

FACTUAL HISTORY

On February 20, 2007 appellant, then a 53-year-old airway transportation systems specialist, filed a traumatic injury claim alleging that he pulled a muscle in his lower back while moving a broken tree limb from the parking lot. OWCP accepted a sprain of back, lumbar region and paid appropriate benefits. Appellant returned to light duty before retiring. On April 3, 2008 OWCP expanded the accepted condition to include lumbar degenerative disc disease with spinal stenosis and disc protrusion at L3-4, as well as L4-5 lumbar radiculitis. It authorized lumbar decompression and fusion, which appellant underwent on May 13, 2008. By decision dated December 10, 2009, OWCP granted him a schedule award for 11 percent impairment of left lower extremity and 27 percent impairment of right lower extremity. Appellant received 109.44 weeks of compensation. On October 28, 2010 and September 29, 2011 he underwent additional authorized back surgeries.

On November 29, 2012 appellant filed a Form CA-7, claim for a schedule award, seeking an additional schedule award. He indicated in a November 29, 2012 letter that he underwent three back surgeries and has nerve damage to both legs, especially his right foot, causing foot drop. Appellant states that he wears an ankle to foot brace to walk and it is difficult to walk without his brace. He stated that he did not have as much nerve damage or any foot drop when he received his first schedule award.

In an October 30, 2012 report, Dr. Thomas Haider, an orthopedic surgeon, noted the history of injury, appellant's clinical history and documented appellant's subjective complaints and clinical objective findings. He noted that the preoperative right foot drop only mildly improved after surgery. Appellant reported the development of a bony growth on his left foot secondary to his abnormal gait and that he was scheduled to undergo surgery in the next few months. Dr. Haider provided an impression of L3 to S1 revision decompression, fusion and fixation on September 29, 2011; L1-2 and L4-5 posterolateral fusion in 2010; and left L2-4 with correction deformity on May 13, 2008. He indicated that appellant had difficulty walking, changing position and getting on to the examining table. Dr. Haider had an antalgic gait due to right-sided foot drop. There is a healed surgical scar in appellant's lower back and tenderness and significant guarding in his lower back. His motion is 40 percent of normal. Straight leg raising test is positive to the right. Sensation is decreased in the right foot along L4, L5 and S1 nerve distribution. Muscle strength is 0/5 for right ankle dorsiflexion as well as right big toe extension. Sensation is decreased in the left foot L4 and L5 nerve distribution. There is no weakness in the left lower extremity. Dr. Haider opined that appellant was permanent stationary. In an accompanying lower extremity impairment evaluation record, he assessed 30 percent impairment to both the right and left lower extremity.

In a January 4, 2013 report, an OWCP medical adviser noted the history of injury and his review of the medical records, including Dr. Haider's October 30, 2012 report. He noted that Dr. Haider's clinical findings made no mention of a supportive device to walk and appellant appeared to be uncomfortable with walking. The medical adviser opined that appellant had 32 percent right lower extremity impairment and 8 percent left lower extremity impairment.

Referencing the July/August 2009 *The Guides Newsletter* for Rating Spinal Nerve Extremity Impairment, the medical adviser stated permanent loss of each lower extremity may be

calculated applying values for sensory involvement/abnormality and motor weakness to affected nerve root.

Utilizing Dr. Haider's examination findings, the medical adviser found that for the right lower extremity, decreased sensation in right L4, L5 and S1 nerve roots equated to moderate sensory deficit or class 1 yielding 3 percent sensory deficit for L4, 3 percent sensory deficit for L5, and 2 percent sensory deficit for S1. Functional history adjustment resulted in a grade modifier of 2, which increased the L4 sensory deficit to 4 percent; increased the L5 sensory deficit to 4 percent; and increased the S1 sensory deficit to 3 percent; for a total of 11 percent. Dr. Haider stated that the records indicate 0/5 right-sided ankle dorsiflexion, which equated to class 1 or 13 percent motor deficit for L4 and 13 percent motor deficit for L5. Under the Combined Values Chart, Dr. Haider found the 13 percent for L4 deficit combined with 13 percent L5 deficit combined with 11 percent motor deficit equated to 32 percent impairment of the right lower extremity.

For the left lower extremity, Dr. Haider graded decreased sensation at L4 and L5 nerve roots as class 1 or 3 percent for L4 sensory deficit and 3 percent sensory for L5 deficit. He stated that functional history adjustment for each nerve root was grade modifier 2, which increased the impairment into category D or 4 percent impairment for each nerve root. Dr. Haider advised that the records did not indicate any left lower extremity motor strength weakness; thus, no additional impairment. He calculated the total left lower extremity impairment as 8 percent, noting it was less than the previously assessed 11 percent impairment. Dr. Haider opined that appellant had a right lower extremity impairment of 32 percent, 5 percentage points higher than the previously awarded 27 percent. He further opined that appellant's left lower extremity impairment of 8 percent was lower than the previously awarded 11 percent impairment and no additional impairment should be awarded. Dr. Haider also opined that maximum medical improvement was reached on October 30, 2012, 13 months following the last surgical procedure.

By decision dated February 22, 2013, OWCP awarded an additional two percent impairment to the lower extremity. The award ran for 5.76 weeks, for the period October 30 to December 9, 2012. OWCP noted that the medical adviser found 8 percent impairment to the left lower extremity and 32 percent impairment to the right lower extremity, for a total 40 percent impairment to the lower extremities. Since appellant was previously paid 38 percent total impairment to the lower extremities, it found he was entitled to an additional 2 percent impairment.

LEGAL PRECEDENT

A claim for an increased schedule award may be based on new exposure.² Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.³

² A.A., 59 ECAB 726 (2008); *Tommy R. Martin*, 56 ECAB 273 (2005); *Rose V. Ford*, 55 ECAB 449 (2004).

³ *James R. Hentz*, 56 ECAB 573 (2005); *Linda T. Brown*, 51 ECAB 115 (1999).

In determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.⁴ Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.⁵

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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 claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁹

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.¹⁰ In 1960, amendments to FECA modified the schedule award provisions 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. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹¹

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides*

⁴ *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446 (2002).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (January 2010).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁸ *Id.*

⁹ *Veronica Williams*, 56 ECAB 367, 370 (2005).

¹⁰ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹¹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

Newsletter, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.¹²

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).¹³ The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹⁴

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹⁵

ANALYSIS

OWCP accepted conditions of lumbar sprain, lumbar degenerative disc disease with spinal stenosis and disc protrusion at L3-4 and L4-5, lumbar radiculitis and authorized three back surgeries, which appellant underwent May 13, 2008, October 28, 2010 and September 29, 2011. By decision dated December 10, 2009, it granted him a schedule award for 11 percent impairment of the left lower extremity and 27 percent impairment of right lower extremity, for total 38 percent impairment. OWCP paid appellant 109.44 weeks of compensation. Appellant subsequently requested an increased schedule award. By decision dated February 22, 2013, OWCP awarded two percent additional impairment to the lower extremity and paid 5.76 weeks of compensation.

In his October 30, 2012 report, Dr. Haider assessed 30 percent impairment to both the left and right lower extremities. However, he did not provide any calculations on how he reached his impairment determinations. The medical adviser reviewed Dr. Haider's report on January 4, 2013 and found that appellant had ratable impairment for motor and sensory deficits under the sixth edition of the A.M.A., *Guides*. He determined that Dr. Haider failed to utilize the proposed new tables in *The Guides Newsletter*, July/August 2009. Under the July/August 2009 issue of *The Guides Newsletter*, an examiner is required to apply neurologic examination findings to the sensory and motor severity tables for each affected nerve root, adjust for functional history and clinical studies and then combine the motor and sensory impairments. The medical adviser properly determined that Dr. Haider's report was not rendered in conformance with the

¹² See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹³ A.M.A., *Guides* 533.

¹⁴ *Id.* at 521.

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

applicable protocols of the sixth edition because he did not rely on the July/August 2009 issue of *The Guides Newsletter*.

Relying on Dr. Haider's examination findings, the medical adviser determined the rating for appellant's bilateral lower extremity impairment. For the right lower extremity, the medical adviser found moderate sensory deficits for the right L4, L5 and S1 nerve roots. Relying on Proposed Table 2 of *The Guides Newsletter*, Spinal Nerve Impairment, the medical adviser properly rated a class 1 impairment for moderate sensory deficit as three percent for L4 nerve deficit; three percent for L5 nerve deficit and two percent for S1 nerve deficit. The medical adviser then found under Table 16-6, page 516 of the A.M.A., *Guides*, that appellant's impairment rated a grade modifier 2 or moderate problem for L4, L5 and S1 sensory deficits. Pursuant to this calculation, the medical adviser found that the net adjustment compared to the diagnostic class resulted in a plus 1 or grade D impairment, which yielded L4 sensory deficit of 4 percent; L5 sensory deficit to 4 percent; and S1 sensory deficit to 3 percent; for a total of 11 percent sensory deficit. He also properly found 0/5 right-sided ankle dorsiflexion was a class 1 severe motor deficit and properly assessed 13 percent for L4 motor deficit and 13 percent for L5 motor deficit. The motor and sensory impairments were combined (13 percent for L4 motor deficit combined with 13 percent for L5 motor deficit combined with 11 percent for sensory deficit) and resulted in total impairment of 32 percent of the right lower extremity.

For the left lower extremity, the medical adviser followed the same procedures and found eight percent total left lower extremity impairment. Relying on Proposed Table 2 of *The Guides Newsletter*, Spinal Nerve Impairment, he properly rated class 1 impairment for moderate sensory deficit as three percent for L4 sensory deficit and three percent for L5 sensory deficit. The medical adviser then found under Table 16-6, page 516 of the A.M.A., *Guides*, appellant's impairment rated a grade modifier 2 or moderate problem for L4, L5 and S1 sensory deficits. Pursuant to this calculation, he found the net adjustment compared to the diagnostic class resulted in a plus 1 or grade D impairment, which yielded L4 sensory deficit of four percent and L5 sensory deficit of four percent. The medical adviser noted there were no findings of any lower left extremity motor strength deficits. Thus, he found the total left lower extremity impairment was 8 percent, which he properly noted was lower than the previously assessed 11 percent. The medical adviser determined that appellant is entitled to a higher right lower extremity impairment of 32 percent or an additional 5 percent than the previously awarded 27 percent right lower extremity impairment.

The Board finds that OWCP's medical adviser properly applied the A.M.A., *Guides* to rate appellant's bilateral lower extremity impairment and that his report constitutes the weight of medical opinion. As noted above, for peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.¹⁶ The medical adviser relied on the July/August 2009 edition of *The Guides Newsletter* and provided a thorough, well-rationalized report in conformance with the applicable tables and protocols of the A.M.A., *Guides* in rendering his impairment rating. The report from Dr. Haider, in contrast, did not meet the standards for rating

¹⁶ See *supra* note 13.

lower extremity impairment for appellant's condition set forth in the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*. His report does not provide adequate medical rationale in support of his opinion that appellant is entitled to 30 percent schedule award for the right and 30 percent schedule award of the left lower extremity.¹⁷

The Board however finds that OWCP improperly found that appellant was entitled only to an additional two percent lower extremity impairment. FECA provides that lower extremity impairments are rated for each member; the two members are not totaled into one sum for lower extremity impairment.¹⁸

As is explained within section 8108 of FECA, reduction of compensation can only be made for subsequent injury to same member or function of the body.

“The period of compensation payable under the schedule in section 8107(c) of this title is reduced by the period of compensation paid or payable under the schedule for an earlier injury if--

(1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and

(2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability.”

As appellant had impairment to two members, not a single member, reduction of compensation is not appropriate.

The medical adviser properly noted that appellant was not entitled to an additional award for left lower extremity as he had already been awarded 11 percent impairment and he was only entitled to 8 percent impairment. He properly found that appellant was entitled to 32 percent impairment to right lower extremity and since he previously received 27 percent, he was entitled to an additional 5 percent impairment. As OWCP only awarded an additional two percent impairment, appellant is entitled to an additional three percent impairment to account for the additional five percent right lower extremity impairment he is entitled.

On appeal, appellant contends that the schedule award did not adequately take into account his right foot drop. A review of the evidence indicates that appellant's right foot drop was included in the impairment calculation and properly calculated in accordance to the A.M.A., *Guides*. Appellant also contends that he received less weeks of pay for each percent of disability than his first schedule award. The number of weeks of compensation is determined by 5 U.S.C. § 8107. Complete loss of use of the leg is 288 weeks of compensation and therefore appellant is entitled to an additional 5 percent of 288 or 14.46 weeks for loss of use of right leg.

¹⁷ *William C. Thomas*, 45 ECAB 591 (1994).

¹⁸ 5 U.S.C. § 8107(c)(2).

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 has no greater than 11 percent left lower extremity impairment and no greater than 32 percent right lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: September 6, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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