

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LINDA BAILEY and U.S. POSTAL SERVICE,  
POST OFFICE, Anchorage, AK

*Docket No. 00-754; Submitted on the Record;  
Issued October 29, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant is entitled to greater than 12 percent impairment of the left upper extremity for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing as untimely filed.

On January 25, 1994 appellant, then a 39-year-old part-time flexible letter sorter, sustained a left shoulder injury in the performance of duty while casing mail.<sup>1</sup> The Office accepted appellant's traumatic injury claim for a left shoulder sprain and cervical disc herniation at C6-7. She underwent an anterior interbody fusion performed on June 8, 1994.

On March 13, 1996 appellant filed a CA-7 claim for a schedule award.

In an April 29, 1996 treatment note, Dr. George R. Vrablik, a Board-certified orthopedic surgeon, noted that appellant presents for an impairment rating. He stated:

"Based on operative disc problem with residuals, she rates nine percent impairment on Table 49, [American Medical Association, *Guides to the Evaluation of Permanent Impairment*], (third edition). She as had a fusion of two cervical vertebrae in a favorable position which rates four percent impairment based on Table 50 and based on motion, the patient has nine percent; that is three percent impairment in flexion, two percent impairment in extension, one percent impairment left rotation, one percent impairment right rotation, one percent left bend, one percent impairment right bend. Total impairment using the combined values tables is 20 [percent.]"

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<sup>1</sup> Appellant was holding a bundle of mail, weighing approximately two to three pounds in the left arm and casing with the right hand.

In a September 18, 1996 letter, the Office notified Dr. Vrablik that he was required to rate appellant's permanent impairment based on the fourth edition and not the third edition of the A.M.A., *Guides*.

On October 11, 1996 Dr. Vrablik prepared a report indicating that appellant's impairment rating remained at 20 percent under either the fourth or third editions of the A.M.A., *Guides*. He stated:

"The patient losses some impairment in flexion, with only two percent impairment. Extension remains two percent impairment. Left bend and right bend are one percent each, and left rotation and right rotation are one percent impairment each for a total of eight percent impairment based on motion. Table 75 rates 9 percent impairment and [T]able 73 rates 5 percent impairment. Combining these using the Combined Value [Chart], it gives a combined value of 20 percent impairment."

The Office referred Dr. Vrablik's October 11, 1996 report to an Office medical adviser for review.

On February 7, 1997 the Office medical adviser responded that Dr. Vrablik's impairment rating examined had included recommendations related to cervical range of motion. He noted that Dr. Vrablik made no finding with regard to impairment of either upper extremity. The Office medical adviser rated appellant's permanent partial impairment as zero percent in either arm.

By letter dated June 30, 1997, the Office inquired of Dr. Vrablik whether or not he agreed with the findings of the Office medical adviser.

In a report dated August 21, 1997, Dr. Vrablik noted that the fourth edition of the A.M.A., *Guides* "does not combined (sic) the table impairment rating with range of motion." He opined that based on range of motion appellant had 8 percent impairment and that, based on Table 75, page 113, appellant had 10 percent impairment of the whole person.

In a letter dated October 27, 1997, the Office informed appellant that he was not entitled to receive a schedule award for the cervical spine, unless the injury caused impairment to a scheduled member under 5 U.S.C. § 8107 of the Federal Employees' Compensation Act. Appellant was directed to submit evidence if he was claiming permanent impairment for another part of his body besides the cervical spine.

By letter dated March 9, 1998 addressed to appellant and Dr. Vrablik, the Office explained the requirements for establishing entitlement to a schedule award. The Office further advised that whole person ratings were not acceptable in evaluating permanent partial impairment.

In an April 30, 1998 treatment note, Dr. Vrablik noted that appellant presented for an impairment rating of her cervical spine. He noted appellant's history of injury. He reported that appellant had 4/5 strength in all muscles of the upper extremity and dysesthesias involving C6-7 and C8. Dr. Vrablik noted that he was unable to rate appellant's whole person impairment based

on the anterior cervical fusion at C6-7 because whole person was not permitted under FECA. He referenced the A.M.A., *Guides* for calculation of the upper extremity impairment due to a spinal nerve injury and stated:

“Using Table 13, page 3/51, it is determined that spinal nerve C6 has a maximum percent upper extremity impairment of 8 percent due to sensory deficit and/or pain. Using this with Table 11, the patient rates 60 percent sensory deficit due to decreased sensibility with or without abnormal sensation or pain, which interferes with activity. This is grade 3. Based on this, C6 sensory impairment 4.8 percent of the upper extremity. C7 and C8 rate 5 percent upper extremity impairment due to sensory deficit and/or pain. Again, the patient has 60 percent sensory deficit based on decreased sensibility with or without abnormal sensation. Each of these values, 5 percent x 60 percent is 3 percent impairment for C6-7 and C8 nerves. Combined sensory impairment ... is 10.8 percent of the upper extremity (left).

“Based on motor deficit, C6 rates 35 percent using Table 12. The patient has grade 4 muscle strength, which rates 5 percent motor deficit. 25 percent x 35 percent gives us a value of 8.75 percent for the C6 nerve root. In addition, the C7 nerve root has the same values, which gives us another 8.75 percent and the C8 nerve root has a motor deficit value of 45 percent x 25 percent giving us a value of 11.25 percent.”

Dr. Vrablik estimated appellant’s total motor deficit impairment as 28.75 percent rounded up to 29 percent. Using the Combined Value Chart (29 percent + 11 percent) he opined that appellant had a total of 37 percent impairment of the left upper extremity.

The Office scheduled appellant for a second opinion evaluation with Dr. Holm C. Neumann, a Board-certified orthopedic surgeon, on November 12, 1998. Dr. Neumann opined that appellant had a Category 2 intervertebral disc and other soft tissue lesions with residual pain and rigidity, which was rated as a nine percent whole person impairment under Table 75, page 3-113 of the fourth edition of the A.M.A., *Guides*. He noted no weakness in the upper extremities and a 5/5 strength in all muscle groups tested. With regard to cervical range of motion, he noted a 15 degree loss of motion or a 2 percent whole person impairment under Table 75, page 3-118. Loss of lateral flexion was reported as 1 percent whole person impairment of the right and left, while right and left rotation showed a 20 percent loss and a 1 percent impairment on each side. The total loss of range of motion was calculated at 8 percent. Using the Combined Value Chart, Dr. Neumann calculated a total of 17 percent loss of the whole person for appellant’s condition.

In a report dated January 29, 1999, Dr. Neumann noted that appellant had 140 degrees of adduction according to Figure 1, page 44 of the fourth edition of the A.M.A., *Guides* for a 2 percent upper extremity impairment due to loss of range of motion. He stated, “However, her normal range of motion in the right shoulder exhibited abduction to 154 degrees and, according to that, her normal should would have one percent impairment.” Dr. Neumann estimated that appellant had a one percent upper extremity impairment for abduction loss in the left shoulder from her January 25, 1994 work injury.

In a March 18, 1999, Dr. Neumann noted that appellant's rating of impairment was unchanged over those noted in his addendum report of January 29, 1999. He stated:

“In regards to the patient's sensation, she did show some subjective loss of sensation on examination, but this sensory loss was nonanatomic in nature, did not fit any dermatomal pattern of loss, and no valid ratable impairment to sensory loss was found on examination. The patient did have two point discrimination entirely within the normal range for her entire upper extremity. According to Table 11, page 48 in the [fourth edition of the A.M.A., *Guides*], she would be placed in a grade 1 classification. To correct an error in my addendum report of January 29, 1999, the shoulder with the slightly decreased range of motion in the *left* shoulder.”

The Office found a conflict of medical opinion and referred appellant for an impartial medical evaluation with Dr. Robert A. Berselli, a Board-certified orthopedic surgeon. In a report dated July 12, 1999, Dr. Berselli noted appellant's history of work injury and medical treatment. Physical findings included full range of motion in the left shoulder compared to the right shoulder; muscle testing of the upper extremities revealed slight weakness of flexion of the left elbow as compared to the right elbow, rated at 4/5; decreased triceps reflex on the left side compared to the right side; nondermatomal sensory abnormalities to pinprick sensation of the left upper extremity. Dr. Berselli obtained x-rays of the cervical spine that showed a solid interbody fusion at C6-7 and degenerative disc disease at C5-6 and C4-5. He opined that appellant suffered from limited cervical spine motion as a result of her work injury and surgery performed on June 8, 1994. Dr. Berselli further noted that appellant “may have some irritation because of the degenerative disc disease at the C5-6 level, of the nerve root subserving the muscular function of the left biceps muscle.”

The Office contacted Dr. Berselli and advised him that he had incorrectly evaluated appellant's permanent partial impairment based on the whole person and not the left upper extremity; therefore, he was requested to provide a supplemental report.

In a report dated August 24, 1999, Dr. Berselli opined that appellant had a 12 percent impairment of the left arm under the fourth edition of the A.M.A., *Guides*. He referenced Table 13, page 3/51, “in which the maximum percent of upper extremity impairment of the C6 nerve root for sensory deficit of pain, is 25 percent of 8 or 1.6 That due to motor deficit at the C6 level is 30 percent of 35 or 10.5 percent.” Using the combined table on page 322, he stated that appellant's value is 12 percent impairment.

In a decision dated September 1, 1999, the Office issued appellant a schedule award for 12 percent permanent impairment of the left extremity. The period of the award was from November 1, 1997 to July 21, 1998.

By letter dated September 30, 1999, which was date-stamped as received by the Office on October 6, 1999, appellant requested an oral hearing. An express mail receipt is of record indicating that appellant mailed her hearing request on October 4, 1999.

In a November 2, 1999 decision, the Office denied appellant's hearing request as untimely filed. The Office, however, exercised its discretionary authority to review appellant's hearing request and determined that it was further denied on the grounds that the issue of the case could be equally well addressed by requesting reconsideration.

The Board finds that appellant has failed to establish that she is entitled to greater than 12 percent impairment of the left upper extremity for which she received a schedule award.

The schedule award provision of the Act<sup>2</sup> and its implementing federal regulation<sup>3</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members, functions or organs of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>4</sup> 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.<sup>5</sup>

The Board notes that a conflict in the record existed between Drs. Vrablik and Neumann as to whether appellant showed any reduced muscle strength in his left upper extremity. The Office, therefore, properly referred appellant for an impartial medical evaluation. Section 8123 of the Act provides that, if there is a 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.<sup>6</sup>

When a case is referred to a referee medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>7</sup> Dr. Berselli's report was based on a proper factual history and contained sufficient reasoning to entitle it to the weight of the medical evidence of record. He concluded that appellant had 12 percent impairment of the left upper extremity based on the fourth edition of the A.M.A., *Guides*. The Board, therefore, affirms the Office's finding that appellant has 12 percent permanent impairment of the left upper extremity due to her accepted work injury.

The Board also finds that the Office properly denied appellant's hearing request as untimely filed.

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (1999).

<sup>4</sup> 5 U.S.C. § 8107(c)(19).

<sup>5</sup> See 20 C.F.R. § 10.404 (1999).

<sup>6</sup> See *Shirley L. Steib*, 46 ECAB 309 (1994).

<sup>7</sup> *Sherry Hunt*, 49 ECAB 467 (1998); *Wiley Richey* 49 ECAB 166 (1997).

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.<sup>8</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>9</sup>

Because appellant's hearing request was postmarked October 4, 1999, more than 30 days after the Office's September 1, 1999 decision, the Office correctly found that appellant was not entitled to a hearing as a matter of right.<sup>10</sup> The Office nevertheless considered appellant's request for a hearing and properly determined that the issue of the case could be equally well resolved through a request for reconsideration. Accordingly, the Board finds that the Office did not abuse its discretion in its denial of appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated November 2 and September 1, 1999 are hereby affirmed.

Dated, Washington, DC  
October 29, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>8</sup> See 5 U.S.C. § 8124(b).

<sup>9</sup> See 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

<sup>10</sup> The date of the hearing request is determined by the postmark of the request. 20 C.F.R. §10.616(a) (1999); see also *Gus N. Rodes*, 43 ECAB 268 (1991).