

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.B., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 14-1518  
Issued: January 9, 2015**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 24, 2014 appellant filed a timely appeal from the April 8, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant met his burden of proof to establish more than an eight percent permanent impairment of his right leg, for which he received a schedule award.

**FACTUAL HISTORY**

OWCP accepted that on April 5, 1999 appellant, then a 31-year-old nuclear machinist, sustained a lumbar strain due to handling a piece of metal in a lathe while at work. The accepted conditions were later expanded to include right herniated L5-S1 disc. On February 28, 2000

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

appellant underwent OWCP-authorized surgery at that level, including laminectomy, hemilaminotomy, and partial disc excision.

In a March 24, 2009 decision, OWCP granted appellant a schedule award for a three percent permanent impairment of his right leg. The award ran from September 3 to November 2, 2006.

In an August 27, 2009 report, Dr. Felix M. Kirven, an attending Board-certified orthopedic surgeon, provided an impairment rating under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009). He stated:

“Based upon [the sixth edition of the A.M.A., *Guides*], Chapter 16, pages 530-555, [appellant] has a 20 percent impairment rating with respect to lower extremity numbness, *i.e.*, the L1, L2, L3 dermatomes on the right. As far as his seizure disorder, *i.e.*, epilepsy is concerned related to medication, [appellant] has a 15 percent [whole person] impairment rating. This is based on Chapter 13; Table 13-5, 13-6.”

In a November 20, 2009 decision, an OWCP hearing representative set aside OWCP’s March 24, 2009 decision and remanded the case to OWCP for consideration of Dr. Kirven’s August 27, 2009 report by an OWCP medical adviser.

On December 5, 2009 Dr. Lawrence A. Manning, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, determined that Dr. Kirven’s August 27, 2009 impairment rating was not derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*. He found that appellant had an eight percent permanent impairment of his right leg based on restricted right ankle motion and sensory deficits of the right lateral femoral cutaneous and femoral nerves.

In a February 22, 2010 decision, OWCP granted appellant a schedule award for an additional five percent permanent impairment of his right leg.<sup>2</sup> The award ran from November 3, 2006 to February 11, 2007 and was based on the December 5, 2009 report of Dr. Manning. Appellant now had been compensated for a total right leg impairment of eight percent.

In an August 20, 2010 report, Dr. Kirven stated that, under Chapter 16 of the sixth edition of the A.M.A., *Guides*, appellant had 10 percent impairment with regard to permanent dysesthetic pain and numbness in the distribution of the lateral femoral cutaneous nerve. He noted:

“[Appellant] has a 10 percent impairment rating with regards to dysesthesia and dysfunction in the L3 dermatome secondary to his lumbar laminectomies. (Chapter 17, pages 557-599). As far as [appellant’s] seizure disorder with memory dysfunction, based on Chapter 13, pages 321-344, has a 15 percent [whole person] impairment rating. This is related to his Demerol and Ultram

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<sup>2</sup> The award inadvertently indicated that it was for appellant’s right arm.

which caused convulsions and he subsequently has lapse in memory secondary to the above.”

In an August 31, 2011 report, Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, determined that Dr. Kirven’s August 20, 2010 impairment rating was not derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*. He applied Table 16-11 and Table 16-12 on pages 533 and 534 of the sixth edition of the A.M.A., *Guides* to find that appellant had a two percent impairment of his right leg due to sensory deficits in his right lateral femoral cutaneous nerve.

In a September 30, 2011 decision, OWCP affirmed its February 22, 2010 decision denying appellant’s claim for increased schedule award compensation.<sup>3</sup> It found that the record did not contain a proper impairment rating under the sixth edition of the A.M.A., *Guides* which showed that appellant had more than an eight percent permanent impairment of his right leg.

In a May 3, 2012 letter, appellant indicated that he was awaiting the receipt of the additional schedule award for a nine percent permanent impairment, as denoted in OWCP’s September 30, 2011 decision.

In a February 18, 2014 letter, OWCP advised appellant that its September 30, 2011 decision contained erroneous information. It stated, “The cover sheet indicated that your award be increased to include an additional 9 percent (14 percent inclusive), however the attached [n]otice of [d]ecision stated that your [r]econsideration was denial of modification. Under the Director’s own motion our office is reopening and vacating your claim for further development in order to preserve your appeal rights.”

In an April 8, 2014 decision, OWCP affirmed its earlier decisions denying appellant’s claim for increased schedule award compensation. As noted in the February 18, 2014 letter, it appears that OWCP’s primary reason for issuing the decision was to preserve appellant’s appeal rights.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> 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

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<sup>3</sup> The cover letter of the decision indicated that OWCP’s February 22, 2010 decision would be modified and that appellant’s award would be “increased to include 9 percent addition (14 percent inclusive).” However, this appears to have been an inadvertent clerical error since the memorandum constituting the body of the decision as well as OWCP’s letter dated February 18, 2014, described herein, show that OWCP found that appellant had no additional impairment beyond that for which he had previously received schedule awards.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

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.<sup>6</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>7</sup>

Schedule awards are not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA. Neither FECA nor its implementing regulations provide for 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.<sup>8</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbar strain on April 5, 1999 due to handling a piece of metal in a lathe at work. The accepted conditions were later expanded to include right herniated L5-S1 disc. On February 28, 2000 appellant underwent OWCP-authorized surgery at that level, including laminectomy, hemilaminotomy, and partial disc excision. In a March 24, 2009 decision, OWCP granted him a schedule award for a three percent permanent impairment of his right leg. In a February 22, 2010 decision, it granted appellant a schedule award for an additional five percent permanent impairment of his right leg. To this point, appellant had been compensated for a total right leg impairment of eight percent.

Appellant did not meet his burden of proof to submit medical evidence showing that he has more than an eight percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides*. He submitted August 27, 2009 and August 20, 2010 reports of Dr. Kirven, an attending Board-certified orthopedic surgeon, which suggested that he had more than an eight percent impairment of his right leg. However, Dr. Kirven's August 27, 2009 and August 20, 2010 opinions on permanent impairment are of limited probative value because they were not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.<sup>9</sup>

For example, although Dr. Kirven indicated that appellant had right leg impairment due to right peripheral nerve impairment, he did not explain how the relevant standards of the sixth edition of the A.M.A., *Guides* showed that appellant had such a high level of impairment. He did not explain whether he applied Table 16-11 on page 533 of the sixth edition to calculate the level of sensory deficit in accordance with the medical findings of record. Dr. Kirven also provided whole person impairments based on appellant's epilepsy condition, but FECA does not provide for an award for such a whole person impairment.<sup>10</sup> He calculated impairment ratings

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<sup>6</sup> *Id.*

<sup>7</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>8</sup> *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

<sup>9</sup> 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).

<sup>10</sup> See *supra* note 8.

for the back under Chapter 17 but FECA does not provide schedule awards for impairment of the back itself.<sup>11</sup>

On appeal, appellant alleged that he was entitled to schedule award compensation for an additional nine percent permanent impairment of his right leg because such an additional award was mentioned in OWCP's September 30, 2011 decision. However, OWCP advised him that the notation in the September 30, 2011 decision regarding an additional nine percent impairment rating was in error and that the body of the decision clearly showed that OWCP was affirming its prior determination that he had not shown that he had more than an eight percent permanent impairment of his right leg.

The record does not contain any medical report showing that appellant has more than an eight percent permanent impairment of his back, for which he received schedule awards. 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.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he has more than an eight percent permanent impairment of his right leg, for which he received a schedule award.

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2015  
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