



## **FACTUAL HISTORY**

The case has previously been before the Board. By order dated November 6, 2014, the Board remanded the case to administratively combine appellant's claims involving lumbar injuries.<sup>2</sup> As the Board indicated, on September 7, 2005 appellant, then a 53-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that she had sustained a back injury while lifting mail. By decision dated January 10, 2006, OWCP accepted the claim for sprain of back, lumbar region under OWCP File No. xxxxxx323. On July 8, 2006 appellant filed another Form CA-1 alleging that she sustained an injury while pushing a lawn mower. OWCP accepted the claim for aggravation of lumbar sprain, under OWCP File No. xxxxxx973. The two claims were administratively combined into master File No. xxxxxx323. Under the master claim file, OWCP issued a schedule award decision dated September 9, 2009 for one percent bilateral lower extremity permanent impairment, one-half percent impairment to each lower extremity.

In addition, on October 3, 2008 appellant filed a Form CA-1 alleging that on that same date she sustained a back and left leg injury when she fell while lifting mail. A new claim was created and by decision dated January 12, 2009, OWCP accepted the claim for sprain of back, lumbar region under OWCP File No. xxxxxx475. By decision dated September 4, 2013, OWCP expanded acceptance of the claim to include left thoracic or lumbosacral neuritis or radiculitis. Pursuant to this claim, OWCP issued a schedule award decision dated July 15, 2013 for 12 percent permanent impairment to the left lower extremity. Appellant requested a hearing. The July 15, 2013 decision was affirmed by an OWCP hearing representative in a decision dated January 29, 2014. Appellant then requested an appeal of the January 29, 2014 decision, and on November 6, 2014 the Board found the three claims should be administratively combined.

With respect to an increased permanent impairment of the lower extremities under the current combined claim, appellant submitted a March 7, 2013 report from Dr. Nicholas P. Diamond, an osteopath. Dr. Diamond provided a history and results on examination. As to manual muscle strength, he reported, "testing of the lower extremities is graded at 4+ to 5/5 on the right" and 4/5 on the left. Dr. Diamond then opined that appellant would have 20 percent left lower extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment, The Guides Newsletter* for mild motor and sensory deficits. He identified L4, L5, and S1 nerve roots on the left.

OWCP referred the March 7, 2013 report of Dr. Diamond to an OWCP medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, for review. In his July 27, 2013 report, Dr. Berman opined that appellant had no additional permanent impairment to the left lower extremity.

In an "updated" report dated June 21, 2013, Dr. Diamond again provided results of the March 7, 2013 examination. He now opined that appellant would have nine percent right lower extremity permanent impairment under *The Guides Newsletter*, based on mild motor deficit at L4. Dr. Diamond repeated his opinion with respect to 20 percent left lower extremity impairment.

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<sup>2</sup> Docket No. 14-1325 (issued November 6, 2014).

By decision dated September 26, 2013, OWCP found appellant had not established additional lower extremity impairment. Appellant, through counsel, requested a hearing before an OWCP hearing representative on October 17, 2013. A hearing was held on February 20, 2014.

By decision dated May 9, 2014, the hearing representative remanded the case to OWCP. She noted that the OWCP medical adviser had not reviewed the June 21, 2013 report from Dr. Diamond or determined whether appellant had any further right lower extremity permanent impairment. The hearing representative remanded the case for a *de novo* decision on the claim for a schedule award of the right lower extremity.

Appellant underwent lumbar surgery on September 17, 2013, performed by Dr. Stephen Cairone, an osteopath. The surgery was described as a partial lumbar laminectomy L4-5 and central decompression L4-5. OWCP referred appellant for a second opinion examination by Dr. Stephen Valentino, an osteopath, and requested an opinion as to whether the surgery was employment related. In a report dated November 19, 2013, Dr. Valentino provided a history and results on examination. He indicated that motor and sensory examinations were normal. Dr. Valentino opined that the surgery was not related to accepted work conditions.

In a report dated November 20, 2013, Dr. Cairone provided results on examination. As to the right lower extremity, he reported 5/5 strength for quadriceps, hamstring, tibialis anterior, extensor hallucis longus, and gastrocnemius.

Pursuant to the May 9, 2014 hearing representative decision, OWCP referred the case to Dr. Berman for an opinion as to whether the June 21, 2013 report from Dr. Diamond showed lower extremity impairment greater than one percent.<sup>3</sup> In a report dated June 4, 2014, Dr. Berman found that Dr. Diamond's calculations were incorrect. With respect to L4, he reported that electromyogram (EMG) studies did not indicate L4 nerve root involvement.

By decision dated July 7, 2014, OWCP found appellant had not established additional impairment for the right lower extremity of record based on the medical evidence. It discussed the June 4, 2014 report from the OWCP medical adviser, Dr. Berman.

On July 11, 2014 appellant requested a hearing before an OWCP hearing representative. A hearing was held on November 19, 2014.

In a brief report dated December 1, 2014, Dr. Diamond reported that he disagreed with this opinion that electromyogram (EMG) studies did not indicate L4 nerve root involvement. He referred to a February 13, 2007 report showing L4 and L5 radiculopathy on the right.<sup>4</sup> Dr. Diamond also referred to EMG results regarding left radiculopathy dated November 4, 2008 and May 22, 2013.

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<sup>3</sup> This apparently refers to the September 9, 2009 schedule award, which found one percent bilateral permanent impairment of the lower extremities. As noted, appellant also received a schedule award for 12 percent permanent impairment of the left lower extremity on July 15, 2013.

<sup>4</sup> The record contains a February 13, 2007 report from Dr. Stephen Masceri, a physiatrist, reporting EMG showed mild-to-moderate L4-5 radiculopathy on the right.

In a report dated January 22, 2015, another OWCP medical adviser, Dr. Morley Slutsky, a Board-certified occupational medicine specialist, opined there was no lower extremity permanent impairment. He did not specifically discuss the right versus the left lower extremity. Dr. Slutsky referred to diagnostic testing and indicated that appellant had undergone a lumbar laminectomy. He opined that both before and after surgery appellant had not been found to have lower extremity motor or sensory deficit, noting the November 19 and 20, 2013 reports.

By decision dated March 2, 2015, the hearing representative remanded the case to OWCP. He noted that the Board had found the three claims should be combined. According to the hearing representative, Dr. Slutsky had not discussed the permanent impairment ratings or findings of Dr. Diamond, or the December 1, 2014 report.

In a report dated June 26, 2015, Dr. Slutsky reviewed the reports from Dr. Diamond. He opined that sensory and motor deficits under the A.M.A., *Guides* were determined by clinical examination, and testing such as EMG results were used for diagnostic purposes and as grade modifiers. Dr. Slutsky found the evidence did not establish motor or sensory deficits to the lower extremities.

By decision dated July 1, 2015, OWCP found that the medical evidence of record failed to establish an additional schedule award. Appellant, through counsel, again requested a hearing before an OWCP hearing representative on July 9, 2015. By letter dated September 10, 2015, appellant's counsel changed his request to a review of the written record.

In a decision dated October 8, 2015, the hearing representative affirmed the July 1, 2015 decision, finding that she found the medical evidence of record did not establish increased permanent impairment to the lower extremities.

### **LEGAL PRECEDENT**

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>5</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>7</sup>

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<sup>5</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>6</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) is to be applied.<sup>8</sup>

### ANALYSIS

Appellant’s counsel has requested that the Board review the October 8, 2015 decision with respect to the issue of increased right lower extremity impairment. He indicated that the left lower extremity determination was not contested.

As to the right lower extremity, Dr. Diamond provided results on examination in his March 7, 2013 report. In his June 21, 2013 report, he opined that appellant has nine percent right lower extremity permanent impairment. The rating was based on *The Guides Newsletter* proposed Table 2 for the L4 nerve root, which provides nine percent impairment for a grade E “mild motor deficit.”<sup>9</sup>

The Board notes that *The Guides Newsletter* evaluates motor deficits on the descriptions found in the A.M.A., *Guides*. As reported by Dr. Slutsky, motor deficits are based primarily on examination results. Motor deficits for the lower extremities are discussed in the A.M.A., *Guides* and are described as based on muscle strength testing, noting that strength testing is voluntary and requires full individual cooperation and concentration.<sup>10</sup> To be valid, the results should be concordant with other observable pathologic signs and medical evidence, and if measurements are made by one evaluator they should be consistent on different occasions.<sup>11</sup> Dr. Diamond does not discuss the manual muscle testing that he performed.

A mild motor deficit is described under Table 16-11 as “[g]rade 4/5 (Against gravity with some resistance), mild weakness.”<sup>12</sup> The examination results provided by Dr. Diamond were “4+ to 5/5” on the right. Dr. Diamond provides no explanation as to why these findings would be consistent with a mild motor deficit as described under the A.M.A., *Guides*. Such an explanation is particularly important in the present case, in view of the other medical evidence of record. As noted by medical adviser Dr. Slutsky, there was a November 19, 2013 report from Dr. Valentino, a second opinion physician, and a November 20, 2013 report from attending physician Dr. Cairone. Neither of these reports showed a motor deficit on the right. Dr. Valentino reported a normal motor examination and Dr. Cairone described 5/5 for his right lower extremity strength results.

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<sup>8</sup> 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 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>9</sup> *The Guides Newsletter* (July/August 2009).

<sup>10</sup> A.M.A., *Guides* 533.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at Table 16-11.

With respect to diagnostic studies, the A.M.A., *Guides* indicate that “electromyographic studies can help confirm motor function of specific muscles or group of muscles.”<sup>13</sup> In his December 1, 2014 report, Dr. Diamond refers only to a February 13, 2007 EMG with respect to L4 radiculopathy on the right, a study performed over six years prior to his examination. Dr. Diamond does not discuss any contemporaneous studies to help confirm his opinion as to motor deficit on the right.

OWCP referred the case to an OWCP medical adviser, Dr. Slutsky.<sup>14</sup> In his January 22 and June 26, 2015 reports, the OWCP medical adviser found there was no current permanent impairment to the right lower extremity, and supported his opinion with medical rationale. The Board finds this opinion represents the weight of the medical evidence. It is appellant’s burden of proof to establish an increased schedule award.<sup>15</sup> The evidence of record does not establish an increased right lower extremity permanent impairment in this case.

On appeal, counsel argues there is a conflict between the OWCP medical adviser and Dr. Diamond. For the reasons discussed above, the Board finds that Dr. Diamond’s report is of diminished probative value with respect to the issue presented.

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.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant has not established increased permanent impairment to her right lower extremity.

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<sup>13</sup> *Supra* note 10.

<sup>14</sup> When the claimant’s physician provides a permanent impairment report, the case is referred to an OWCP medical adviser. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (February 2013).

<sup>15</sup> *Edward W. Spohr*, 54 ECAB 806, 810 (2003).

<sup>16</sup> *See Linda T. Brown*, 51 ECAB 115 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 8, 2015 is affirmed.

Issued: June 6, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board