

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

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R.B., Appellant )  
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and )  
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U.S. POSTAL SERVICE, POST OFFICE, )  
Milwaukee, WI, Employer )  
\_\_\_\_\_ )

**Docket No. 07-1034  
Issued: December 18, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 6, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' schedule award decision dated December 8, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

**ISSUE**

The issue is whether appellant has more than a 29 percent permanent impairment of his right upper extremity, for which he received schedule awards.

**FACTUAL HISTORY**

This case has previously been on appeal before the Board.<sup>1</sup> In a September 12, 2005 decision, the Board found that there was no medical evidence establishing that appellant had more than 27 percent impairment of the right and left arms, for which he received schedule awards. The facts and the history contained in the prior appeal are incorporated by reference.

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<sup>1</sup> Docket No. 05-456 (issued September 12, 2005).

In a February 15, 2006 report, Dr. Diane W. Braza, a Board-certified physiatrist and a treating physician, opined that appellant was totally disabled secondary to chronic pain and depression. She noted that she had previously completed a permanent impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) 166 (5<sup>th</sup> ed. 2001) and advised that appellant had a “high level of constant pain, with significant activity limitation and effect on mood resulting from chronic pain.” Dr. Braza opined that appellant was permanently disabled and reached maximum medical improvement. She included a copy of a September 27, 2001 report. Dr. Braza utilized the fourth edition of the A.M.A., *Guides* and opined that appellant had a residual degree of symptomatology, related to his neck operation, which included muscular guarding, muscular weakness, in coordination and loss of balance. She noted that appellant was within the diagnosis-related estimate cervical thoracic cavity five; severe upper extremity neurologic compromise. Dr. Braza indicated that appellant did “not require the use of an external or dysfunction or adaptive device, but that he has multilevel segmental involvement.” She opined that appellant has 35 percent whole person impairment. In a May 19, 2006 report, Dr. Braza opined that appellant had worsening right arm pain and paresthesias and that additional treatment was warranted.

In a July 6, 2006 report, Dr. Jacqueline Wertsch, a physiatrist, noted appellant’s history and advised that an electromyography (EMG) scan of the right upper extremity revealed multilevel C5 to T1 chronic changes.

On July 17, 2006 appellant requested a schedule award.

In a July 17, 2006 report, Dr. Braza opined that appellant had a worsening of his right upper extremity pain and paresthesias, which “may be secondary to chronic radicular pain, especially [at] C7-T1.” In a July 19, 2006 attending physician’s report, Dr. Braza diagnosed chronic pain syndrome affecting the upper extremities secondary to chronic radiculitis, which was caused or aggravated by his employment injury.

In an August 21, 2006 report, an Office medical adviser reviewed appellant’s history of injury and treatment, including that maximum medical improvement was reached on September 27, 2001. The medical adviser noted that in his last report, of October 17, 2004, he had recommended 27 percent to the bilateral upper extremities. Since then, Drs. Wertsch and Braza had submitted additional medical evidence related to increased pain in the right arm. The Office medical adviser noted that appellant advised that he had constant pain in the right arm starting proximal to the elbow and radiating into the 4<sup>th</sup> and 5<sup>th</sup> digits in that hand. He also noted that appellant’s pain was exacerbated with lifting, reaching, twisting or carrying. The Office medical adviser advised that appellant’s physical examination demonstrated that he had “no visible muscle atrophy or muscle fasciculations.” Additionally, he indicated that appellant’s strength in the right arm was diffusely decreased in all major muscle groups and advised that it was secondary to pain rather than true weakness. The Office medical adviser indicated that a recent upper extremity EMG did not reveal any new problems in the right ulnar nerve. He also indicated that appellant had an “excellent CMAP and motor response and there was no change in the ulnar sensory deficit as noted in previous upper extremity EMG tests.” The Office medical adviser opined that while appellant had “diffuse pain in the right upper extremity, there is no objective evidence to support a new radiculopathy or additional irritation of the ulnar nerve.” He

advised that as appellant's pain in the distribution of the C8 spinal nerve had increased, "he should now be awarded 5 percent [right upper extremity] [permanent partial impairment] for a [G]rade 1 pain in the distribution of the C8 spinal nerve." The Office medical adviser referred to Table 15-15 and Table 15-17.<sup>2</sup> He explained that since appellant had already received three percent for pain in the right C8 nerve root, appellant would be entitled to an additional two percent impairment. The Office medical adviser referred to the Combined Values Chart<sup>3</sup> and opined appellant's impairment of 29 percent to the right upper extremity. He opined that there was no objective evidence to support any additional impairment to the left upper extremity.

On December 8, 2006 the Office granted appellant a schedule award for an additional two percent impairment of the right arm. The award covered a period of 6.24 weeks from February 15 to March 30, 2006.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>5</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>6</sup> 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>7</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>8</sup>

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.<sup>9</sup> As neither the Act, nor its regulations provide for the payment of a schedule award for the permanent loss of use, of the back or the body as a whole, no claimant is entitled to such a schedule award.<sup>10</sup> The Board notes that section 8109(19) specifically excludes the back from the definition of organ.<sup>11</sup> However, a claimant may

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<sup>2</sup> A.M.A., *Guides* 424.

<sup>3</sup> *Id.* at 604.

<sup>4</sup> The decision actually indicated that the period of the award ran from February 16 to November 8, 2006. However, this appears to be a typographical error as the calculation sheet shows the correct date.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>8</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); 20 C.F.R. § 10.404.

<sup>9</sup> See *Richard R. Lemay*, 56 ECAB \_\_\_\_ (Docket No. 04-1652, issued February 16, 2005); see also *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>10</sup> 5 U.S.C. § 8107; see also *Richard R. Lemay*, *supra* note 9.

<sup>11</sup> 5 U.S.C. § 8109(19).

be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.<sup>12</sup>

### ANALYSIS

In support of his claim for an additional schedule award, appellant submitted several reports from his treating physician, Dr. Braza, a Board-certified physiatrist. However, the only report which specifically addressed appellant's impairment was her September 27, 2001 report. In that report, Dr. Braza indicated that she had utilized the fourth edition of the A.M.A., *Guides* and opined that appellant had a 35 percent whole person impairment. In this case, the Board notes that while Dr. Braza used the fourth edition of the A.M.A., *Guides* in making her assessment, the fifth edition of the A.M.A., *Guides* was required on all medical opinions dated after February 1, 2001.<sup>13</sup> The Board has held that a medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's permanent impairment.<sup>14</sup> Consequently, this report is of limited probative value.<sup>15</sup>

The Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.<sup>16</sup>

The Office medical adviser reviewed Dr. Braza's report and noted that the medical evidence indicated that appellant had increased pain in the right arm. He determined that appellant had constant pain in the right arm and radiating into the fourth and fifth digits in that hand. The Office medical adviser also indicated that appellant's pain was exacerbated with physical activity and that appellant's strength in the right upper extremity was diffusely decreased in all major muscle groups and opined that it was secondary to pain. The Office medical adviser indicated that recent diagnostic testing did not reveal any new problems in the right ulnar nerve and there was no change in the ulnar sensory deficit. He determined that appellant's pain in the distribution of the C8 spinal nerve had increased and that "he should now be awarded 5 percent [right upper extremity] [permanent partial impairment] for a [G]rade 1 pain in the distribution of the C8 spinal nerve." The Office medical adviser referred to Tables 15-15 and 15-17<sup>17</sup> and determined that appellant was previously awarded three percent impairment for Grade 3 radicular pain in the distribution of the C8 nerve root and was entitled to an additional

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<sup>12</sup> See *Richard R. Lemay* and *Thomas J. Engelhart*, *supra* note 9.

<sup>13</sup> See *A.S.*, 58 ECAB \_\_\_\_ (Docket No. 06-1613, issued November 29, 2006); FECA Bulletin No. 01-05 (issued January 29, 2001).

<sup>14</sup> *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999).

<sup>15</sup> Furthermore, the Board notes that appellant was not entitled to an increased schedule award based on impairment ratings pertaining solely to his back or whole person impairment. Neither the Act nor its implementing federal regulations provides for a schedule award for impairment to the back or to the body as a whole.

<sup>16</sup> See *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

<sup>17</sup> A.M.A., *Guides* 424, Tables 15-15 and 15-17. Although these tables noting loss of function due to pain are in the chapter of the A.M.A., *Guides* pertaining to the spine and not the upper extremity, essentially identical tables, Tables 16-10 and 16-11 appears on pages 482 and 484 of the A.M.A., *Guides* and pertains to the upper extremities.

two percent. The Board notes that, under Table 15-17, the maximum percentage loss due to sensory deficit or pain of the C8 nerve root is five percent. The Office medical adviser determined that appellant should now be awarded five percent for a Grade 1 pain in the distribution of the C8 spinal nerve. When the Grade 1 classification maximum of 99 percent from Table 15-15 is multiplied by the 5 percent maximum loss of function due to pain, in Table 15-17, the result is 5 percent impairment. Since, in the previous schedule award, appellant had already received three percent impairment for pain attributable to the C8 nerve root, the medical adviser recommended an additional two percent impairment. The Office medical adviser referred to the Combined Values Chart<sup>18</sup> and combined the previous award of 27 percent impairment with the 2 percent pain impairment to total 29 percent impairment of the right arm. He properly concluded that appellant was entitled to an additional two percent impairment for the right upper extremity. The Office medical adviser also noted that as there were no objective findings for the left upper extremity, appellant was not entitled to an additional impairment. He reported no other basis on which to attribute any greater impairment pursuant to the A.M.A., *Guides*.

On appeal, appellant alleged that he was entitled to a greater impairment. However, there is no medical evidence in the record establishing that appellant has more than the 29 percent impairment of the right upper extremity and a 27 percent impairment of the left upper extremity for which he received a schedule award.

#### **CONCLUSION**

The Board finds that appellant has not established that he has more than 29 percent impairment of the right upper extremity and 27 percent impairment of the left upper extremity.

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<sup>18</sup> A.M.A., *Guides* 604.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 8, 2006 is affirmed.

Issued: December 18, 2007  
Washington, DC

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

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

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