



reconsideration request.<sup>2</sup> The Board found that she did not advance a relevant legal argument that a conflict in medical evidence existed between the August 27, 2007 opinion of Dr. David O. Weiss, an osteopath, who opined that she had six percent impairment of her right and left lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and the July 14, 2010 opinion of Dr. David Rubinfeld, a Board-certified orthopedic surgeon and OWCP referral physician, who opined that she had no impairment under the sixth edition of the A.M.A., *Guides*. The Board found that OWCP properly denied appellant's schedule award claim. The only medical evidence that addressed impairment under the applicable sixth edition of the A.M.A., *Guides* was Dr. Rubinfeld's July 14, 2010 evaluation, which found no impairment. The facts of the previous Board decision are incorporated herein by reference.

On December 19, 2012 appellant, through her attorney, requested reconsideration. He submitted Dr. Weiss' August 27, 2007 report updated to the sixth edition of the A.M.A., *Guides* on November 30, 2012. Dr. Weiss stated that appellant was involved in a work-related motor vehicle accident on December 11, 2002 and another work-related accident on January 26, 2004. He also noted that she was involved in a motor vehicle accident on December 25, 2005. Dr. Weiss noted appellant's complaints of bilateral shoulder pain and occasional bilateral hip pain and presented physical examination findings of August 27, 2007. He opined that she reached maximum medical improvement on August 27, 2007. Under the sixth edition of the A.M.A., *Guides*, Dr. Weiss opined that appellant had 12 percent left upper extremity impairment, 1 percent right upper extremity impairment, 2 percent right lower extremity impairment and 2 percent left lower extremity impairment.

On February 10, 2013 an OWCP medical adviser reviewed the January 29, 2013 statement of accepted facts and the medical record. He noted that Dr. Weiss did not mention the accepted March 24, 2005 injury to the right hip and that his report focused on a December 11, 2002 motor vehicle accident and a January 2, 2004 slip and fall, with left shoulder injuries. The medical adviser noted that Dr. Weiss mentioned a May 16, 2005 hip magnetic resonance imaging (MRI) scan, which was unremarkable and a December 25, 2005 motor vehicle accident. He opined that appellant's diagnosis of chronic post-traumatic trochanteric bursitis to the right and left hips was based on subjective entities. The medical adviser stated that a date of maximum medical improvement was not applicable. He opined that there was no right lower extremity impairment based on the previous medical adviser's August 31, 2010 opinion based on Dr. Rubinfeld's July 14, 2010 medical report.

By decision dated February 27, 2013, OWCP denied the schedule award claim finding that the medical evidence failed to establish any permanent impairment. It noted that the November 30, 2012 report of Dr. Weiss contained permanent impairment ratings for conditions not accepted by OWCP.

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<sup>2</sup> Docket No. 12-573 (issued September 7, 2012). OWCP accepted that on March 24, 2005 appellant, then a 37-year-old letter carrier, sustained an enthesopathy of the right hip region. In a September 15, 2010 decision, it denied her schedule award claim. OWCP noted that decisions issued on or after May 1, 2009 must be in accordance with the sixth edition of the A.M.A., *Guides*.

On March 5, 2013 appellant's counsel requested a hearing before an OWCP hearing representative.

On April 8, 2013 appellant's counsel requested reconsideration before OWCP based on Dr. Weiss' narrative report updated to the sixth edition of the A.M.A., *Guides* on November 30, 2012.

By decision dated July 3, 2013, OWCP denied reconsideration as there was no new relevant legal argument and the November 30, 2012 medical report of Dr. Weiss was previously considered in the February 27, 2013 decision and of no probative value to support appellant's current request.<sup>3</sup>

On June 24, 2013 a hearing was held. Counsel contended that Dr. Weiss' November 30, 2012 report, which found two percent right lower extremity impairment under the sixth edition of the A.M.A., *Guides*, created a conflict in medical opinion with Dr. Rubinfeld and the medical advisers, who found no impairment to the right lower extremity.

By decision dated September 9, 2013, an OWCP hearing representative affirmed the February 27, 2013 decision. The hearing representative found that Dr. Weiss did not establish that appellant sustained impairment due to her accepted work injury and the medical evidence of record did not establish injury-related permanent impairment.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>5</sup> 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.<sup>6</sup>

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<sup>3</sup> The last merit decision of record at the time of appellant's reconsideration request was OWCP's February 27, 2013 decision denying the schedule award claim. The Board's September 7, 2012 nonmerit decision became final upon the expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). Thus, appellant could not request reconsideration of the Board's September 7, 2012 decision. While she could have requested reconsideration of OWCP's February 27, 2013 decision, this issue as well as OWCP's July 3, 2013 decision is moot as OWCP performed a merit review on September 9, 2013.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>6</sup> *Veronica Williams*, 56 ECAB 367, 370 (2005).

OWCP's 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.<sup>7</sup>

### ANALYSIS

OWCP accepted the condition of enthesopathy of the right hip resulting from a March 24, 2005 work injury. It denied appellant's claim for a schedule award finding that the medical evidence did not establish a permanent impairment due to the accepted condition. The issue is whether appellant sustained a ratable impairment causally related to the accepted March 24, 2005 work injury.

Appellant underwent an examination by Dr. Weiss on August 27, 2007. He rated impairment under the fifth edition of the A.M.A., *Guides*. On November 30, 2012 Dr. Weiss provided an updated opinion as to appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*, based on the August 27, 2007 examination results.<sup>8</sup> The Board has held that an opinion on a permanent impairment must be based on a reasonably current physical examination and that an opinion based on examination conducted several years earlier is of diminished probative value.<sup>9</sup> The November 30, 2012 rating by Dr. Weiss was not based on a current physical examination. He did not discuss the history of the March 24, 2005 employment injury or provide any rationale that his right lower extremity impairment rating was causally related to the work injury. The Board has held that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of limited probative value.<sup>10</sup> Because Dr. Weiss' report is based on inaccurate history, his opinion on causal relationship and subsequent impairment rating is insufficient to establish her claim.<sup>11</sup>

In a February 10, 2013 report, OWCP's medical adviser noted that Dr. Weiss did not mention the accepted March 24, 2005 injury to the right hip and that the May 16, 2005 hip MRI scan was unremarkable.<sup>12</sup> He opined that appellant's diagnosis of chronic post-traumatic

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<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

<sup>8</sup> Under the sixth edition of the A.M.A., *Guides*, Dr. Weiss that opined appellant had 12 percent left upper extremity impairment, 1 percent right upper extremity impairment, 2 percent right lower extremity impairment and 2 percent left lower extremity impairment.

<sup>9</sup> See *B.N.*, Docket No. 12-1394 (issued August 5, 2013) (examination dated July 2004, updated opinion provided in November 2011 report); *E.W.*, Docket No. 13-506 (issued May 13, 2013) (October 2004 examination, May 2011 opinion); *W.M.*, Docket No. 12-773 (issued March 29, 2013) (September 2006 examination, June 2010 opinion).

<sup>10</sup> *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

<sup>11</sup> See *Veronica Williams*, *supra* note 6.

<sup>12</sup> The medical adviser indicated that Dr. Weiss' report focuses on a December 11, 2002 motor vehicle accident and a January 2, 2004 slip and fall, with left shoulder injuries and mentions a December 25, 2005 motor vehicle accident.

trochanteric bursitis to the right and left hips was based on subjective entities. Thus, the medical adviser found that there was no evidence of an injury-related ratable impairment. He also found that the evidence of record did not establish an injury-related permanent impairment. There is no other medical evidence in record establishing that appellant has permanent impairment to a scheduled member causally related to her accepted enthesopathy of the right hip region.

On appeal, appellant's counsel contends that Dr. Weiss' report created a conflict in medical evidence with OWCP's medical adviser and Dr. Rubinfeld's July 14, 2010 evaluation, which found no impairment. OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.<sup>13</sup> Where there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>14</sup> However, for the reasons set forth above, Dr. Weiss' report is of diminished probative value and does not create a conflict of medical opinion with the medical adviser or Dr. Rubinfeld.

Appellant may request an 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 not sustained permanent impairment to a scheduled member causally related to her accepted enthesopathy of the right hip region.

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<sup>13</sup> See *supra* note 7.

<sup>14</sup> K.S., Docket No. 12-43 (issued March 12, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2014  
Washington, DC

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

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

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