

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

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C.U., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,** )  
**ZABLOCKI MEDICAL CENTER,** )  
**Milwaukee, WI, Employer** )

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**Docket No. 08-1941**  
**Issued: April 16, 2009**

*Appearances:*  
*Appellant, pro se*  
*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 June 30, 2008 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated January 7, 2008 finding that appellant was not entitled to a schedule award of greater than six percent for her right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether appellant has greater than six percent impairment to her right upper extremity, for which she received a schedule award.

**FACTUAL HISTORY**

This case was previously before the Board.<sup>1</sup> In a September 25, 2007 decision, the Board found that there was an unresolved conflict in the medical evidence between appellant's treating

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<sup>1</sup> Docket No. 07-1221 (issued September 25, 2007). On May 27, 2003 appellant, then a 59-year-old medical support assistant, sustained an injury to her neck and right shoulder when the elevator she was riding stopped

physician, Dr. Subbanna Jayaprakash, a Board-certified physiatrist, who found that appellant had a 16 percent impairment to her right upper extremity<sup>2</sup> and the Office medical adviser, who found that appellant had no more than a 6 percent impairment of the right upper extremity.<sup>3</sup> Accordingly, the Board found that the case was not in posture for decision and remanded the case for referral to an impartial medical specialist to resolve the conflict in evidence and for the Office to then issue a new decision. The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein.

On remand, by letter dated November 6, 2007, the Office referred appellant to Dr. Norman Bettle, a Board-certified neurologist, for an impartial medical examination. In a report dated December 4, 2007, Dr. Bettle noted that appellant's nerve conduction study/electromyography was essentially normal, not revealing evidence for neuropathy, brachial plexopathy or C5-T1 motor radiculopathy on the right upper extremity. He also noted normal tone in both upper and lower extremities and in the cervical paraspinal muscles, with no atrophy noted in the neck/shoulder region and proximal and distal arm. Dr. Bettle found 5/5 strength in the bilateral deltoid, biceps, triceps pronator teres, abductor pollicis brevis (APB) and abductor digiti minimi (ADM) muscles. He opined that appellant had a four percent impairment of the right upper extremity. In reaching this conclusion, Dr. Bettle noted that appellant continued to have sensory symptoms consistent with a right C6 sensory radiculopathy but noted that, on examination and electromyogram, no evidence for a motor radiculopathy could be found. He opined that the C6 nerve root could be affected due to reported mild to moderate neuroforaminal narrowing at that level of the first magnetic resonance imaging (MRI) scan. Dr. Bettle then opined that, pursuant to Tables 15-15, Table 15-17 and 16-13 of the A.M.A., *Guides*, an impairment of four percent "seems most appropriate."<sup>4</sup> He indicated that he could not grant motor impairment pursuant to the A.M.A., *Guides*.

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abruptly. She stopped work the date of the accident and did not return. On November 25, 2003 the Office accepted appellant's claim for a cervical fracture and appropriate medical and compensation benefits were paid. Appellant retired effective December 8, 2003.

<sup>2</sup> In a medical report dated March 10, 2006, Dr. Jayaprakash indicated that appellant had residual weakness of the C6 root affecting the right biceps and supinator and hand grip at 3+4 (30 percent) loss as well as supraspinatus (30 percent). He also found residual numbness in the C6 distribution at 50 percent especially forearm and index finger right. Dr. Jayaprakash determined appellant's impairment due to sensory changes by multiplying 8 percent (maximum upper extremity impairment due to sensory deficit or pain for the C6 spinal nerve pursuant to American Medical Association, *Guides to the Evaluation of Permanent Impairment* 489, Table 16-13) by 50 percent (residual numbness in the C6 distribution) to conclude that appellant had a 4 percent impairment based on sensory deficit. He then calculated appellant's impairment due to motor deficit as 12 percent. Combining these two figures, Dr. Jayaprakash determined that appellant had a 16 percent impairment of the right upper extremity.

<sup>3</sup> The Office medical adviser indicated in a report dated June 5, 2006, that, after reviewing appellant's medical record, she was entitled to a four percent impairment for pain/sensory deficit in the C6 nerve distribution on the right. He further noted a one percent right upper extremity impairment based on Tables 15-15 combined with Table 15-17 of the A.M.A., *Guides* 424. The Office medical adviser then added an additional two percent impairment for Grade 4 motor deficit in her right C6 nerve distribution according to A.M.A., *Guides* 424, Tables 15-16. He then calculated appellant's total impairment to his right upper extremity as six percent.

<sup>4</sup> A.M.A., *Guides* 424, Table 15-15, 15-17; 489, Table 16-13.

By decision dated January 7, 2008, the Office determined that appellant was not entitled to a schedule award for greater than six percent of the right upper extremity.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>5</sup> and its implementing regulations<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. 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.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>7</sup>

### **ANALYSIS**

In the instant case, a conflict arose between appellant's treating physician, Dr. Jayaprakash, and the Office medical adviser with regard to the extent of impairment to appellant's right upper extremity. Dr. Jayaprakash found that appellant had 16 percent impairment to the right upper extremity and the Office medical adviser determined that appellant had 6 percent impairment. Pursuant to this Board's decision dated September 25, 2007, the Office referred appellant to Dr. Bettle for an impartial medical examination, who found that appellant had a four percent impairment based on sensory deficit. This finding is actually consistent with both the opinion of Dr. Jayaprakash and the Office medical adviser, who both found that, based on the A.M.A., *Guides*, appellant had a four percent impairment based on sensory deficit of the C6 nerve.<sup>8</sup> However, unlike either Dr. Jayaprakash or the Office medical adviser, Dr. Bettle determined that he could not grant motor impairment. His decision not to grant an impairment rating for motor deficit was supported by normal muscle tone in appellant's extremities and in the cervical paraspinal muscles and no atrophy noted in the neck and shoulder region and proximal and distal arm and no evidence of motor radiculopathy. Dr. Bettle also found 5/5 strength in the bilateral deltoid, biceps, triceps pronator teres and APB and ADM muscles.

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>8</sup> A.M.A., *Guides* 489, Table 16-13.

The Board finds that the special weight of the medical evidence rests with the well-rationalized opinion of the impartial medical specialist, Dr. Bettle,<sup>9</sup> who opined that appellant had four percent impairment to his right upper extremity was based on an accurate factual and medical history and upon a proper interpretation of the A.M.A., *Guides*. Dr. Bettle determined that appellant was entitled to four percent impairment based on sensory deficit but no impairment due to motor deficit. Accordingly, appellant has not established that she is entitled to a schedule award for greater than a six percent impairment of his right upper extremity.

**CONCLUSION**

The Board finds that appellant has no greater than six percent impairment to her right upper extremity, for which she received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 7, 2008 is affirmed.

Issued: April 16, 2009  
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

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<sup>9</sup> See *Darlene R. Kennedy*, 57 ECAB 414 (2006).