

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

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N.S., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,** )  
**NEW JERSEY HEALTHCARE SYSTEM,** )  
**East Orange, NJ, Employer** )

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**Docket No. 10-310**  
**Issued: November 4, 2010**

*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  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 13, 2009 appellant filed a timely appeal from an August 14, 2009 decision of the Office of Workers' Compensation Programs in which a hearing representative affirmed a January 15, 2009 schedule award decision. 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 met her burden of proof to establish that she is entitled to a schedule award for her accepted lumbar strain and right lateral epicondylitis.

On appeal counsel contends that the opinion of Dr. Thomas K. Bills, Board-certified in orthopedic surgery, should not be given special weight because it is speculative and unrationalized and because he performed no motor or grip strength testing.

## **FACTUAL HISTORY**

On February 24, 2003 appellant, then a 67-year-old accountant, filed a traumatic injury claim, alleging that on February 20, 2003 she injured her back when she tripped on a computer wire. The Office accepted the conditions of lumbar sprain and right lateral epicondylitis and she returned to regular duty.

Appellant filed a schedule award claim on August 6, 2004. In a March 29, 2004 report, Dr. David Weiss, an osteopath, noted the history of injury and appellant's complaint of daily radiating low back pain and stiffness and right elbow pain with stiffness and swelling. He stated that her daily activity was restricted in regard to household duties and self-care. On physical examination of the lumbar spine, there was paravertebral muscle spasm and tenderness with diminished range of motion with strength testing of the gastrocnemius musculature and hip flexors 5/5 bilaterally and a normal sensory examination of both lower extremities. Examination of the right elbow demonstrated tenderness and flexion-extension of 145/145 degrees, pronation of 80/80 degrees and supination of 80/80 degrees. Muscle strength testing of the biceps and triceps musculature was 5/5. Grip strength testing demonstrated 16 kilograms (kg) of force on the right and 28 kg of force on the left. Dr. Weiss stated that he rated impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>1</sup> From Table 16-34, appellant had a 20 percent grip strength deficit and, under Table 18-1, a right upper extremity pain-related impairment of 3 percent, for a total 23 percent right upper extremity impairment. He also found pain-related impairments of three percent for each lower extremity.

In an October 4, 2005 report, Dr. Andrew Merola, a Board-certified orthopedic surgeon and Office medical adviser, reviewed Dr. Weiss' report. He advised that the findings on examination did not conform to the physical therapy notes or other medical records. Dr. Merola recommended further evaluation.

The Office determined that a conflict in medical evidence had been created between the reports of Dr. Weiss and the Office medical adviser, and referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial evaluation. In a January 17, 2006 report, Dr. Dennis reviewed the statement of accepted facts and medical record and noted appellant's complaint of constant, severe pain in the right elbow, right knee and back, radiating into both legs with numbness. Appellant could not grip anything with her right hand or sit for long periods of time, and had difficulty performing household chores. Examination of the lumbar spine demonstrated obvious congenital scoliosis and mild limitation of motion but no referred pain and no evidence of radiculopathy, and five negative straight leg raising tests. The right elbow revealed a large birthmark extending from the shoulder to the anterior aspect of the elbow represented by slight discoloration and thickening of the skin on the volar aspect of the arm and forearm. Dr. Dennis noted that Dr. Weiss did not discuss either of these conditions. He advised that grip strength testing showed a great deal of voluntary limitation of maximal effort but demonstrated no difference in the two hands. Range of motion was normal. Dr. Dennis diagnosed preexisting, unrelated and unaltered scoliosis in the thoracolumbar spine; degenerative

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

changes of the lumbar spine causing restricted motion; no current evidence of sciatica or radiculopathy in the lower extremities whatsoever; no evidence of sensory motor, or reflex changes in either lower extremity that would cause a permanency determination; historic sprain of the right elbow, possibly work related, without any current definable residual that could be attributed to post-traumatic changes other than pain of a minimal degree about the medial epicondyle of the right elbow which was not ratable; preexisting birthmark with some tightening of the skin of the anterior aspect of the right arm and forearm; no evidence of radiculitis and resolved cervical sprain. In answer to specific Office questions, he advised that maximum medical improvement had been reached several years prior and in accordance with the A.M.A., *Guides*, appellant had no permanent impairment due to her accepted conditions.

In reports dated February 26 and March 16, 2006, Dr. Merola reviewed the report of Dr. Dennis and agreed that appellant had no impairment. In a March 25, 2006 report, a second Office medical adviser, Dr. Henry Magliato, also Board-certified in orthopedic surgery, reviewed the medical evidence and agreed that appellant had zero impairment.

By decision dated June 5, 2008, the Office found the weight of medical opinion was represented by Dr. Dennis. It denied appellant's claim for a schedule award.

Appellant, through her attorney, requested a hearing. In an August 23, 2006 decision, an Office hearing representative found that a conflict in medical opinion did not arise between Dr. Weiss and the first Office medical adviser. Therefore, Dr. Dennis was an Office referral physician; but a conflict in opinion was created between Dr. Weiss and Dr. Dennis. The hearing representative remanded the case to the Office to schedule an impartial evaluation.

On March 23, 2007 the Office referred appellant to Dr. Bills, Board-certified in orthopedic surgery, for an impartial evaluation.<sup>2</sup>

In an April 18, 2007 report, Dr. Bills described the history of injury and reported appellant had been in a motor vehicle accident in December 2006, sustaining several rib fractures and injuries to her left knee. He noted his review of the medical record including the reports of Dr. Weiss and Dr. Dennis. Physical examination demonstrated a normal gait with no atrophy of the upper and lower extremities and full range of motion of the cervical, thoracic and lumbar spines, both shoulders, elbows and wrists. There was a positive impingement sign at the right shoulder, and examination of the right elbow demonstrated lateral epicondylar tenderness with no swelling, warmth, instability or crepitus present and a normal sensory examination. Bilateral lower extremity examination demonstrated mild crepitus with range of motion, no instability or effusion and normal neurologic examination. Dr. Bills concluded that appellant had no permanent impairment related to the February 20, 2003 employment injury.

By report dated June 1, 2007, Dr. Morley Slutsky, an Office medical adviser Board-certified in occupational and preventive medicine, noted that he had not been provided with a list

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<sup>2</sup> The record reflects that appellant was referred to Dr. Nasser Ani, a Board-certified orthopedic surgeon, for an impartial evaluation; however, appellant was examined by an associate of Dr. Ani. It is well established that the physician selected to conduct an impartial examination must conduct the evaluation. See *D.A.*, 61 ECAB \_\_\_ (Docket No. 09-936, issued January 13, 2010); *Shirley L. Steib*, 46 ECAB 309 (1994).

of the accepted conditions. He noted that Dr. Bills did not provide goniometer readings for his range of motion findings or explain his finding of normal neurologic examination in both upper extremities. On June 11, 2007 the Office asked Dr. Bills to provide range of motion measurements in accordance with the A.M.A., *Guides*, and further explain his examination findings. On July 26, 2007 it asked that an Office medical adviser review Dr. Bills' April 18, 2007 report, and by report dated July 30, 2007, Dr. Magliato reviewed the medical evidence and advised that appellant had zero impairment.

In an August 8, 2007 decision, the Office found that appellant was not entitled to a schedule award.

On August 13, 2007 appellant, through her attorney, requested a hearing.

In a November 13, 2007 decision, an Office hearing representative remanded the case to the Office to obtain a supplemental report from Dr. Bills, as was requested.

On November 28, 2007 the Office asked that Dr. Bills provide clarification of his examination. In a June 13, 2007 report, received by the Office on January 14, 2008, Dr. Bills advised that he did not measure appellant's range of motion with a goniometer but that her range of motion was entirely normal, and that this comported with the A.M.A., *Guides*. He stated that he did not perform two-point discrimination, protective sensibility, and light touch examination as these were subjective, and advised that, if further impairment evaluation was needed, a reexamination should be scheduled.

By report dated February 11, 2008, Dr. Slutsky noted his review of the medical record including the reports of Dr. Weiss, Dr. Dennis and Dr. Bills. He indicated that, as all physicians found normal right upper extremity range of motion, and that Dr. Dennis reported suboptimal effort on grip strength testing, appellant had no ratable right upper extremity impairment. Dr. Slutsky also noted that both Dr. Bills and Dr. Dennis found no evidence of sensory, motor or reflex changes in either lower extremity and therefore there was no ratable lower extremity impairment.

In a February 13, 2008 decision, the Office denied appellant's claim for a schedule award.

On February 20, 2008 counsel requested a hearing. Appellant described her physical conditions and stated that Dr. Dennis conducted a very brief physical examination, and that Dr. Bills did not examine her.

Appellant was not present at the hearing held on June 25, 2008. Counsel argued that Dr. Bills' examination was insufficient for schedule award purposes.

By decision dated August 27, 2008, an Office hearing representative found Dr. Bills' opinion incomplete, and remanded the case to the Office to refer appellant to Dr. Bills for reexamination.

On October 16, 2008 the Office referred appellant to Dr. Bills for further examination and clarification of his opinion. In an October 29, 2008 report, Dr. Bills noted appellant's

complaints of bilateral knee pain, lower back pain and right elbow pain and weakness in the right arm. Physical examination demonstrated a normal gait with no atrophy in her upper or lower extremities and a right thoracolumbar scoliosis. Dr. Bills provided specific range of motion findings for the cervical, thoracic and lumbar spines, shoulders, elbows, wrists, hips, knees and ankles and wrists was normal.<sup>3</sup> Right shoulder examination demonstrated no instability, swelling, erythema or warmth, and no detectable elbow joint effusion. Evaluation of both knees revealed no effusion or instability in any plane in either knee with mild crepitus on range of motion. Neurologic examination of both upper and lower extremities was entirely within normal limits, including determination of muscle strength, reflexes and sensation. Dr. Bills reviewed a September 16, 2005 lumbar spine x-ray that demonstrated thoracolumbar scoliosis to the right and diffuse spondylolitic changes in the thoracolumbar spine. He advised that, based on his examinations of April 18, 2007 and October 29, 2008, his review of the medical records including the reports of Drs. Weiss, Dennis and Slutsky, and the statement of accepted facts, appellant sustained a lumbosacral strain and traumatic lateral epicondylitis of the right elbow when she fell on February 20, 2003, that she was treated appropriately, and had reached maximum medical improvement with regard to these injuries on April 21, 2003. Dr. Bills concluded that, based on appellant's physical examination, the expected ranges of motion and examination parameters found in the A.M.A., *Guides*, appellant had no impairment with regard to the February 20, 2003 employment injuries and that her ongoing symptomatology was consistent with preexistent degenerative disease in her knees and spine.

In a January 5, 2009 report, Dr. Magliato, an Office medical adviser, stated that, based on Dr. Bills' October 29, 2008 report, appellant had no ratable impairment.

In a January 15, 2009 decision, the Office found the opinion of Dr. Bills to constitute the weight of medical evidence. It denied appellant's claim for a schedule award.

On January 21, 2009 counsel requested a hearing that was held on May 27, 2009. Appellant testified that she returned to full duty after the February 20, 2003 employment injury. She described her current physical condition, stating that she had limited use of her right arm that was very weak and painful, that her right knee was in constant pain, and that she could not perform self-care or household duties. Appellant stated that at the April 17, 2007 examination, Dr. Bills performed a very brief examination and that, when purportedly examined by him again on October 29, 2008, she was examined by a different person, who took no measurements, and performed a brief examination. Counsel argued that Dr. Bills' opinion was insufficient to carry special weight as he had not examined appellant in October 2008 and did not perform a proper evaluation.

By decision dated August 14, 2009, an Office hearing representative found that Dr. Bills properly assessed appellant and provided a comprehensive evaluation. She affirmed the January 15, 2009 decision.

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<sup>3</sup> Dr. Bills provided specific measurements noting that each measurement met the expected value.

## LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,<sup>4</sup> and its implementing federal regulations,<sup>5</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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>8</sup> It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.<sup>9</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 shall appoint a third physician who shall make an examination.<sup>10</sup> When 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>11</sup>

## ANALYSIS

The Board finds that appellant has not established permanent impairment based on her accepted right lateral epicondylitis and lumbar strain. The Office determined that a conflict in medical opinion arose between Dr. Weiss, an attending osteopath, and Dr. Dennis, an Office referral physician who is Board-certified in orthopedic surgery. It referred appellant to Dr. Bills for an impartial evaluation.

In an October 29, 2008 report, Dr. Bills provided a reasoned opinion on permanent impairment based on appellant's accepted conditions of right lateral epicondylitis and lumbar strain. In a comprehensive report, he noted his previous examination in April 2007, reviewed the record, including the statement of accepted facts, and provided thorough findings on examination. Dr. Bills provided right upper extremity range of motion measurements, which

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>9</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>10</sup> 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>11</sup> *Manuel Gill*, 52 ECAB 282 (2001).

were normal, and found that neurologic examination of both the upper and lower extremities was entirely within normal limits, including determination of muscle strength, reflexes and sensation. He concluded that, upon review of the fifth edition of the A.M.A., *Guides*, appellant had no ratable impairment.

Regarding appellant's argument that Dr. Bills did not perform grip strength measurements, the A.M.A., *Guides* does not encourage the use of grip strength as an impairment rating because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* for the most part is based on anatomic impairment. The A.M.A., *Guides* do not assign a large role to such measurements. Only in rare cases should grip strength be used, and only when it represents an impairing factor that has not been otherwise considered adequately.<sup>12</sup> While Dr. Weiss advised that appellant had 20 percent right upper extremity impairment due to grip strength deficit, he did not provide a sufficient explanation as to why 20 percent impairment was assigned. Dr. Dennis explained that appellant's grip strength testing showed a great deal of voluntary or purposeful limitations of maximal effort but found no difference between her two hands. This formed a basis for the conflict in medical opinion Dr. Bills was asked to resolve.

Dr. Weiss awarded appellant three percent pain-related impairments for the right upper extremity and each lower extremity. The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain under Chapter 18, if an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly.<sup>13</sup> A formal pain assessment, however, is to be performed in accordance with Chapter 18.<sup>14</sup> Dr. Weiss did not provide a formal pain-related impairment assessment in accordance with Chapter 18.

It is appellant's burden to establish that she sustained permanent impairment of a scheduled member or function as a result of the accepted employment injury.<sup>15</sup> Dr. Bills provided a comprehensive, well-rationalized evaluation as reflected in his October 29, 2008 report. He clearly set forth findings on examination, reviewed the record and explained his conclusion that appellant had no impairment due to the February 20, 2003 employment injury. Dr. Bills' report is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical opinion.<sup>16</sup> Appellant did not meet her burden of proof to establish that she sustained permanent impairment for her accepted right lateral epicondylitis and lumbar strain.

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<sup>12</sup> *Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>13</sup> *T.H.*, 58 ECAB 334 (2007).

<sup>14</sup> A.M.A., *Guides*, *supra* note 1 at 573.

<sup>15</sup> *Tammy L. Meehan*, *supra* note 9.

<sup>16</sup> *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

**CONCLUSION**

The Board finds that appellant did not establish that she is entitled to a schedule award for her right lateral epicondylitis or lumbar strain.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 4, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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