, 2001 while pulling wire through a conduit in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for a ruptured left biceps tendon. Appellant underwent surgery on December 13, 2001 and then returned to light duty effective December 17, 2001. On June 28, 2002 appellant filed a (Form CA-7) claim for a schedule award. In a decision dated March 6, 2003, the Office issued a schedule award for a five percent permanent impairment of the left extremity. The period of the award was from September 4 to December 22, 2002. In a letter received by the Office on April 7, 2003, appellant requested reconsideration. In a decision dated May 30, 2003, the Office denied appellant's request for reconsideration, finding the evidence submitted to be insufficient to warrant a merit review.

The Board finds that the case is not in posture for a decision due to a conflict in the medical evidence.

Section 8107 of the Federal Employees' Compensation Act¹ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, function and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the

¹ The Act provides that, for total or 100 percent loss of use of a leg, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c).

appropriate standard for evaluating schedule losses.² Effective February 1, 2001, schedule awards are determined in accordance with the fifth edition of A.M.A., *Guides*.³

In this case, appellant submitted a May 8, 2002 treatment note from his attending physician, Dr. Michael P. Kuhn, a Board-certified orthopedic surgeon, indicating that his primary problem was a musculocutaneous deficit in the long head of the biceps. Dr. Kuhn stated that appellant had a 12 percent impairment for motor deficit of the biceps according to Table 16-15, page 492 of the A.M.A., *Guides* (fifth edition).⁴ In a report dated September 4, 2002, he noted that, since appellant demonstrated fair range of motion in his shoulder, he thought it was more appropriate to calculate appellant's impairment under the strength deficit charts at Table 16-35, page 510 of the A.M.A., *Guides*.⁵ Dr. Kuhn opined that appellant had 14 percent permanent impairment of the elbow in accordance with Table 16-35 for motor strength deficit.

In a November 8, 2002 letter, the Office requested that Dr. Kuhn provide additional information including the date of maximum medical improvement, a description of any restriction appellant suffered in terms of degree of retained active motion, a description of all pertinent objective findings, a description of subjective complaints causing impairment, and a recommended percentage of impairment of the left lower extremity based on the A.M.A., *Guides* (fifth edition). Dr. Kuhn replied by facsimile on November 8, 2002, stating that appellant had only minimal restriction of range of motion but complete loss of appearance and function of the long head of the biceps. He related that appellant had pain left arm and shoulder, especially with progressive resistance. The date of maximum medical improvement was listed as May 8, 2002.

The Office subsequently referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon, for a second opinion examination performed on January 31, 2003. In a report dated February 4, 2003, Dr. Hrutkay indicated that appellant had no complaints of left shoulder or elbow pain. On physical examination, the left shoulder showed full range of motion, 180 degrees of forward flexion, 50 degrees of extension, 170 degrees of abduction, 50 degrees of adduction, 80 degree of internal rotation, and 90 degrees of external rotation. There was negative impingement sign. Dr. Hrutkay reported that the long head of the biceps muscle had prominence consistent with the tendon tear. He stated that manual motor testing with the left elbow revealed a mild decrease in flexion strength when compared to the right elbow. Dr. Hrutkay stated that he would rate appellant's impairment in accordance with Table 16-15, page 492 of the A.M.A., *Guides* (fifth edition), which allowed for a maximum of 25 percent impairment with regard to

² 20 C.F.R. § 10.404 (1999).

³ FECA Bulletin No. 01-05 (issued January 29, 2001).

⁴ He also stated that appellant had a seven percent impairment of the whole person at Table 16-3. The Board, however, notes that, while the A.M.A., *Guides*, provide for both impairment to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person; *see John Yera*, 48 ECAB 243 (1996).

⁵ Dr. Kuhn noted that appellant had fair range of motion in his shoulder so he did not consider range-of-motion measurements to accurately reflect the degree of appellant's permanent impairment of the shoulder. He stressed that appellant had a significant deficit with respect to motor strength in the long head of the biceps.

musculocutaneous nerve in the left biceps muscle. Using Table 16-11 on page 484, he calculated that appellant had 20 percent motor deficit for Grade 4 strength. He multiplied the 2 percentages and found that appellant had 5 percent impairment of the upper extremity impairment (20 percent x 25 percent = 5 percent).⁶ The Office forwarded a copy of Dr. Hrutkay's report to an Office medical adviser who agreed that appellant had a five percent impairment of the left upper extremity based on Tables 16-11 and 16-15.

The Board finds that a conflict exists between Dr. Kuhn and Dr. Hrutkay as to the nature and degree of permanent impairment appellant sustained to the upper extremity due to his accepted work injury. Dr. Kuhn opined that appellant had a 14 percent impairment of the left upper extremity due to strength deficits in the elbow a Table 16-35 while Dr. Hrutkay calculated appellant's total impairment for the left upper extremity to be only 5 percent under Tables 16-11 and 16-15.

Section 8123(a) of the Act provides that, 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.⁷ Because a conflict exists in the record as to the applicable tables of the A.M.A., *Guides* for calculating appellant's schedule award, and the percentage of appellant's impairment to the left shoulder and elbow, the Board finds that the case must be remanded in order for appellant to be examined by an impartial medical specialist, who shall offer a rating of appellant's permanent impairment to the left upper extremity.⁸ After such further medical development as the Office deems necessary, the Office shall issue a *de novo* decision regarding appellant's schedule award.

⁶ With respect to appellant's left elbow, Dr. Hrutkay noted that flexion strength was preserved due to the fact that the brachialis muscle tendon and the short head of the biceps muscle tendon functioned normally. He estimated that appellant had lost 20 percent of elbow flexion strength with the loss of the long head of the biceps muscle tendon. Dr. Hrutkay, however, did not make a separate impairment rating for the elbow, and his report implies that the elbow impairment was incorporated into the final rating of five percent impairment for the left upper extremity.

⁷ 5 U.S.C. § 8123(a); see *Charles S. Hamilton*, 52 ECAB 110 (2000).

⁸ Dr. Kuhn indicated that appellant was in pain during his examination. In contrast, Dr. Hrutkay noted that appellant had no pain in his left shoulder or arm. The impartial medical specialist should ascertain whether or not appellant is entitled to an impairment rating under the A.M.A., *Guides* (fifth edition) for pain related to the left upper extremity.

The decisions of the Office of Workers' Compensation Programs dated May 30 and March 6, 2003 are hereby set aside and the case is remanded for further development consistent with this opinion.

Dated, Washington, DC
September 15, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member