

injury when lifting and turning while removing a rim from a crane tire weighing approximately 300 pounds. By decision dated March 22, 2002, OWCP accepted the claim for lumbosacral strain. The case was later expanded to include displacement of lumbosacral disc without myelopathy.²

On August 19, 2011 appellant filed a claim for a schedule award (Form CA-7).

By decision dated November 17, 2011, OWCP denied appellant's schedule award claim.

Appellant requested reconsideration of OWCP's decision. In support of his claim, he submitted a February 29, 2012 medical report from Dr. David Weiss, a doctor of osteopathic medicine, who reviewed appellant's prior medical record and provided a history of injury. Appellant provided findings on physical examination and diagnosed herniated nucleus pulposus at L2-L3, bulging disc at L3-L4, L4-L5, aggravation of preexisting osteoarthritis of the lumbar spine, aggravation of preexisting lumbar pathology with discectomy and laminectomy in 1980 and 1981 at L4-L5 and left lower extremity radiculitis. In accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), Dr. Weiss provided an impairment rating of one percent of the left lower extremity.

By decision dated June 28, 2012, OWCP set aside the November 17, 2011 decision and remanded the case for referral to a district medical adviser (DMA) for an opinion on whether the evidence of record was sufficient to demonstrate that appellant suffered a ratable permanent impairment of a scheduled member due to his accepted work injury and whether he had reached maximum medical improvement.

On July 24, 2012 OWCP routed Dr. Weiss' report, a statement of accepted facts and the case file to OWCP's DMA. In an August 25, 2012 report, Dr. Morley Slutsky, the DMA, reported that there were no ratable deficits and no lower extremity impairment related to the accepted conditions of lumbosacral strain and displacement of lumbosacral disc without myelopathy. The date of maximum medical improvement was noted as February 29, 2012, the date of Dr. Weiss' examination. The DMA noted that Dr. Weiss found sensory deficits in the L3 and L4 distribution and assigned ratings based upon those issues. His clinical findings were considerably different from the majority of physicians who had evaluated appellant since 2002 who found no significant sensory, motor or reflex changes in the lower extremities. The DMA further noted that appellant had undergone additional diagnostic testing including lumbar magnetic resonance imaging (MRI) scans and computerized tomography (CT) scans which did not show results consistent with involvement of the L3-L4 nerve roots. He noted that Dr. Weiss' findings were not consistent with many of the other providers of record and could not be explained by diagnostic testing. As such, the DMA's reasons were not reliable or valid as to ratable lower extremity deficits upon which to base impairment calculations. He further noted that appellant's tests did not support left-sided L2 involvement and that neither the A.M.A., *Guides* or *The Guides Newsletter* allowed ratings for this nerve root. Moreover, there were no clinical findings in the lower extremities to support deficits at this level.

² The Board notes that, on November 13, 2001, appellant suffered a traumatic injury as a result of falling six feet from a crane. OWCP accepted the claim for left shoulder conditions of strain and subluxation, Claim No. xxxxxx046.

By decision dated November 27, 2012, OWCP denied appellant's claim for a schedule award finding that he failed to establish any permanent impairment to the left lower extremity. It noted that the weight of the medical evidence rested with the report of the DMA.

On December 2, 2012 appellant, through his representative, requested an oral hearing before the Branch of Hearings and Review. A hearing was held on March 19, 2013.

In support of his claim, appellant submitted a supplemental report from Dr. Weiss dated April 9, 2013. In his report, Dr. Weiss reported that appellant's January 10, 2002 work-related injury was the producing factor for the subjective and objective findings made in his report. He referred to Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, to determine class 1 moderate sensory deficit left L5 nerve root value of three percent.³ Dr. Weiss calculated the functional history grade by using the Pain Disability Questionnaire (PDQ) test for lower back pain, a questionnaire which calculates functional disability grades by rating the difficulties a patient experiences in performing basic activities of daily living. He related that appellant had a 118 percent PDQ score, which yielded a grade modifier 3 for Functional History (GMFH), for a severe problem.⁴ Dr. Weiss then calculated a grade modifier 2 for Clinical Studies (GMCS) based on Table 16-8 of the A.M.A., *Guides*.⁵ He assigned 1 for the impairment class for the diagnosed condition (CDX), which was then adjusted by grade modifiers based on functional history and clinical studies. Dr. Weiss subtracted the grade modifier 1 from functional history and clinical studies, which yielded a net adjusted grade of 3 minus 1 and 2 minus 1 -- a total net adjustment of 3, for a five percent impairment of the right lower extremity.

Dr. Weiss then assigned class 1 moderate sensory deficit left S1 nerve root with a value of two percent.⁶ He determined functional history as grade 3 and clinical studies as grade 2. After subtracting the grade modifier of 1 from the functional history and clinical studies, Dr. Weiss arrived at a total net adjustment of three percent of the left lower extremity ((3-1) + (2-1)). Thus, the final combined value of the left lower extremity was eight percent (5+3). Dr. Weiss determined that maximum medical improvement had been reached on April 9, 2013.

By decision dated June 3, 2013, the Branch of Hearings and Review affirmed OWCP's November 27, 2012 decision finding that appellant failed to establish a permanent impairment as a result of his accepted work injury.

By letter dated June 11, 2013, appellant, through his representative, appealed the June 3, 2013 decision.

On June 14, 2013 OWCP referred the case file, statement of accepted facts and Dr. Weiss' April 9, 2013 report to OWCP's DMA to review the records and provide an opinion regarding permanent functional loss of the affected lower extremity.

³ Table 2, *The Guides Newsletter*, sixth edition (July/August 2009).

⁴ A.M.A., *Guides* 575, Table 17-6.

⁵ *Id.* at 519.

⁶ *Supra* note 3.

In a June 13, 2013 report, Dr. Slutsky, the DMA, found no ratable deficits and no lower extremity impairments secondary to the accepted conditions. He noted that an impairment rating was performed by Dr. Weiss on February 29, 2012 which found sensory deficits in the L3 and L4 distribution and assigned ratings based upon those issues. Appellant was reevaluated by Dr. Weiss on April 9, 2013 which revealed decreased sensation in the L5 and S1 dermatomes and normal lower extremity motor strength. The DMA noted that Dr. Weiss' clinical findings were considerably different from the majority of physicians who evaluated appellant since 2002. They found no significant sensory, motor or reflex changes in the lower extremities. Additionally, appellant had undergone diagnostic testing included lumbar MRI and CT scans, the results of which were not consistent with involvement of nerve roots at the L5-S1 levels. The DMA found that Dr. Weiss' findings were inconsistent and could not be explained by diagnostic testing. He further found that there were no reliable or valid, ratable lower extremity deficits upon which to base impairment calculations. The DMA noted that while appellant's tests supported left-sided L2 involvement, neither the A.M.A., *Guides* or *The Guides Newsletter* allowed for ratings of this nerve root and there were no clinical findings in the lower extremities to support deficits at this level.

By decision dated July 16, 2013, OWCP affirmed the June 3, 2013 decision finding that the evidence failed to establish a permanent impairment to a member or function of the body. It noted that the weight of medical opinion rested with the report of the DMA.

LEGAL PRECEDENT

The schedule award provision of FECA 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.⁷ 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* (6th ed. 2009) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁹ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the

⁷ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁸ *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

⁹ *Tammy L. Meehan*, 53 ECAB 229 (2001).

impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹⁰

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.¹¹ 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.¹²

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.¹³ 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.¹⁴ FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹⁵

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH and if electrodiagnostic testing were done, GMCS.¹⁶ The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹⁷

ANALYSIS

OWCP accepted appellant's claim for lumbosacral strain and displacement of lumbosacral disc without myelopathy. The issue is whether appellant sustained a permanent impairment as a result of his employment-related work injuries. The Board finds this case is not in posture for decision.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

¹¹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹³ *Supra* note 10 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁴ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also supra* note 10 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁵ *Supra* note 10 at Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

¹⁶ A.M.A., *Guides* 533.

¹⁷ *Id.* at 521.

Appellant submitted an April 9, 2013 report from Dr. Weiss in support of his schedule award claim. Dr. Weiss determined that appellant's January 10, 2002 work-related injury was the producing factor for the subjective and objective findings made in his report. He provided a detailed pre- and postoperative history, examination findings and clinical studies to calculate an impairment rating for permanent residuals of the left lower extremity. Dr. Weiss referred to Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, to determine class 1 moderate sensory deficit left L5 nerve root value of three percent.¹⁸ He assigned 1 for the CDX impairment class. Dr. Weiss provided a grade modifier of 3 for functional history and 2 for clinical studies based on the A.M.A., *Guides*.¹⁹ After subtracting the grade modifier 1 from functional history and clinical studies, he calculated a total net adjustment of 3 for a five percent impairment of the right lower extremity.

Dr. Weiss then assigned class 1 moderate sensory deficit left S1 nerve root with a value of two percent.²⁰ He determined functional history as grade 3 and clinical studies as grade 2. After subtracting the grade modifier of 1 from the functional history and clinical studies, Dr. Weiss arrived at a total net adjustment of three percent of the left lower extremity. Thus, the final combined value of the left lower extremity was eight percent (five + three). Dr. Weiss determined that maximum medical improvement had been reached on April 9, 2013.

OWCP routed the case file to the DMA who found no ratable deficits and no lower extremity impairments secondary to the accepted conditions. The DMA generally noted that Dr. Weiss' clinical findings were considerably different from the majority of physicians who evaluated appellant since 2002 who found no significant sensory, motor or reflex changes in the lower extremities. Additionally, appellant had undergone diagnostic testing included lumbar MRI scans and CT scans, the results of which were not consistent with involvement of nerve roots at the L5-S1 levels. The DMA found that Dr. Weiss' findings were inconsistent and could not be explained by diagnostic testing. He further found that there were no reliable or valid, ratable lower extremity deficits upon which to base impairment calculations. The DMA noted that while appellant's tests supported left-sided L2 involvement, neither the A.M.A., *Guides* or *The Guides Newsletter* allowed for ratings of this nerve root and there were no clinical findings in the lower extremities to support deficits at this level.

The Board finds that this case is not in posture for decision. The rating by Dr. Weiss was in conformance to the protocols under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Slutsky rejected the impairment rating largely on the basis that other physicians who had examined appellant had not found significant sensory, motor or reflex changes in lower extremities. For this reason, the case will be remanded to OWCP to refer appellant to an appropriate medical specialist for examination and an opinion on permanent impairment. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.²¹

¹⁸ *Supra* note 3.

¹⁹ *Supra* notes 4 and 5.

²⁰ *Supra* note 3.

²¹ *See L.Y.*, Docket No. 13-106 (issued March 18, 2014).

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: April 21, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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