

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

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M.S., Appellant )  
and ) Docket No. 08-1326  
DEPARTMENT OF THE NAVY, NAVAL SEA ) Issued: November 4, 2008  
SYSTEMS COMMAND, Colts Neck, NJ, )  
Employer )  
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*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On April 2, 2008 appellant filed a timely appeal from a March 12, 2008 decision of the Office of Workers' Compensation Programs, adjudicating his schedule award claim. 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 has more than 11 percent permanent impairment of his right upper extremity.

**FACTUAL HISTORY**

This is the second appeal in this case.<sup>1</sup> By order dated January 28, 2008, the Board remanded the case for reconstruction because a portion of a February 26, 2007 Office decision was missing from the record.

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<sup>1</sup> Docket No. 07-2090 (Order Remanding Case issued January 28, 2008).

On November 27, 2001 appellant, then a 54-year-old material handler, filed a claim for cervical sprain and postconcussion syndrome when an object fell onto his head at work. The Office accepted his claim and later appellant subsequently filed a claim for a schedule award. It expanded the claim to include cervical radiculopathy.

In a January 3, 2005 report, Dr. David Weiss, an osteopath specializing in orthopedic medicine, reviewed appellant's medical history and provided findings on physical examination. He stated that appellant had daily and constant cervical pain and stiffness which radiated to the upper back. Appellant experienced intermittent numbness and tingling in his right upper extremity. Dr. Weiss described appellant's pain level as a 7 to 10 on a 0 to 10 scale. Appellant experienced difficulty with performing his job as a forklift driver, performing household chores, personal grooming, walking greater than three blocks, climbing stairs, swimming, driving, lifting more than 40 pounds and repetitive bending and lifting. Dr. Weiss diagnosed chronic post-traumatic cervical sprain and strain, right cervical radiculopathy, post-traumatic facet arthropathy to the cervical spine, and a bulging disc at C3-4. He found that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition, appellant had 13 percent combined right upper extremity impairment for sensory deficit of the C5 and C6 nerve roots, including 4 percent for the C5 nerve and 6 percent for the C6 nerve, according to Tables 15-15 and 15-17 at page 424 and 3 percent for pain according to Table 18-1 at page 574.

By decision dated June 29, 2005, the Office denied appellant's schedule award on the grounds that he was not entitled to a schedule award for a back injury. Appellant requested an oral hearing. By decision dated November 18, 2005, an Office hearing representative set aside the June 29, 2005 decision and remanded the case for further development of the medical evidence.

On January 17, 2006 the Office asked an Office medical director to review the report of Dr. Weiss and determine appellant's impairment. The Office medical director found that the appellant had 11 percent impairment of the right upper extremity based on the report of Dr. Weiss. This included eight percent for sensory deficits of the C5 and C6 nerve roots and three percent for pain. The Office medical director stated that the Office should accept cervical radiculopathy as a work-related condition.<sup>2</sup>

By decision dated March 22, 2006, the Office granted appellant a schedule award for 11 percent impairment of his right upper extremity from January 3 to August 31, 2005, or 34.32 weeks.<sup>3</sup>

On September 8, 2006 appellant, through his representative, requested reconsideration. The Office found a conflict in the medical opinion evidence between Dr. Weiss and the Office medical director as to appellant's right upper extremity impairment. It referred appellant,

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<sup>2</sup> On September 20, 2006 the Office accepted cervical radiculopathy as related to appellant's November 27, 2001 employment injury.

<sup>3</sup> The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of the upper extremity. 5 U.S.C. § 8107(c)(10). Multiplying 312 weeks by 11 percent equals 34.32 weeks of compensation.

together with a statement of accepted facts, a list of questions and the case record, to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 14, 2006 report, Dr. Fries reviewed appellant's medical history, course of treatment and the results of diagnostic tests. He provided detailed findings on physical examination. Dr. Fries stated that appellant had no right upper extremity impairment causally related to his November 27, 2001 employment injury. He stated:

"The basis for accepting cervical radiculopathy was Dr. Weiss' January 3, 2005 evaluation in which he opined [that appellant] had 'perceived sensory deficit over the C5-C6 dermatome involving the right upper extremity,' and then provided percentage impairments for right C5 and right C6 nerve roots....

"[Appellant] has no such sensory deficits, nor even sensory complaints in C5 or C6 distributions upon examination. [Note the enclosed symptom drawing completed by [appellant] and the above complaints elicited and dictated in his presence]. Medical records are almost silent concerning upper extremity complaints past his shoulders.

"I found no other objective or subjective findings on physical examination to confirm C5 or C6 cervical radiculopathies.

"However, [appellant] has florid findings consistent with widespread rheumatoid arthritis. His right shoulder, right acromioclavicular [joint], left elbow, both wrists, probably both ankles and possibly cervical and lumbar spine are involved. This widespread nontraumatic condition substantially influences strength, movement, discomfort and pain in each of these areas. His arthritis is not related to his November 27, 2001 accident.

"[Appellant] [h]as decreased cervical motion, but according to [the Act], this does not qualify, as there is no effect upon an upper extremity. His lack of neck motion is most likely due to generalized rheumatoid arthritis and not trauma."

By decision dated February 26, 2007, the Office denied modification of the March 22, 2006 schedule award decision.<sup>4</sup>

On March 12, 2008 the Office issued a complete copy of the February 26, 2007 decision.

#### **LEGAL PRECEDENT**

Section 8107 of the Act<sup>5</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as

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<sup>4</sup> The February 26, 2007 Office decision of record was missing portions of the Office's analysis of the evidence.

<sup>5</sup> 5 U.S.C. § 8107.

permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>6</sup>

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 [of Labor] shall appoint a third physician who shall make an examination.”<sup>7</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.

### ANALYSIS

In this case, Dr. Weiss found that appellant had 13 percent right upper extremity impairment. The Office medical director found 11 percent impairment. Due to the conflict in the medical opinion evidence between the two physicians as to appellant’s right upper extremity impairment, the Office referred him to Dr. Fries for an impartial medical examination.

Dr. Fries provided a comprehensive report dated December 14, 2006. He was provided with appellant’s case file and a statement of accepted facts. Dr. Fries reviewed the factual and medical background in the record, including diagnostic test results. He provided detailed findings on physical examination. Dr. Fries found that appellant had no sensory deficits in his right upper extremity or even sensory complaints in C5 or C6 distributions, upon examination. He found no other objective or subjective findings on physical examination to confirm C5 or C6 cervical radiculopathies. Dr. Fries did note physical findings consistent with widespread rheumatoid arthritis in appellant’s right shoulder, right acromioclavicular joint, left elbow, both wrists, probably both ankles and possibly his cervical and lumbar spine. He noted that appellant’s widespread rheumatoid arthritis substantially influences his strength, movement, discomfort and pain in each of these areas. Dr. Fries opined that appellant’s arthritis was not related to his November 27, 2001 employment-related conditions, cervical sprain and radiculopathy and postconcussion syndrome.

The Board finds that Dr. Fries’ thorough and well-rationalized report is entitled to the special weight accorded an impartial medical specialist and constitutes the weight of the medical evidence.<sup>8</sup> His report establishes that appellant has no additional permanent impairment of his right upper extremity. Dr. Fries provided thorough medical rationale for his medical opinion that appellant had no right upper extremity impairment at the time of his examination. His report establishes that appellant has no additional permanent impairment of his right upper extremity causally related to his November 27, 2001 employment injury. Therefore, appellant is not entitled to an additional schedule award for his right upper extremity. The Board finds that the

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<sup>6</sup> 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>7</sup> 5 U.S.C. § 8123(a); see also *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>8</sup> See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

weight of the medical evidence establishes that appellant has no more than 11 percent impairment of his right upper extremity for which he received a schedule award.

On appeal, appellant asserts that Dr. Fries' opinion regarding his right upper extremity impairment is not entitled to special weight because he did not acknowledge that appellant's claim was expanded to include cervical radiculopathy. However, Dr. Fries noted in his report that the Office's medical director had accepted cervical radiculopathy as work related. At the time of his examination of appellant, he found that appellant's symptoms were related to his nonwork-related rheumatoid arthritis, not cervical radiculopathy.

### **CONCLUSION**

The Board finds that appellant has no more than 11 percent impairment of his right upper extremity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 12, 2008 is affirmed.

Issued: November 4, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board