

FACTUAL HISTORY

OWCP accepted that on May 2, 2006 appellant, then a 52-year-old agriculture specialist, sustained thoracic and lumbosacral neuritis and displacement of a lumbar intervertebral disc without myelopathy due to climbing, lifting, and bending while inspecting fruit containers. Appellant stopped work on May 19, 2006 and received compensation on the daily rolls beginning July 2, 2006. She later returned to full-time work for the employing establishment.

In a November 27, 2007 decision, OWCP granted appellant a schedule award for three percent impairment of her right leg and three percent impairment of her left leg. The award ran for 17.28 weeks from July 9 to November 6, 2007. The award was based on a November 7, 2007 report of Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. Dr. Berman had evaluated the medical evidence of record, including several reports of Dr. Robert I. Winer, an attending Board-certified neurologist.

In a September 16, 2008 report, Dr. Steven M. Allon, an attending orthopedic surgeon, reported the findings of his physical examination on that date. He determined that, under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had 29 percent permanent impairment of her left leg due to sensory deficit and motor loss and 12 percent permanent impairment of her right leg due to sensory deficit.

Appellant claimed an increased schedule award. After extensive development of the evidence, OWCP determined that there was a continuing conflict in the medical opinion evidence regarding her leg impairment and referred appellant to Dr. Scott Sexton, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter. Dr. Sexton produced reports dated February 28 and August 23, 2011, and July 11, 2013. In his July 11, 2013 report, Dr. Sexton determined that appellant did not have any permanent impairment of either leg under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009). On July 19, 2013 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, stated that he agreed with Dr. Sexton that appellant did not have any permanent impairment of either leg.²

In a July 25, 2013 decision, OWCP denied appellant's claim for increased schedule award compensation. It found that the July 11, 2013 report of Dr. Sexton and the July 19, 2013 report of Dr. Slutsky demonstrated that appellant had no more than a three percent impairment of her right leg or more than three percent impairment of her left leg, for which she received a schedule award.

Appellant submitted a November 1, 2013 report in which Dr. Allon "updated" his September 16, 2008 impairment rating report. The report used the same physical examination findings that Dr. Allon obtained on September 16, 2008 and applied the standards of the sixth edition of the A.M.A., *Guides* to these findings. Dr. Allon determined that, under *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition"

² Dr. Slutsky indicated that the medical evidence did not show any evidence of sensory or motor deficits stemming from the low back and extending into the legs.

(July/August 2009),³ appellant had five percent impairment of her right leg and 16 percent impairment of her left leg.

By decision dated January 30, 2014, an OWCP hearing representative set aside OWCP's July 25, 2013 decision and remanded the case to OWCP for further development. He indicated that the November 1, 2013 report of Dr. Allon should be sent to an OWCP medical adviser for evaluation.

In a March 23, 2014 report, Dr. Berman, again serving as an OWCP medical adviser, stated that he had reviewed the November 1, 2013 report of Dr. Allon and noted, "His recommendation was for 16 percent left lower extremity and 5 percent impairment right lower extremity. However, subsequent examinations were carried out since that time, and these examinations do not document the same findings." Dr. Berman concluded that there was no medical evidence of record which showed that appellant had more than three percent impairment of her right leg or more than three percent impairment of her left leg.

In an April 7, 2014 decision, OWCP again denied appellant's claim for increased schedule award compensation due to leg impairment. It noted that Dr. Berman had explained that no medical evidence, including the November 1, 2013 report of Dr. Allon, showed that appellant had more than three percent impairment of her right leg or more than three percent impairment of her left leg, for which she received a schedule award.

Appellant, through counsel, requested a review of the written record by an OWCP hearing representative. Counsel asserted that there was a conflict in the medical opinion evidence that was created between the November 1, 2013 report of Dr. Allon and the March 23, 2014 report of Dr. Berman.

In an October 28, 2014 decision, OWCP hearing representative affirmed OWCP's April 7, 2014 decision. He found that Dr. Berman properly determined that the November 1, 2013 report of Dr. Allon did not show that appellant had more than three percent impairment of her right leg or more than three percent impairment of her left leg. The hearing representative indicated that Dr. Allon's November 1, 2013 impairment rating was based on old examination findings from 2008 and noted, that given the limited probative value of Dr. Allon's November 1, 2013 report, there was no conflict between it and the March 23, 2014 opinion of Dr. Berman.

LEGAL PRECEDENT

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

³ See *infra* note 12.

⁴ 5 U.S.C. § 8107.

⁵ 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.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 Moreover, 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.¹⁰

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.¹¹

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.¹² 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.¹³ 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.¹⁴

⁶ *Id.*

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹¹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹² 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, n.5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹³ *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁴ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

Section 8123(a) of FECA provides that, 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.¹⁵ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁶ OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹⁷

While an OWCP medical adviser may create a conflict in medical opinion, he or she may generally not resolve it. Furthermore, a reasoned opinion by an OWCP medical adviser will not usually constitute the weight of the medical evidence in an accepted disability case, even if the medical adviser is a Board-certified specialist in the appropriate field of medicine and the attending physician is not a specialist and offers no rationale. This is because the medical adviser has not examined the claimant while the attending physician has.¹⁸

In some instances, OWCP medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*. In this instance, a detailed opinion by the medical adviser may constitute the weight of the medical evidence.¹⁹

ANALYSIS

OWCP accepted that on May 2, 2006 appellant sustained thoracic and lumbosacral neuritis and a displacement of a lumbar intervertebral disc without myelopathy caused by climbing, lifting, and bending to inspect fruit containers. In a November 27, 2007 decision, it granted her a schedule award for three percent impairment of her right leg and three percent impairment of her left leg.

Appellant claimed that she was entitled to additional schedule award compensation due to her leg impairment. She submitted a November 1, 2013 report in which Dr. Allon, an attending Board-certified orthopedic surgeon, "updated" his previous September 16, 2008 impairment rating report. The report used the same physical examination findings that Dr. Allon obtained on September 16, 2008 and applied the standards of the sixth edition of the A.M.A., *Guides* to these

¹⁵ 5 U.S.C. § 8123(a); *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁶ *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹⁷ *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004); *see also Richard R. LeMay*, 56 ECAB 341 (2005).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8g (September 2010).

¹⁹ *Id.* at Chapter 2.810.8j; *John L. McClanic*, 48 ECAB 552 (1997).

findings. Dr. Allon determined that appellant had five percent impairment of her right leg and 16 percent impairment of her left leg.

The Board finds that appellant did not show that she has more than three percent impairment of her right leg or more than three percent impairment of her left leg.

In a March 23, 2014 report, Dr. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, explained that no medical evidence of record, including the November 1, 2013 report of Dr. Allon, showed that appellant had more than three percent impairment of her right leg or more than three percent impairment of her left leg, for which she received a schedule award. The Board finds that Dr. Berman's evaluation of the medical evidence, including the November 1, 2013 report of Dr. Allon, was correct with respect to the matter of appellant's leg impairment. The Board has held that an impairment rating that is not based on reasonably current examination findings is of little probative value.²⁰ Given that Dr. Allon's November 1, 2013 impairment rating used physical examination findings that were more than four years old, his rating of appellant's leg impairment is clearly of little probative value.

On appeal counsel argues that there was a conflict in the medical opinion evidence between the November 1, 2013 report of Dr. Allon and the March 23, 2014 report of Dr. Berman. However, because the November 1, 2013 report of Dr. Allon is obviously stale on the relevant issue of the present case, there is no such conflict in the medical evidence.²¹

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 her burden of proof to establish that she has more than a three percent impairment of her right leg and more than a three percent impairment of her left leg, for which she received a schedule award.

²⁰ See *W.M.*, Docket No. 12-773 (issued March 29, 2013) (where a physician sought in June 2011 to update a prior impairment rating, but the Board found that the May 2004 findings which served as the basis for the updated rating constituted stale medical evidence); *P.S.*, Docket No. 12-649 (issued February 14, 2013) (the Board found that a physician's January 2010 impairment rating was of reduced probative value because the physician relied on October 2007 findings as the basis for this updated impairment rating).

²¹ See *supra* notes 15 through 17. On appeal counsel argues that Dr. Berman, in his role as an OWCP medical adviser, impermissibly resolved a conflict in the medical opinion evidence. However, Dr. Berman's actions were proper as there was no current conflict in the medical opinion evidence and he merely determined that Dr. Allon's November 1, 2013 impairment rating was not derived in accordance with the relevant standards of the A.M.A., *Guides*. See *supra* notes 18 and 19.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2014 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 28, 2015
Washington, DC

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

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

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