

FACTUAL HISTORY

OWCP accepted that on June 3, 2003 appellant, then a 37-year-old laborer, sustained right shoulder and upper arm strains and displacement of cervical intervertebral disc without myelopathy. On October 20, 2003 Dr. Rafael Lopez Steuart, an attending Board-certified orthopedic surgeon, performed OWCP-authorized anterior cervical fusion surgery utilizing allograft at C5-6 and C6-7.² Beginning in July 2007, appellant received disability compensation on the daily and periodic rolls. His compensation was reduced to zero in April 2007 for failure to cooperate with OWCP-sponsored vocational rehabilitation efforts.

In May 2009 appellant filed a claim for a schedule award due to his accepted work injuries.

Appellant submitted an April 11, 2012 impairment worksheet of Dr. Lopez Steuart in support of his claim. Dr. Lopez Steuart provided diagnoses of herniated cervical disc and cervical fusion surgery at C5 through C7. He stated that, under Table 17-2 on page 564 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition 2009), appellant had a grade 3 diagnosis of cervical fusion surgery at C5 through C7 (also known as pseudoarthrosis) with a default value of 19 percent. Dr. Lopez Steuart indicated that appellant had grade modifier scores of three for functional history, physical examination and clinical studies such that there was no movement from the default value. He concluded that appellant had 19 percent permanent impairment of his cervical spine.

In a February 27, 2014 decision, OWCP denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he had a permanent impairment entitling him to schedule award compensation. The April 11, 2012 worksheet of Dr. Lopez Steuart was not sufficient to establish that appellant sustained permanent impairment entitling him to schedule award compensation.

In a form dated April 15, 2014 and postmarked April 16, 2014, appellant requested a review of the written record with an OWCP hearing representative.³

In a May 21, 2014 decision, OWCP denied appellant's request for a review of the written record. It noted that appellant's request was untimely because OWCP's last merit decision was issued on February 27, 2014 and his request for a review of the written record was postmarked on April 16, 2014. Since appellant's request was not made within 30 days, he was not, as a matter of right, entitled to a review of the written record. OWCP indicated that it had, in its discretion, carefully considered appellant's request for a review of the written record and had determined that the issue in this case could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which established entitlement to schedule award compensation.

² Dr. Lopez Steuart indicated that diagnostic testing confirmed that appellant had a herniated disc at C6-7 and a bulging disc at C5-6.

³ Appellant submitted a brief narrative report of Dr. Lopez Steuart dated April 11, 2012.

LEGAL PRECEDENT -- ISSUE 1

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 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.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

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).

⁹ *M.P.*, Docket No. 14-777 (issued July 18, 2014).

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).

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

An opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.¹⁴

ANALYSIS -- ISSUE 1

OWCP accepted that on June 3, 2003 appellant sustained right shoulder and upper arm strains and displacement of cervical intervertebral disc without myelopathy. On October 20, 2003 Dr. Lopez Steuart, an attending Board-certified orthopedic surgeon, performed OWCP-authorized anterior cervical fusion surgery utilizing allograft at C5-6 and C6-7. Appellant later filed a claim for a schedule award due to his accepted work injuries, but OWCP denied his claim in a decision dated February 27, 2014.

The Board finds that appellant did not meet his burden of proof to establish that he has a permanent impairment entitling him to schedule award compensation.

Appellant submitted an April 12, 2012 worksheet of Dr. Lopez Steuart which contained an impairment rating. Dr. Lopez Steuart stated that, under Table 17-2 of the sixth edition of the A.M.A., *Guides*, appellant had a grade 3 diagnosis of cervical fusion surgery at C5 through C7 with a default value of 19 percent. He listed grade modifier scores for functional history, physical examination and clinical studies and concluded that appellant had 19 percent permanent impairment of his cervical spine.

OWCP properly found that the April 11, 2012 worksheet of Dr. Lopez Steuart was of little probative value because it did not contain an impairment rating that was derived in accordance with the proper standards under FECA. As noted above, schedule awards are not payable for permanent impairment of the spine, including the cervical spine.¹⁵ FECA provides standards for rating permanent impairment of the arm, a specifically scheduled body member, for peripheral nerve impairment resulting from a cervical spine injury.¹⁶ However, Dr. Lopez Steuart did not perform an impairment rating under these standards and appellant did not submit other medical evidence containing same.

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

¹⁴ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

¹⁵ See *supra* notes 8 and 9.

¹⁶ See 5 U.S.C. § 8107(c)(1); *supra* notes 11 through 13.

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 utilizing the appropriate tables in the A.M.A., *Guides*.

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.¹⁷ OWCP's regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an OWCP hearing representative in lieu of an "oral hearing."¹⁸ OWCP has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of OWCP's final decision.¹⁹

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.²⁰ The principles underlying OWCP's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. OWCP's procedures, which require it to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of FECA and Board precedent.²¹

ANALYSIS -- ISSUE 2

Appellant's April 16, 2014 request for a review of the written record was made more than 30 days after the date of issuance of OWCP's prior decision dated February 27, 2014 and, thus, he was not entitled to a review of the written record as a matter of right.²² Hence, OWCP was correct in stating in its May 21, 2014 decision that appellant was not entitled to a review of the written record as a matter of right because his request for a review of the written record was not made within 30 days of OWCP's February 27, 2014 decision.

OWCP also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right. In its May 21, 2014 decision, it indicated that it had, in its discretion, carefully considered appellant's request for a

¹⁷ 5 U.S.C. § 8124.

¹⁸ 20 C.F.R. §§ 10.616, 10.618. The date of the request is determined by the postmark or other carrier's date marking. *Id.* at § 10.616(a).

¹⁹ See *Michael J. Welsh*, 40 ECAB 994 (1989).

²⁰ *Henry Moreno*, 39 ECAB 475 (1988).

²¹ See *Michael J. Welsh*, *supra* note 19.

²² Appellant requested a review of the written record in a document postmarked April 16, 2014 and, therefore, his request was made on April 16, 2014. See *supra* note 18.

review of the written record and had determined that the issue in this case could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which established entitlement to schedule award compensation. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²³ In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has a permanent impairment entitling him to schedule award compensation. The Board further finds that OWCP properly denied his request for a review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the May 21 and February 27, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 28, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

²³ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).