

ISSUE

The issue is whether appellant met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 25, 2007 appellant, then a 47-year-old maintenance work inspector, filed an occupational disease claim (Form CA-2) alleging a cervical condition due to repetitive neck movements at work over time. OWCP accepted his claim for cervical stenosis/dystonia. Shortly after filing his claim, appellant began working in a light-duty position for the employing establishment.⁴

On January 25, 2008 Dr. William Maggio, an attending Board-certified neurosurgeon, performed OWCP-approved discectomy and fusion at C3-4.

An April 21, 2009 x-ray test of appellant's cervical spine contained an impression of unremarkable postoperative changes apart from mild dextroscoliosis.⁵ On July 9, 2009 Dr. Maggio noted that a computerized tomography (CT) scan from an unspecified date was normal and that appellant had no neurologic complaints.⁶

On January 6, 2014 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted work injury.

In a July 9, 2014 report, Dr. Robert W. Macht, an attending Board-certified general surgeon, determined that appellant had 10 percent impairment of his left upper extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁷ He opined that appellant had a cervical radiculopathy as shown by recent electromyogram (EMG) and nerve conduction velocity (NCV) testing. Dr. Macht referenced tables relating to spinal nerves in the American Medical Association publication, *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition"

³ Docket No. 16-1116 (issued October 20, 2016).

⁴ Appellant received a leave buy back payment for the period August 22, 2007 to February 15, 2008.

⁵ A November 3, 2000 magnetic resonance imaging (MRI) scan of appellant's cervical spine showed cord compression at C3-4.

⁶ The record does not contain a CT scan of the cervical spine produced around the time of Dr. Maggio's report.

⁷ 6th ed. 2009.

(July/August 2009) (hereinafter *The Guides Newsletter*).⁸ He indicated that appellant reached maximum medical improvement (MMI) as of June 1, 2014.

On December 5, 2014 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, indicated that he had reviewed appellant's file. He noted that Dr. Macht's findings contrasted with those of Dr. Maggio in that Dr. Maggio had previously reported that appellant had a normal CT scan and did not have any neurologic complaints. Dr. Slutsky noted that the file did not contain a report of the EMG/NCV study referenced by Dr. Macht. He determined that the medical evidence of record was insufficient to support an impairment rating.

In January 2015 OWCP referred appellant for a second opinion examination to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, in order to evaluate the permanent impairment of his upper extremities under the standards of the sixth edition of the A.M.A., *Guides*.

In a February 12, 2015 report, Dr. Draper discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. Appellant exhibited findings of 5/5 upper extremity strength bilaterally, restricted cervical range of motion, +2 symmetric reflexes, normal light touch sensation, negative bilateral shoulder impingement, and diminished left hand motion. Dr. Draper noted that appellant had no objective motor deficits, sensory loss, or neurologic abnormalities, and indicated that his findings were consistent with those reported by Dr. Maggio in 2009. However, he found that paresthesia in appellant's upper extremities reflected cervical radiculopathy related to the accepted injury. Citing Table 1 in *The Guides Newsletter*, Dr. Draper classified appellant at a class 1, grade C, or one percent permanent impairment of each upper extremity referable to C6 sensory deficit. In each upper extremity, appellant had grade modifiers of 1 for physical examination, 1 for functional history, and 1 for clinical studies which yielded a net adjustment of zero and a final impairment rating of one percent for each upper extremity. He indicated that appellant reached MMI as of February 18, 2008.

The report from Dr. Draper was referred to OWCP's medical adviser, Dr. Slutsky, for review. On March 11, 2015 Dr. Slutsky indicated that Dr. Draper's report showed that there was no objective evidence of sensory or motor loss and that, therefore, there was no ratable permanent impairment. He indicated that the report of an EMG/NCV study referenced by Dr. Macht was not in the case record and concluded that appellant had no permanent upper extremity impairment.

In a June 2, 2015 report, Dr. Macht noted that the EMG/NCV study referenced in his earlier report was conducted on April 1, 2014 by another attending physician, who provided an impression of left C5 radiculopathy. He indicated that this testing showed evidence of motor loss.

In a June 16, 2015 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, noted that the November 3, 2000 cervical spine MRI scan

⁸ See *infra* note 18.

showed cord compression at C3-4, and the postsurgery CT scan showed residual posterior osteophyte at C3-4. He opined that these findings were consistent with the paresthesia reported by Dr. Draper, and therefore constituted evidence of bilateral upper extremity sensory deficit. Citing Table 1 in *The Guides Newsletter*, Dr. Berman agreed with Dr. Draper's finding that appellant had one percent permanent impairment of each upper extremity. He indicated that appellant reached MMI on February 18, 2008.

In a June 29, 2015 decision, OWCP granted appellant a schedule award for one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. The award ran for 6.24 weeks from February 18 to April 1, 2008 and was based on a determination that the weight of the medical opinion evidence with respect to permanent impairment rested with the opinions of Dr. Draper and Dr. Berman.

Appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 29, 2016 counsel argued that OWCP did not properly consider the June 2, 2015 report of Dr. Macht.

By decision dated April 4, 2016, an OWCP hearing representative affirmed OWCP's June 29, 2015 decision noting that appellant had not established more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. He indicated that the degree of schedule award compensation granted to appellant was supported by the opinions of Dr. Draper and Dr. Berman. The hearing representative noted that Dr. Macht's June 2, 2015 report did not contain an impairment rating supported by an EMG/NCV study of record.

Appellant appealed his case to the Board and, in an October 20, 2016 decision,⁹ the Board affirmed OWCP's April 4, 2016 decision finding that appellant had not met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received schedule awards. The Board found that the weight of the medical opinion evidence rested with the opinions of Dr. Draper and Dr. Berman who found that appellant had one percent permanent impairment of each upper extremity. The Board determined that the permanent impairment ratings of Dr. Draper and Dr. Berman were in accordance with the relevant standards of the sixth edition of the A.M.A., *Guides*. The Board noted that appellant failed to submit probative evidence showing that he had more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. The Board indicated that Dr. Macht had posited on July 9, 2014 that appellant had 10 percent impairment of his left upper extremity as indicated by the findings an EMG/NCV study. The Board found that this opinion was of limited probative value because Dr. Macht did not adequately describe the rationale for this opinion under the standards of the sixth edition of the A.M.A., *Guides* and he referenced an EMG/NCV study that was not in the record.

By letter dated and received on November 30, 2016, appellant, through counsel, requested reconsideration of his claim. Appellant submitted the findings of an April 1, 2014 EMG/NCV study of the upper extremities which contained a clinical interpretation of abnormal

⁹ See *supra* note 3.

electrophysiological study of the left upper extremity due to chronic left C5 radiculopathy of moderate-to-severe degree, and early mild bilateral carpal tunnel syndrome (sensory in nature with no involvement in the motor fiber).¹⁰

In an April 7, 2017 decision, OWCP denied modification of its prior decision, noting that he did not meet his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received a schedule award. It indicated that appellant provided an April 1, 2014 EMG/NCV study, but found the study by itself did not establish an increase in the permanent impairment of his upper extremities. OWCP found that appellant had not provided a well-reasoned and rationalized impairment rating from a physician showing that he had more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provisions of FECA¹¹ and its implementing regulations¹² 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 regulation as the appropriate standard for evaluating schedule losses.¹³ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹⁴

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.¹⁵ A 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.¹⁶ Moreover, neither FECA nor its implementing regulations provides for

¹⁰ The clinical interpretation portion of the report did not identify any abnormal findings for the right upper extremity.

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404 (1999).

¹³ *Id.*

¹⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁵ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁶ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

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.¹⁷

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.¹⁸

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.¹⁹ 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.²⁰ 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.²¹

ANALYSIS

OWCP accepted that appellant sustained an occupational injury in the form of cervical stenosis/dystonia. On February 12, 2014 appellant filed a claim for a schedule award due to his accepted work injury. In a June 29, 2015 decision, OWCP granted him a schedule award for one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. By decision dated April 4, 2016, an OWCP hearing representative affirmed OWCP's June 29, 2015 decision. In an October 20, 2016 decision, the Board affirmed OWCP's April 4, 2016 decision finding that appellant had not met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

The Board notes that it found, in its October 20, 2016 decision, that none of the evidence contained in the record prior to the issuance of OWCP's April 4, 2016 decision established that appellant had more than one percent permanent impairment of his right upper extremity and one

¹⁷ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹⁸ See *supra* note 15.

¹⁹ 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.

²⁰ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

²¹ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

percent permanent impairment of his left upper extremity. The only medical evidence that appellant submitted after the issuance of OWCP's April 4, 2016 decision was an April 1, 2014 EMG/NCV study of his upper extremities which contained a clinical interpretation of abnormal electrophysiological study of the left upper extremity due to chronic left C5 radiculopathy of moderate-to-severe degree, and early mild bilateral carpal tunnel syndrome.²² In an April 7, 2017 decision, OWCP denied appellant's claim noting that he did not meet his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity.

The Board finds that appellant has not met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received schedule awards.

As noted, appellant provided an April 1, 2014 EMG/NCV study after the issuance of the Board's October 20, 2016 decision. However, this study would not, in and of itself, establish that appellant had more than one percent permanent impairment of either upper extremity. The Board notes that, in its October 20, 2016 decision, it referenced the absence of an EMG/NCV study in the record when it determined that a July 9, 2014 report of Dr. Macht, an attending physician, was of limited probative value due to its lack of medical rationale supporting its opinion on upper extremity permanent impairment.²³ The April 1, 2014 EMG/NCV study did not contain any opinion on the extent of the permanent impairment of appellant's upper extremities and, therefore, is of limited probative value regarding this matter.²⁴ The mere inclusion of the April 1, 2014 EMG/NCV study in the record would not remedy the fact that the record still lacks a rationalized medical report showing that appellant had more than one percent permanent impairment of either upper extremity. For these reasons, OWCP properly found, in its April 7, 2017 decision, that appellant had not provided a well-reasoned and rationalized impairment rating report from a physician showing more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*.

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

²² The clinical interpretation portion of the report did not identify any abnormal findings for the right upper extremity.

²³ The Board has held that a report which does not contain medical rationale supporting its conclusion regarding a given medical matter is of limited probative value regarding that matter. *D.R.*, Docket No. 16-0528 (issued August 24, 2016).

²⁴ See *Charles H. Tomaszewski*, 39 ECAB 461 (1988) (finding that medical evidence which does not offer an opinion regarding a given medical matter is of limited probative value regarding that matter).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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