

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

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**J.L., Appellant**

**and**

**DEPARTMENT OF THE ARMY, DENTAL  
CLINIC, Fort Dix, NJ, Employer**

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**Docket No. 08-412  
Issued: July 3, 2008**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 20, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 16, 2007 regarding a schedule award. 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 for any additional impairment to his right or left arm.

**FACTUAL HISTORY**

The case was before the Board on a prior appeal.<sup>1</sup> As the Board explained, the Office had issued the following schedule award decisions: May 23, 1995 for a 20 percent left arm impairment (62.4 weeks of compensation commencing February 28, 1995); September 5, 1997

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<sup>1</sup> Docket No. 00-2631 (issued March 14, 2002).

for a 2 percent right arm impairment (6.24 weeks commencing August 18, 1997);<sup>2</sup> August 3, 1998 for an 8 percent right arm impairment (24.96 weeks commencing October 1, 1997); and September 2, 1999 for a 10 percent right arm impairment (31.20 weeks commencing July 23, 1999). The Board remanded the case for further development on the issue of whether appellant had more than a 20 percent impairment to each arm, finding that the referee physician, Dr. Dean Nachtigall, did not resolve the conflict in the medical evidence. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

The Office referred appellant to Dr. Daniel Hely, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated June 13, 2002, Dr. Hely opined that appellant had a 32 percent right arm impairment based on sensory deficit/pain for the median and ulnar nerves. He did not provide an impairment for the left arm, other than to note appellant had received 20 percent.

In an undated memorandum, the Office indicated that it had paid schedule awards totaling 36 percent, not 40 percent. By decision dated August 8, 2002, it stated that appellant was entitled to a schedule award for 18 percent for the left arm and 24 percent for the right arm, totaling 42 percent. The Office indicated that appellant had received 36 percent arm impairments and therefore was entitled to 6 percent, or 18.5 weeks.

Appellant requested a hearing, which was held on July 1, 2004. By decision dated October 18, 2004, the hearing representative remanded the case for further development. Dr. Hely submitted a supplemental report dated February 11, 2005. He explained that he graded appellant's right arm impairment at 70 percent of the maximum, while he would grade the left arm impairment at 61 percent of the maximum. Dr. Hely opined that appellant had a 32 percent right arm impairment and a 28 percent left arm impairment.

By decision dated March 4, 2005, the Office issued a schedule award for 15.60 weeks of compensation commencing July 6, 2000. The Office stated that appellant had been awarded a total of 42 percent impairment to the arms, and he was now entitled to 47 percent, or an additional 5 percent.

Appellant again requested a hearing before an Office hearing representative, which was held on December 20, 2005. By decision dated March 6, 2006, the hearing representative remanded the case for further development.

In a report dated October 5, 2006, an Office medical adviser concurred that appellant had a 32 percent right arm impairment and a 28 percent left arm permanent impairment. By decision dated November 17, 2006, the Office issued a schedule award for "13 percent additional due for right and left upper extremities." The period of the award was 40.56 weeks from February 27, 2000.

Following another hearing on May 9, 2007, an Office hearing representative, by decision dated July 16, 2007, affirmed the November 17, 2006 schedule award decision.

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<sup>2</sup> As the Board noted, the decision stated a left arm impairment, but the Office intended a right arm impairment.

## LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.<sup>4</sup>

## ANALYSIS

When a claimant has received a schedule award and then seeks an additional award, the initial inquiry is to determine what appellant has received and then determine whether the evidence shows a greater impairment. In the July 16, 2007 decision, the hearing representative stated the issue was whether appellant had more than a 32 percent right arm impairment and a 28 percent left arm impairment. Based on the development of the case, however, the Board does not concur with that determination.

As the Board explained in its prior decision, the Office decisions from May 23, 1995 to September 2, 1999 found that appellant had a 20 percent right arm impairment and a 20 percent left arm impairment. Following the Board's decision, the Office then appeared to find that appellant had only been paid for a total of 36 percent permanent impairment to the arms. If that was the case, the solution was to pay appellant additional weeks of compensation in accord with the specific terms of the issued final decisions. Instead, the Office appeared to conclude that appellant was only entitled to an award based on a combined 36 percent impairment. This led to the issuance of schedule award decisions that had an incorrect determination as to the prior schedule awards and were based on total impairments to the arms, rather than to a specific arm. Further confusing the issue was the Office's unexplained determinations, at least in the August 8, 2002 and March 4, 2005 decisions, as to how the medical evidence supported the Office's findings.

Following the September 2, 1999 Office decision, the Office issued an August 8, 2002 decision for a 6 percent arm impairment, March 4, 2005 decision for 5 percent and a November 17, 2006 decision for 13 percent. Combined with the prior Office decisions, appellant was awarded a total of 64 percent impairment to the arms. The record is not clear, however, as to how this was divided between the right and the left arms. A schedule award under 5 U.S.C.

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<sup>3</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>4</sup> A. *George Lampo*, 45 ECAB 441 (1994).

§ 8107(c)(1) is issued for an arm, not the arms.<sup>5</sup> It is necessary to document the specific percentage for each arm in order to ensure the proper development of the claim.<sup>6</sup>

The case will accordingly be remanded to the Office to properly determine the percentage of impairment to each arm that has been awarded in this case. The Board notes that appellant is entitled to compensation in accord with the terms of the decisions issued. After the Office has properly determined the right arm and left arm impairment that appellant has previously been awarded, it should review the medical evidence to determine if appellant has any additional impairment to either arm. The Office should then issue an appropriate decision.

**CONCLUSION**

The record was improperly developed with respect to the schedule award issue and the case is remanded to the Office for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 16, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 3, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>5</sup> 5 U.S.C. § 8107(c)(1) provides 312 weeks of compensation for complete loss of use of an arm.

<sup>6</sup> See *Carol A. Smart*, 57 ECAB 340 (2006) (the Office incorrectly determined the percentage previously awarded for the right leg, resulting in an incorrect schedule award decision). The Board notes that if a claimant submits evidence regarding an additional impairment to one arm, the previous impairment to the specific arm must be documented to properly determine the additional impairment.