

further development of the medical evidence.² The facts and evidence of that decision is incorporated herein.

On May 14, 2009 the Office asked Dr. Morley Slutsky, Board-certified in preventive medicine with a specialty in occupational medicine and an Office medical adviser, to review the combined record and determine whether appellant has more than six percent right lower extremity impairment causally related to his accepted back conditions. It noted that appellant's three case files had been combined and the medical evidence from the three files was forwarded to Dr. Slutsky for review.

On June 6, 2009 Dr. Slutsky reviewed the medical evidence, which totaled approximately 417 pages and was dated between 1998 and 2007. In a detailed 40-page report, he provided physical findings, diagnostic test results and medical opinions of the physicians who treated and evaluated appellant, including Dr. James P. Dambrogio, an attending osteopathic physician who provided an impairment rating, finding that he had right lower extremity impairment due to sensory deficit. Dr. Slutsky noted that the accepted conditions in the three combined records were a lumbar sprain, lumbar herniated disc, thoracic sprain and left knee sprain. He noted that Dr. Dambrogio found pain in a distribution consistent with radicular pain originating in the right L3 to L5 nerve roots. However, none of the other physicians made this finding. On a consistent basis they found no objective evidence of lumbar nerve root pathology or right lower extremity sensory deficit. Objective testing, such as an electromyogram and magnetic resonance imaging scan, did not reveal evidence of lumbar nerve root compromise or compression at any of the lumbar levels. The most recent physical examinations by Dr. Dambrogio showed only facet pain as opposed to any clinical signs of lumbar radiculopathy. Dr. Slutsky found that the weight of the medical evidence did not establish that appellant had right lower extremity impairment causally related to the accepted back conditions. Consequently, the evidence did not establish right lower extremity impairment greater than the six percent previously awarded.³

By decision dated July 23, 2009, the Office found that appellant had no more than six percent right lower extremity impairment.⁴

LEGAL PRECEDENT

² Docket No. 08-634 (issued April 6, 2009); Docket No. 07-246 (issued October 5, 2007); Docket No. 06-997 (issued October 2, 2006).

³ See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the American Medical Association, *Guides to the Evaluation Permanent Impairment*, (A.M.A., *Guides*) with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

⁴ Subsequent to the July 23, 2009 Office decision, additional evidence was submitted to the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ 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, the Act 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 sixth edition of the A.M.A., *Guides* has been adopted by the Office as the appropriate standard for evaluating schedule losses.⁷

ANALYSIS

Following remand, the Office combined the three case files for appellant's accepted back injuries. It forwarded the medical evidence from those three files to Dr. Slutsky for review and a determination as to whether he had more than six percent right lower extremity impairment causally related to his accepted back conditions.

Dr. Slutsky reviewed the medical evidence from appellant's three case records. In a 40-page report, he reviewed the physical findings, diagnostic test results and medical opinions of the physicians who treated and evaluated appellant, including Dr. Dambrogio. The six percent schedule award for permanent impairment of appellant's right lower extremity was initially based upon the findings Dr. Dambrogio reported on December 6, 2004.

In his December 6, 2004 report, regarding the permanent impairment of appellant's right lower extremity, Dr. Dambrogio stated that appellant had sensory loss attributable to the L3, L4 and L5 nerve roots. Pursuant to Table 15-18 of the A.M.A., *Guides* at page 424, he noted that the maximum allowable sensory loss for each nerve root was five percent. Dr. Dambrogio then found that pursuant to Table 15-15 of the A.M.A., *Guides* at page 424 appellant's sensory loss would be a Grade 3 impairment, and therefore appellant's loss for each nerve root would be 60 percent of 5 percent, which would equal a 3 percent loss for each nerve root. He also noted, without further explanation, that appellant had lower limb impairment due to gait derangement of seven percent and four percent impairment due to pain. As Dr. Dambrogio did not explain the basis of his pain impairment, it is unclear whether this rating was even proffered for the impairment at issue in this appeal. Also, as he did not support his gait derangement rating with x-ray or other findings as required by section 17.2 of the A.M.A., *Guides*, the Board concludes that the only ratable impairment Dr. Dambrogio supported for the right lower extremity was the impairment he calculated for sensory loss.

Dr. Dambrogio's report was reviewed by an Office medical adviser on April 16, 2005. The Office medical adviser also rated appellant's impairment due to sensory loss at nerve roots L3-L5 pursuant to Table 15-18 and Table 15-15 at page 424. He however assigned a Grade 4 to appellant's sensory loss, rather than a Grade 3 and therefore determined that appellant had a total

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404, FECA Bulletin No. 9-03 (issued March 15, 2009) (providing for use of the 6th edition of the A.M.A., *Guides* effective May 1, 2009).

⁷ *Id.*

combined sensory loss of six percent. The Board has reviewed the calculations of Dr. Dambrogio and the Office medical adviser and concludes that both properly utilized Table 15-15 and Table 15-18 of the A.M.A., *Guides*. The difference in the percentage of permanent impairment due to sensory loss rated by these two physicians occurred due to the variation in grade assigned.

After the Office's May 2, 2005 schedule award for six percent permanent impairment of right lower extremity, development of the record has focused on the question of whether appellant was entitled to a greater award, based upon his sensory loss due to his L3-5 disc conditions. Following the Board's last remand, Dr. Slutsky, another Office medical adviser, was asked to review all of appellant's case records and determine whether appellant had more than a six percent permanent impairment.

Dr. Slutsky noted that the accepted conditions in the three combined records were a lumbar sprain, lumbar herniated disc, thoracic sprain and left knee sprain. He reviewed Dr. Dambrogio's continued medical findings regarding the right lower extremity, but he also noted that none of the other physicians of record offered objective findings, which would substantiate a greater schedule award.

In evaluating the medical evidence of record, Dr. Slutsky noted that, as early as December 1998, there was no evidence of lumbar radiculopathy and no impairment of appellant's right lower extremity. Electromyography studies in 2001 found no indicators of lumbar radiculopathy and in 2002 the evidence reflected no radicular leg pain. Further, Dr. Slutsky found that in 2007 there was no evidence of clinical herniation or radiculopathy. He therefore concluded that the weight of the medical evidence did not substantiate an increased sensory loss award or that appellant had more than a six percent permanent impairment of the right lower extremity previously granted.

Finally, the Board notes that, following the Board's last review of this case, multiple reports from Dr. Dambrogio were submitted to the record. These reports continued to note tenderness at appellant's L4-S1 facet distribution, but none of these reports substantiated an additional permanent impairment of appellant's lower right extremity, pursuant to the A.M.A., *Guides*.

The Board finds that the weight of the medical evidence does not establish that appellant has a permanent impairment of the right lower extremity greater than the six percent previously awarded.

On appeal appellant contends that the Office did not advise Dr. Slutsky that a herniated disc was an accepted condition. In his report, Dr. Slutsky noted that a lumbar herniated disc was an accepted condition. Appellant contends that it is unclear whether the three case records were consolidated. The Office combined the three records with xxxxxx397 as the master file and xxxxxx119 and xxxxxx543 as subfiles. Appellant contends that it was improper for Dr. Slutsky to determine whether he had more than six percent right lower extremity impairment because he did not perform a physical examination. As noted, the Office's procedure manual provides that the medical evidence should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*. The Office

properly referred the case to Dr. Slutsky who made a determination regarding impairment based on all the medical evidence, including the physical examination findings of the physicians in this case.

CONCLUSION

The Board finds that appellant has no more than six percent impairment to his right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2009 is affirmed.

Issued: September 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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