

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

C.L., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
BUREAU OF LAND MANAGEMENT,)
Roseburg, OR, Employer)

Docket No. 14-364
Issued: February 27, 2015

Appearances:

Alan J. Shapiro, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 6, 2013 appellant, through counsel, filed a timely appeal from the October 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 met his burden of proof to establish more than 13 percent permanent impairment of his left and right legs, for which he received schedule awards.

FACTUAL HISTORY

OWCP accepted that on July 20, 2004 appellant, then a 46-year-old laborer, was injured when he sustained a fall from 10 feet after climbing over a log. It accepted that he sustained

¹ 5 U.S.C. §§ 8101-8193.

aggravation of spondylolisthesis, and later expanded the claim to include lumbosacral radiculopathy of both legs, chronic pain syndrome and reaction to spinal or lumbar puncture. On June 22, 2005 appellant underwent L5-S1 fusion surgery which was authorized by OWCP.²

In a June 25, 2010 report, Dr. Annette Weller, an attending Board-certified physiatrist determined that appellant had 13 percent impairment of his whole person under Table 17-4 through Table 17-9 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009).

On October 21, 2010 Dr. Morley Slutsky, a Board-certified preventive medicine physician serving as an OWCP medical adviser, stated that Dr. Weller's rating was improper as it was based on whole person impairment. He calculated that appellant had 13 percent permanent impairment of his left leg and 13 percent permanent impairment of his right leg due to sensory loss associated with the sciatic nerve distributions to each leg. Dr. Slutsky applied the standards of Table 16-11 and Table 16-12 of the sixth edition of the A.M.A., *Guides*.³

In a February 8, 2011 decision, OWCP granted appellant schedule awards for 13 percent permanent impairment of his left and right legs. The awards ran for 74.88 weeks from June 25, 2010 to December 1, 2011.

By letter dated January 4, 2012, appellant requested an increased schedule award based on the addendum report of Dr. Hebrard, appellant's attending physician. OWCP determined that there was a conflict in the medical evidence between Dr. Hebrard, and the government physicians, Dr. Slutsky and Dr. Stewart, regarding the extent of appellant's permanent impairment. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA, to Dr. Timothy Borman, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 21, 2012 report, Dr. Borman calculated that, under Table 17-4 of the sixth edition of the A.M.A., *Guides*, appellant had 25 percent whole person impairment. He noted that "generally looking at the impairment ratings of doctors using peripheral nerve calculation method, [appellant] has minimal evidence of radiculopathy."

OWCP requested that Dr. Borman provide a supplemental report properly evaluating appellant's impairment under *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009). In a May 16, 2012 supplemental

² Appellant had undergone a prior nonwork-related spinal fusion procedure.

³ In a September 13, 2010 report, Dr. Michael Hebrard, an attending Board-certified physiatrist, calculated that appellant had 32 percent permanent impairment of his left leg and 32 percent permanent impairment of his right leg due to motor loss associated with the sciatic nerve distributions in each leg. He applied the standards of Table 16-11 and Table 16-12 of the sixth edition of the A.M.A., *Guides*. It is unclear why Dr. Slutsky did not address Dr. Hebrard's impairment rating in his October 21, 2010 report. In a December 14, 2011 report, Dr. Hebrard indicated that appellant had 32 percent permanent impairment of his left leg and 32 percent permanent impairment of his right leg under *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009). On February 21, 2012 Dr. William Stewart, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, expressed disagreement with this assessment.

report, Dr. Borman again listed the findings of his March 21, 2012 examination, noting that he documented normal resisted muscle group strength testing to all muscle groups to both lower extremities. Straight leg raising provoked no lower extremity discomfort and light touch sensation was preserved to both lower extremities. Dr. Borman stated that deep tendon reflexes at the knees and ankles were symmetric. He reviewed *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) and stated:

“Class 1 involves either sensory deficits and/or motor deficits. Based on my examination of March 21, 2012, [appellant] had no loss of sensation to the lower extremities and specifically no loss of sensation to the plantar aspect of either foot. In addition, [appellant] had no motor deficits to the lower extremities. Therefore, he would be assigned by default a Class 0 impairment regarding spinal nerve injury and/or dysfunction associated with a work injury of July 20, 2004.”

In an April 22, 2013 decision, OWCP found that appellant had not met his burden of proof to establish more than 13 percent permanent impairment of either leg. It based its decision on the opinion of Dr. Borman.

Appellant requested a hearing with an OWCP hearing representative. At the September 16, 2013 hearing, counsel argued that OWCP’s rating methodology for extremity impairment originating in the spine amounted to “junk science.”

In an October 28, 2013 decision, an OWCP hearing representative affirmed the April 23, 2013 decision denying appellant’s claim for additional schedule award compensation.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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.⁶ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

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.⁸ A

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ *Id.*

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA. Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹

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.¹⁰

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 Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.¹¹ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹² In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹³

Section 8123(a) of FECA provides in pertinent part: "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."¹⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁵ In situations where there exist 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 upon a proper factual background, must be given special weight.¹⁶

⁹ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ 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.

¹² *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹³ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

OWCP accepted that on July 20, 2004 appellant, then a 46-year-old laborer, was injured when he sustained a 10-foot fall after climbing over a log. It accepted that he sustained aggravation of spondylolisthesis, lumbosacral radiculopathy of both legs, chronic pain syndrome and reaction to spinal or lumbar puncture. On June 22, 2005 appellant underwent an authorized L5-S1 fusion surgery. OWCP granted him schedule awards for 13 percent permanent impairment to his left and right legs.

Appellant claimed an additional schedule award of compensation based on an addendum report of Dr. Hebrard. OWCP then determined that there was a conflict in the medical opinion regarding the extent of his permanent impairment between Dr. Hebrard, appellant's attending physician, and OWCP medical advisers, Dr. Slutsky and Dr. Stewart and referred appellant, pursuant to section 8123(a) of FECA, to Dr. Borman, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In his May 16, 2012 report, Dr. Borman found that appellant did not have more than 13 percent permanent impairment of his left leg and 13 percent permanent impairment of his right leg, for which he received a schedule award. He properly applied the standards of *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009). Dr. Borman stated, "Class 1 involves either sensory deficits and/or motor deficits. Based on my examination of March 21, 2012, [appellant] had no loss of sensation to the lower extremities and specifically no loss of sensation to the planar aspect of either foot. In addition, he had no motor deficits to the lower extremities. Therefore, [appellant] would be assigned by default a Class 0 impairment regarding spinal nerve injury and/or dysfunction associated with a work injury of July 20, 2004."

The Board finds that OWCP properly relied on his well-rationalized medical opinion to deny appellant's claim for additional schedule award compensation. Appellant's impairment rating is based on a complete and accurate factual history and he properly applied the relevant standards of the A.M.A., *Guides*. Dr. Borman's opinion constitutes the weight of the medical evidence with respect to this matter.

On appeal, counsel asserts that OWCP's rating methodology for extremity impairment originating in the spine amounts to "junk science." As noted, OWCP's reliance on *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) was incorporated into the Federal (FECA) Procedure Manual and is a proper exercise of OWCP's discretion.¹⁷

¹⁷ See *supra* notes 11 through 13. In the present appeal, appellant, through counsel, filed a pleading alleging that OWCP's use of *The Guides Newsletter* represented an unwarranted use of "junk science" standards. On December 23, 2013 the Director of OWCP filed a response to appellant's pleading. The Director presented extensive argument rebutting appellant's assertion that OWCP did not have the authority to implement the use of *The Guides Newsletter*. On December 27, 2013 appellant, through counsel, filed a reply to the Director's brief.

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 did not meet his burden of proof to establish that he has more than 13 percent permanent impairment of his left leg and 13 percent permanent impairment of his right leg, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.¹⁸

Issued: February 27, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ Michael E. Groom, Alternate Judge, participated in the original decision but was no longer a member of the Board effective December 27, 2014.