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

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| **J.H., Appellant** | ) | |
| **and** | ) | **Docket No. 13-693** |
| | ) | **Issued: September 16, 2013** |
| **DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Philadelphia, PA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On February 5, 2013 appellant, through his attorney, filed a timely appeal from a September 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of his schedule award claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 is entitled to a schedule award for left lower extremity impairment related to his accepted spinal injury.

On appeal, counsel contends that the August 31, 2010 report from impartial medical examiner, Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, is insufficient to establish a zero percent impairment rating of appellant's left lower extremity.

[1] 20 C.F.R. § 8101 *et seq.*

## ***FACTUAL HISTORY***

OWCP accepted that appellant, then a 53-year-old sheet metal mechanic, sustained an aggravation of degenerative disc disease at L3-4 as a result of a trip and fall in the performance of duty on January 14, 2002. It authorized physical therapy. Appellant retired from the employing establishment effective January 3, 2003.

OWCP referred appellant to Dr. Jatinkumar Gandhi, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related condition. In his September 24, 2002 report, Dr. Gandhi reviewed a statement of accepted facts, appellant's medical history and records and conducted a physical examination. He diagnosed degenerative disc disease of the lumbar spine with disc herniation of L5-S1 and spinal stenosis. Dr. Ghandi did not find any lower extremity neurologic deficits. He opined that appellant was able to perform light-duty work with restrictions on bending and lifting no more than 15 pounds. On October 9, 2002 Dr. Gandhi indicated that appellant had previous lower back problems. He opined that the employment injury aggravated appellant's preexisting back problems regarding the L5-S1 herniated disc, noting that it could be a permanent aggravation.

On September 27, 2002 appellant underwent a functional capacity evaluation, which showed that his level of ability was below sedentary.

Appellant submitted a May 20, 2004 report from Dr. Thomas P. McMahon, a Board-certified internist, regarding his bilateral shoulder conditions. He also submitted x-ray and magnetic resonance imaging (MRI) scan reports of the right shoulder dated December 1, 2005 and a November 9, 2005 electromyography (EMG) of the upper extremities in relation to possible carpal tunnel syndrome.

On April 24, 2009 appellant, through his attorney, filed a claim for a schedule award and submitted a February 19, 2009 report from Dr. Nicholas Diamond, an osteopathic family practitioner, who reviewed his medical history and records and conducted a physical examination. Dr. Diamond described weakness involving the musculature of the hip and found that appellant had reached maximum medical improvement on February 19, 2009. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), he determined that appellant had a 55 percent permanent impairment of the right upper extremity, a 53 percent permanent impairment of the left upper extremity and a 26 percent impairment of the left lower extremity due to his federal employment.

On June 7, 2010 Dr. Henry J. Magliato, an OWCP medical adviser, reviewed Dr. Diamond's February 19, 2009 report and concluded that his findings in the left lower extremity seemed out of proportion to the accepted condition of aggravation of degenerative disc disease in the lumbar spine. He explained that the bulging or protruding disc at L5-S1 would not affect the femoral and the obturator and superior gluteal nerves, noting that at the most it would affect part of the sciatic nerve distribution which was not included in Dr. Diamond's calculations.

OWCP found a conflict in medical opinion between Drs. Diamond, Gandhi and Magliato and referred appellant to Dr. Glenn for an impartial medical examination. In his August 31,

2010 report, Dr. Glenn reviewed a statement of accepted facts, appellant's medical history and records and conducted a physical examination. The neurological examination revealed active and asymmetrical patellar and Achilles' reflexes. There were no areas of muscle fasciculation and muscle strength testing proved perfectly normal throughout both lower extremities. He noted appellant's history of a fractured ankle treated surgically with immobilization. Dr. Glenn indicated that appellant had problems referable to his low back prior to the slip and fall incident of January 14, 2002 and his radiographic findings were consistent with preexisting multilevel degenerative disc disease. He found no evidence of any residual neurological deficits involving either lower extremity. Specifically, Dr. Glenn could not substantiate the weakness involving the musculature of the hip as described by Dr. Diamond on February 19, 2009 and noted that Dr. Ghandi did not find any lower extremity neurologic deficits in his September 24, 2002 report. Based on the sixth edition of the A.M.A., *Guides*, he concluded that appellant did not have any permanent impairment to the lower extremities causally related to the January 14, 2002 employment injury.

In a December 17, 2010 supplemental report, Dr. Glenn stated that in all categories of the regional grid appellant would be placed in Class 0, which equates to zero percent permanent impairment of the left lower extremity. Utilizing Table 16-5[2] on page 515 of the A.M.A., *Guides*, he stated that appellant's functional history would indicate severe problems and be a grade modifier 3, however, the physical examination and clinical findings were basically normal or grade modifier 0 and did not substantiate the functional history. Citing to page 516, Dr. Glenn indicated that, if the grade for functional history differed by two or more grades from that defined by physical examination or clinical studies, the functional history should be assumed to be unreliable and excluded from the grading process. Under Table 16-7[3] and Table 16-8,[4] he opined that appellant fell within grade modifier 0 for no consistent findings and, consequently, had no lower extremity impairment.

On June 6, 2011 OWCP's medical adviser, Dr. Andrew A. Merola, reviewed the medical evidence of record with special reference to Dr. Glenn's August 31, 2010 report. He concurred with Dr. Glenn's opinion that appellant had zero percent permanent impairment to the left lower extremity and indicated that the date of maximum medical improvement was August 31, 2010, the date of Dr. Glenn's examination.

By decision dated April 23, 2012, OWCP denied appellant's schedule award claim on the basis that the medical evidence did not establish a ratable impairment of a scheduled member.

On April 30, 2012 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative, which was held on August 13, 2012.

[2] Table 16-5, page 515 of the sixth edition of the A.M.A., *Guides* is entitled *Adjustment Grid: Summary*.

[3] Table 16-7, page 517 of the sixth edition of the A.M.A., *Guides* is entitled *Physical Examination Adjustment -- Lower Extremities*.

[4] Table 16-8, pages 519-520 of the sixth edition of the A.M.A., *Guides* is entitled *Clinical Studies Adjustment -- Lower Extremities*.

By decision dated September 26, 2012, OWCP's hearing representative affirmed the April 23, 2012 decision denying appellant's claim for a schedule award.

## ***LEGAL PRECEDENT***

An employee seeking compensation under FECA has the burden of establishing the essential elements of her claim, including that she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[5]

The schedule award provision of FECA[6] and its implementing regulations[7] 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, FECA 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 regulations as the appropriate standard for evaluating schedule losses.[8] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[9] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[10] A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[11]

A schedule award is not payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[12] As neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[13] However, as FECA makes provision for the

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[5] *See Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.*

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

[10] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (September 1995). This portion of OWCP procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[11] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[12] *See Tania R. Keka*, 55 ECAB 354 (2004).

[13] *See id*. FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[14]

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15]

## ***ANALYSIS***

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body. OWCP accepted appellant's claim for aggravation of degenerative disc disease at L3-4. Although appellant may not receive a schedule award for permanent impairment to his back,[16] he may be entitled to a schedule award for any permanent impairment to his left lower extremity, provided the medical evidence establishes such impairment.[17] However, the medical evidence of record does not establish that he sustained permanent impairment to the left lower extremity due to the accepted spinal injury.

The Board finds that OWCP properly relied on a June 6, 2011 report from Dr. Merola, an OWCP medical adviser who, based on the clinical findings of the impartial medical specialist Dr. Glenn, concluded that appellant had no permanent impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*. Dr. Merola properly reviewed the medical record and found no basis for rating impairment to a scheduled member of the body.[18] He reviewed an August 31 and December 17, 2010 assessment of Dr. Glenn, a Board-certified orthopedic surgeon serving as an impartial medical specialist. Dr. Merola noted that Dr. Glenn found no evidence of any residual neurological deficits involving either lower extremity and concluded that based on the sixth edition of the A.M.A., *Guides* appellant had no permanent impairment to the left lower extremity causally related to the January 14, 2002 employment injury. OWCP's medical adviser properly concluded that there was no medical evidence of impairment to the left lower extremity resulting from the accepted spinal injury and, therefore, there was no ratable

[14] *See George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.

[15] *See Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[16] 5 U.S.C. § 8101(19); *James E. Mills*, 43 ECAB 215 (1991).

[17] *See George E. Williams*, *supra* note 14.

[18] The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (September 1995); *Richard R. LeMay*, 56 ECAB 341 (2006).

impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*. In his December 17, 2010 reports, Dr. Glenn stated that in all categories of the regional grid appellant would be placed in class 0, which equates to zero percent permanent impairment of the left lower extremity. Utilizing Table 16-5 on page 515 of the A.M.A., *Guides*, he stated that appellant's functional history would indicate severe problems and be a grade modifier 3, however, the physical examination and clinical findings were basically normal or grade modifier 0 and did not substantiate the functional history. Citing to page 516, Dr. Glenn indicated that, if the grade for functional history differed by two or more grades from that defined by physical examination or clinical studies, the functional history should be assumed to be unreliable and excluded from the grading process. Under Table 16-7, on page 517, and Table 16-8, on pages 519-20, of the A.M.A., *Guides* he opined that appellant fell within grade modifier 0 for no consistent findings and, consequently, had no lower extremity impairment. As Dr. Glenn was selected as the impartial medical specialist to resolve the issue of extent and degree of any employment-related impairment, his report constitutes the special weight of the medical evidence.

Appellant submitted a May 20, 2004 report from Dr. McMahon regarding his bilateral shoulder conditions, x-ray and MRI scan reports dated December 1, 2005 and a November 9, 2005 EMG of the upper extremities in relation to possible carpal tunnel syndrome. OWCP has not accepted an upper extremity condition in this case. Thus, the Board finds that this medical evidence is irrelevant and insufficient to meet appellant's burden of proof to establish a schedule award claim.

Appellant did not submit sufficient medical evidence to establish that he sustained a permanent impairment to a specified member, organ or function of the body listed in FECA or its implementing regulations. As he has not established any ratable left lower extremity impairment related to his accepted spinal injury, the Board finds that appellant did not meet his burden of proof to establish entitlement to a schedule award.

On appeal, counsel contends that the August 31, 2010 report from Dr. Glenn is insufficient to establish a zero percent impairment rating of appellant's left lower extremity. For the reasons stated above, the Board finds that the attorney's arguments are not substantiated.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

## ***CONCLUSION***

The Board finds that appellant is not entitled to a schedule award for left lower extremity impairment related to his accepted spinal injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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