

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

C.M., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
Artesia, NM, Employer)

Docket No. 11-1290
Issued: December 20, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2011 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated March 25, 2011. Pursuant to the Federal Employees' Compensation Act¹ (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 sustained permanent impairment to a scheduled member of his body causally related to his accepted neck, thoracic or lumbosacral conditions entitling him to a schedule award under 5 U.S.C. § 8107.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 32-year-old border patrol officer/instructor, experienced discomfort in his chest when the vehicle in which he was a passenger crashed into a building on January 22, 2009. He filed a claim for benefits, which OWCP accepted for neck sprain, thoracic sprain, lumbosacral sprain and muscle spasm.

On January 11, 2010 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right upper extremity.

In a March 29, 2010 report, Dr. Stanley E. French, a chiropractor, found that appellant had a four percent right upper extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed.) (A.M.A., *Guides*). He diagnosed a herniated nucleus pulposus of the cervical spine, cervical radiculitis and muscle spasm. Dr. French rated a class 1 impairment of the cervical spine pursuant to the cervical spine regional grid at Table 17-2, page 564 of the A.M.A., *Guides*,² for intervertebral disc herniation. Pursuant to the Adjustment Grid Summary for rating cervical impairments at Table 17-6, page 575 of the A.M.A., *Guides*,³ he found that the grade modifier at Table 17-5, page 575, for functional history was two, for pain/symptoms with normal activity; the grade modifier at Table 17-7, page 576⁴ for physical examination was zero, for negative cervical compression/foraminal compression of the spine; the grade modifier at Table 17-9, page 581,⁵ for clinical studies was zero, for normal electrodiagnostic testing. Dr. French then subtracted the grade modifier of one from grade modifier 2 at Table 17-6 and zero from grade modifier 1 at Table 17-7 and Table 17-9 for a net adjusted impairment of one; this yielded a total, adjusted grade B impairment of the right upper extremity. He then found that a class 1, adjusted grade B default impairment yielded a four percent impairment of the cervical spine and whole person pursuant to Table 17-10, page 582 of the A.M.A., *Guides*.⁶

In a June 23, 2010 impairment evaluation, OWCP's medical adviser reviewed Dr. French's report. He noted that OWCP did not give schedule awards due to impairment of the spine or for whole person impairments, therefore, Dr. French's report was not sufficient to support any impairment under the A.M.A., *Guides*. Dr. French recommended that appellant be referred for a second opinion impairment evaluation to determine whether he had any permanent impairment of the right upper extremity.

Appellant was referred to Dr. Sofia W. Weigel, a Board-certified in physical medicine and rehabilitation, for a second opinion impairment evaluation. In a September 20, 2010 report, Dr. Weigel reviewed the medical history, stated findings on examination and determined that

² A.M.A., *Guides* 564.

³ *Id.* at 575.

⁴ *Id.* at 576.

⁵ *Id.* at 581.

⁶ *Id.* at 582.

appellant had a zero percent (no) impairment of the right upper extremity. She noted that he had a diagnosis of cervical strain under Table 17-2 of the A.M.A., *Guides*. Dr. Weigel stated that this diagnosis was not a basis for a ratable impairment because appellant showed no evidence of spinal/peripheral nerve injury, cervical nerve injury or peripheral nerve involvement under any of the relevant tables at Chapter 15, the section of the A.M.A., *Guides* utilized for rating upper extremity impairments.

In a November 15, 2010 report, relying on Dr. Weigel's impairment evaluation, OWCP's medical adviser found that appellant had no permanent impairment rating arising from the accepted conditions.

By decision dated March 25, 2011, OWCP found that appellant had no ratable impairment causally related to an accepted condition and therefore was not entitled to a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ 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.⁹ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹⁰

ANALYSIS

OWCP accepted the conditions of neck strain, thoracic strain, lumbosacral strain and muscle spasm. The Board finds that the medical evidence of record does not establish that appellant sustained any permanent impairment of the right arm due to his accepted conditions.

Dr. French, a chiropractor, found that appellant had a class 1, adjusted grade B default impairment, which yielded a four percent impairment of the cervical spine and whole person pursuant to Table 17-10, page 582 of the A.M.A., *Guides*. The Board has held that the opinion of a chiropractor, regarding a permanent impairment of a scheduled extremity or other member

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁹ *Id.*

¹⁰ *Veronica Williams*, 56 ECAB 367, 370 (2005).

of the body is beyond the scope of the statutory limitation of a chiropractor's services.¹¹ A chiropractor is recognized under FECA as a physician only to the extent that services are for treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist.¹²

OWCP's medical adviser reviewed Dr. French's report on June 23, 2010 and noted that a schedule award was not payable under FECA for injury to the spine¹³ or based on whole person impairment.¹⁴ 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.¹⁵ Appellant was referred to Dr. Weigel, who found that the diagnosis of cervical strain under Table 17-2 of the A.M.A., *Guides* did not constitute a ratable impairment because appellant showed no evidence of spinal/peripheral nerve injury, cervical nerve injury or peripheral nerve involvement pursuant to any of the relevant tables at Chapter 15, the section of the A.M.A., *Guides* utilized for rating upper extremity impairments.

The Board notes that appellant has the burden to establish impairment to a scheduled member caused by the accepted condition before any impairment due to a preexisting condition can be assessed.¹⁶ The instant record is not sufficient to establish that appellant has an impairment caused by his accepted neck, thoracic and lumbosacral strains. As Dr. Weigel properly determined, appellant had no findings of spinal/peripheral nerve injury, cervical nerve injury or peripheral nerve involvement sufficient to warrant an impairment rating for cervical strain in her September 20, 2010 report. The Board will affirm OWCP's March 25, 2011 decision.

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 has not sustained any permanent impairment to a scheduled member of his body causally related to his accepted neck, thoracic, lumbosacral and muscle spasm conditions, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

¹¹ *Pamela K. Guesford*, 53 ECAB 726 (2002); *see also George E. Williams*, 44 ECAB 530 (1993) (a chiropractor may only qualify as a physician in the diagnosis and treatment of spinal subluxation and his or her opinion is not considered competent medical evidence in evaluation of other disorders, including those of the extremities, although these disorders may originate in the spine); *see also M.E.*, Docket No 10-2277 (issued June 13, 2011).

¹² *See* 5 U.S.C. § 8101(2).

¹³ *Pamela J. Darling*, 49 ECAB 286 n.7 (1998).

¹⁴ *N.M.*, 58 ECAB 273 n.9 (2007).

¹⁵ *Thomas J. Engelhart*, 50 ECAB 319 n.8 (1999).

¹⁶ *See generally Thomas P. Lavin*, 57 ECAB 353 (2006).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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