

lumbar strains with radiculopathy. On April 4, 2001 appellant filed a claim for a schedule award.¹

In a July 23, 2003 decision, the Board affirmed a September 2, 2002 Office decision which awarded appellant a two percent schedule award for a permanent impairment to his right lower extremity.² The Office found the Office medical adviser, who based his impairment opinion on the findings of the Office referral physician Dr. Randy J. Pollet, a Board-certified orthopedic specialist, properly utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (hereinafter).³

Appellant later received several other schedule awards due to his accepted conditions. In a June 28, 2007 decision, the Office advised that he had received schedule awards totaling nine percent impairment to the right leg and six percent impairment to the left leg. In August 27 and November 16, 2007 decisions, it found that the medical evidence did not support increased impairment for the right leg.

In an April 22, 2008 medical report, Dr. Sergio B. Pacheco, a neurologist, noted the history of injury and appellant's complaints with regard to chronic and acute lumbosacral pains associated with intermittent radicular sciatic type of pain entering the posterior aspect of both lower extremities following mainly the S1 nerve root and intermittent recurrent leg cramps and paresthesias. He reported subjective decreased pinprick sensation of S1 greater on the right than the left with no leg weakness or atrophy.

On September 8, 2008 appellant filed a Form CA-7 and requested an additional schedule award. In a September 3, 2008 report, Dr. Alvaro A. Hernandez, a Board-certified orthopedic surgeon and appellant's attending physician, opined that appellant had 16 percent impairment of the right leg and 8 percent impairment of the left leg based on the fifth edition of the A.M.A., *Guides*. He enclosed a copy of an August 18, 2008 report by Louis Zuniga, physical therapist, upon which his impairment evaluation was based. In an August 18, 2008 report, Mr. Zuniga noted appellant's diagnoses and indicated that appellant's August 14, 2008 examination findings revealed leg atrophy and motor and sensory deficits of L5 and S1 nerve roots. He set forth his impairment calculations under the fifth edition of the A.M.A., *Guides*.

In a December 1, 2008 report, an Office medical adviser found Dr. Hernandez' impairment findings were not probative for a schedule award as his medical findings conflicted with those of Dr. Pacheco. He noted Dr. Hernandez reported leg weakness while Dr. Pacheco did not. The Office medical adviser recommended appellant's referral to another specialist. He

¹ Appellant's initial claim for a schedule award, filed on March 4, 1996, was denied in a June 7, 1996 Office decision. In an August 23, 1999 decision, the Board affirmed an October 24, 1997 Office decision which found appellant's September 3, 1997 reconsideration request was untimely filed and insufficient to show clear evidence of error of its June 7, 1996 decision. Docket No. 98-381 (issued August 23, 1999).

² Docket No. 03-571 (issued July 23, 2003), *petition for recon denied* (issue October 15, 2003).

³ On March 15, 2004 the Board issued an Order Dismissing Appeal and Dismissing Petition for Reconsideration. Docket Nos. 04-301 & 03-571 (issued March 15, 2004).

also advised that while appellant may have symptoms in the feet secondary to a radiculopathy, this was included in the accepted lumbar disorder.

The Office referred appellant, along with a statement of accepted facts, list of questions and medical record, to Dr. Donald M. Mauldin, a Board-certified orthopedic surgeon, for a second opinion. In a January 9, 2009 report, Dr. Mauldin set forth his examination findings and diagnosed chronic lumbar radicular syndrome and chronic L5-S1 bilateral lumbar radiculopathy. He cited to various tables in the fifth edition of the A.M.A., *Guides* and opined that appellant had 10 percent right lower extremity impairment for sensory and motor deficits resulting from the L5 and S1 radiculopathy and 4 percent impairment to the left lower extremity based on L5 sensory and motor loss.

In a February 10, 2009 report, the Office medical adviser reviewed the medical record and used Dr. Mauldin's January 9, 2009 findings and the fifth edition of the A.M.A., *Guides* to find that appellant had 10 percent right leg impairment and 4 percent left leg impairment based on L5 and S1 nerve root abnormalities. He opined that appellant had no additional impairment beyond his previously awarded 11 percent right lower extremity impairment and no additional impairment over his previously awarded 6 percent left lower extremity impairment.

By decision dated March 3, 2009, the Office denied appellant's claim for an additional schedule award.

On April 27, 2009 appellant requested reconsideration. By decision dated September 4, 2009, the Office vacated the March 3, 2009 decision in part to reflect additional entitlement to one percent permanent impairment of the right lower extremity. It advised it was erroneously noted that appellant had 11 percent right leg impairment as he was only awarded and paid for 9 percent. The Office found that, medical evidence of record reflected 10 percent right lower extremity impairment and since he had previously received 9 percent impairment, he was entitled to an additional 1 percent right leg impairment. It further affirmed the denial of additional impairment to the left leg. By decision dated September 8, 2009, the Office awarded appellant an additional 1 percent impairment to the right lower extremity, for a total of 10 percent impairment.

On November 10, 2009 appellant requested reconsideration and contended that he had previously submitted a February 19, 2009 supplemental report from Dr. Pacheco wherein the physician indicated that there was weakness in both legs. He thus contended that Dr. Hernandez' impairment rating of 15 percent to the right lower extremity was probative for a schedule award determination as the fact that there was weakness in both legs is corroborated by Dr. Pacheco. Appellant further requested that the Office expand his case to include the condition of degenerative disc disease.

In support of reconsideration request, appellant submitted copies of a July 23, 2009 magnetic resonance imaging scan, an August 5, 2009 electromyogram/nerve conduction study and Dr. Pacheco's February 19, 2009 report, all previously of record. Dr. Pacheco's report noted the presence of progressive bilateral leg weakness associated with bilateral radiculopathy. New evidence included: diagnostic testing dated September 16, 2009; an October 21, 2009 progress note from Dr. Hernandez; and a September 24, 2009 report from Dr. Pacheco.

In an October 5, 2009 report, Dr. Michael J. Mrochek, a Board-certified physiatrist, noted the history of injury and his review of the medical evidence. He reported a decreased sensation following an S1 distribution on the right and weakness in right ankle plantar flexion with ability to walk on appellant's heels. No atrophy was seen in the L4 and L5 muscle groups and straight leg raise was negative with negative hip range of motion. A diagnosis of sprain lumbar region and lumbosacral neuritis was provided. Citing to various tables under the fifth edition of the A.M.A., *Guides*, Dr. Mrochek opined that appellant had 15 percent impairment of the right lower extremity due to the S1 radiculopathy.

In a December 28, 2009 letter, the Office advised appellant that effective May 1, 2009 permanent impairment determinations were being made in accordance to the sixth edition of the A.M.A., *Guides*. Appellant was requested to submit an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* within 30 days.

The Office received reports dated January 19 and February 24, 2010 from Dr. Hernandez. In the January 19, 2010 report, Dr. Hernandez indicated that appellant had weakness in the left peroneal which was consistent with L5-S1 radiculopathy. Citing to various tables in the fifth edition of the A.M.A., *Guides*, he opined that appellant had 15 percent impairment of the right lower extremity and 8 percent impairment of the left lower extremity. Dr. Hernandez further stated maximum medical improvement was reached on January 11, 2010. He noted that appellant underwent an impairment evaluation on January 11, 2010. A copy of the January 11, 2010 impairment evaluation by Mr. Zuniga, physical therapist, was also provided. Mr. Zuniga opined that appellant had 15 percent impairment for the right lower extremity and 8 percent impairment for the left lower extremity for both sensory and motor loss under the fifth edition of the A.M.A., *Guides*.

By decision dated March 22, 2010, the Office denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ 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, 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ Effective

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁷

After obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.⁸

ANALYSIS

Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*. The Office's FECA Bulletin No. 09-03 clarifies that any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. The Bulletin notes, a claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.⁹

The Board finds that the Office did not properly develop the medical evidence with regard to appellant's entitlement to an additional schedule award. In support of his November 10, 2009 reconsideration request, appellant included an October 5, 2009 report from Dr. Mrochek and a January 19, 2010 report from Dr. Hernandez. Both physicians were familiar with appellant's history, provided examination findings and determined an impairment rating. These detailed reports included a history of clinical presentation, physical findings, functional history, clinical studies or objective tests and analysis of findings. Dr. Mrochek determined that appellant had 15 percent impairment of the right lower extremity due to S1 radiculopathy. Dr. Hernandez determined that appellant had 15 percent impairment of the right lower extremity and 8 percent impairment of the left lower extremity due to sensory and motor loss resulting from the L5-S1 radiculopathy. Both physicians based their impairment rating on the fifth edition of the A.M.A., *Guides*. Although these physicians did not reference the current edition of the A.M.A., *Guides*, they offered findings in support of their impairment ratings. The Office did not request that an Office medical adviser consider whether their findings supported any greater impairment under the sixth edition of the A.M.A., *Guides* than that which appellant was previously awarded. Prior to denying the claim, pursuant to Office procedures, these reports, along with appellant's file, should then have been referred to the Office medical adviser for an opinion concerning the nature and percentage of impairment under the sixth edition of the A.M.A., *Guides*.¹⁰

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

⁹ *Supra* note 7.

¹⁰ *Supra* note 8.

The Board will remand the case to the Office to undertake additional development of the medical evidence to appropriately determine if appellant has an additional impairment of the legs for schedule award purposes. On remand, the Office should develop the medical evidence as appropriate to determine the extent of permanent impairment due to appellant's accepted employment injury under the sixth edition of the A.M.A., *Guides*.

CONCLUSION

The Board finds that the case is not in posture for decision. The Board will set aside the Office decision and remand the case for further development consistent with the findings herein.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: March 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board