

ISSUE

The issue is whether appellant has greater than eight percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 31, 2016 appellant, then a 50-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date a machine door struck her on the side of her face while in the performance of duty. She stopped work on November 1, 2016 and returned to light-duty work on February 17, 2017. OWCP accepted appellant's claim for head contusion, benign paroxysmal vertigo, and cervical spine sprain.

On February 12, 2018 OWCP expanded the acceptance of the claim to include cervical disc disorder with radiculopathy, C3-4, C4-5, C5-6, and C6-7. Appellant stopped work on March 7, 2017. She underwent a percutaneous anterior cervical discectomy at C5-6 on May 30, 2018. Appellant returned to light duty on September 19, 2018.

On October 15, 2021 appellant filed a claim for compensation (Form CA-7) requesting a schedule award.

In a November 11, 2021 impairment evaluation, Dr. Mark A. Seldes, a Board-certified family medicine physician, discussed appellant's complaints of neck pain radiating into the upper extremities. He referenced *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*),⁵ which is a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ Dr. Seldes applied a grade modifier for functional history (GMFH) of 2, based on pain and symptoms with normal activities and use of medication; and a grade modifier for clinical studies (GMCS) of 2, based on clinical and radiological evidence of C6 nerve root radiculopathy. He, therefore, opined that she had 5 percent permanent impairment of the left upper extremity and 15 percent permanent impairment of the right upper extremity.

On December 9, 2021 OWCP requested that a district medical adviser (DMA) review Dr. Seldes' impairment rating. In a December 14, 2021 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, recommended that OWCP refer appellant for a second opinion examination to confirm Dr. Seldes' findings regarding her upper extremity deficits and to access permanent impairment.

⁴ Docket No. 19-0410 (issued August 13, 2019).

⁵ Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments.

⁶ A.M.A., *Guides* (6th ed. 2009).

On January 20, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Omar David Hussamy, an orthopedic surgeon, for a second opinion examination to determine her permanent impairment for schedule award purposes.

In a February 4, 2022 report, Dr. Hussamy reviewed the SOAF and provided findings on physical examination, including objective findings of limited range of motion of the cervical spine and decreased sensation in the C6 and C7 dermatomal distributions of the right upper extremity. He found that left upper extremity sensation was intact. Dr. Hussamy diagnosed C4-7 cervical disc disorders with radiculopathy and cervical sprain with radiculopathy. He found that appellant reached maximum medical improvement (MMI) on February 4, 2022. Dr. Hussamy applied the A.M.A., *Guides* and *The Guides Newsletter* and found the sensory deficits in the C6 and C7 dermatomes. He applied a GMFH of 2, and a GMCS of 2. Dr. Hussamy calculated eight percent permanent impairment of the right upper extremity due to five percent impairment of the C6 dermatome and three percent impairment of the C7 dermatome in accordance with *The Guides Newsletter*, Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments.

On March 8, 2022 OWCP referred Dr. Hussamy's report to the DMA. In a March 29, 2022 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a DMA, agreed with Dr. Hussamy's impairment rating of eight percent permanent impairment of the right upper extremity in accordance with the A.M.A., *Guides* and *The Guides Newsletter*.

By decision dated April 27, 2022, OWCP granted appellant a schedule award for eight percent permanent impairment of the right upper extremity. The award ran for 24.96 weeks from February 4 through March 26, 2022.

On May 27, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on September 15, 2022.

By decision dated November 30, 2022, OWCP's hearing representative affirmed the April 27, 2022 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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 way the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the

⁷ *Supra* note 3.

⁸ 20 C.F.R. § 10.404.

A.M.A., *Guides*, published in 2009.⁹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

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 the medical adviser providing rationale for the percentage of impairment specified.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.¹² Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a GMFH, a grade modifier for physical examination (GMPE), and a GMCS.¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁵

Neither FECA, nor its implementing regulations, provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹⁶ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁷ The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations in which a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on

⁹ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *S.J.*, Docket No. 22-0714 (issued March 31, 2023); *M.H.*, Docket No. 21-1250 (issued February 17, 2023); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *Supra* note 9 at Chapter 2.808.6f (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

¹² A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹³ *Id.* at 494-531.

¹⁴ *Id.* at 411.

¹⁵ *S.J.*, *supra* note 10; *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹⁶ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see S.J.*, *supra* note 10; *C.S.*, Docket No. 19-0851 (issued November 18, 2019).

¹⁷ *Supra* note 9 at Chapter 2.808.5c(3) (March 2017).

evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedures.¹⁸

Section 8123(a) of FECA provides in 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."¹⁹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.²⁰

ANALYSIS

The Board finds this case not in posture for decision.

In a November 11, 2021 impairment evaluation, Dr. Mark A. Seldes, a Board-certified family medicine physician, discussed appellant's complaints of neck pain radiating into the upper extremities. Referencing *The Guides Newsletter*,²¹ he applied a grade modifier for functional history (GMFH) of 2, based on pain and symptoms with normal activities and use of medication; and a grade modifier for clinical studies (GMCS) of 2, based on clinical and radiological evidence of C6 nerve root radiculopathy. Dr. Seldes, therefore, opined that she had 5 percent permanent impairment of the left upper extremity and 15 percent permanent impairment of the right upper extremity. OWCP referred appellant to Dr. Hussamy for a second opinion evaluation. On February 4, 2022 Dr. Hussamy found decreased sensation in the C6 and C7 dermatomal distributions of the right upper extremity, but determined that left upper extremity sensation was intact. He diagnosed C4-7 cervical disc disorders with radiculopathy and cervical sprain with radiculopathy. Dr. Hussamy applied the A.M.A., *Guides* and *The Guides Newsletter* and found that the GMFH was 2, Table 15-7, page 406, A.M.A., *Guides*, and GMCS was 2, Table 15-9, page 411, A.M.A., *Guides*. After applying the net adjustment formula, he reached eight percent permanent impairment of the right upper extremity due to five percent impairment of the C6 dermatome and three percent impairment of the C7 dermatome. On March 8, 2022 OWCP referred Dr. Hussamy's report to the DMA. In a March 29, 2022 report, Dr. Ugokwe, serving as DMA concurred with Dr. Hussamy's impairment rating of eight percent permanent impairment of the right upper extremity.

The Board thus finds that a conflict in medical opinion exists between Dr. Seldes and Drs. Hussamy and Ugokwe, with regard to the extent of appellant's permanent impairment of the right upper extremity, necessitating referral to an impartial medical examiner (IME) for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).²²

¹⁸ *Supra* note 9 at Chapter 3.700, Exhibit 4 (January 2010); *see also M.W.*, Docket No. 20-2052 (issued May 24, 2021); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹⁹ 5 U.S.C. § 8123(a).

²⁰ 20 C.F.R. § 10.321; *see R.J.*, Docket No. 23-0580 (issued April 15, 2024); *V.B.*, Docket No. 19-1745 (issued February 25, 2021); *K.C.*, Docket No. 19-1251 (issued January 24, 2020).

²¹ Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments.

²² 5 U.S.C. § 8123(a). *See also S.L.*, Docket No. 24-0522 (issued June 17, 2024); *S.G.*, Docket No. 24-0529 (issued June 12, 2024).

On remand OWCP shall refer appellant, along with an updated SOAF and the medical record, to a specialist in the appropriate field of medicine for a reasoned opinion resolving the conflict regarding the extent of appellant's permanent impairment.²³ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 13, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²³ See *S.W.*, Docket No. 22-0917 (issued October 26, 2022); *K.D.*, Docket No. 19-0281 (issued June 30, 2020).