

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*). He based part of his impairment rating on L5-S1 radiculopathy, noting that appellant had been diagnosed with lumbar radiculopathy by EMG as recently as July 2007; he also stated that she continued to complain of low back pain radiating into her lower extremities.

In a November 1, 2008 report, Dr. Andrew Merola, OWCP's medical adviser, found that appellant had a nine percent left lower extremity impairment and an eight percent impairment of the right lower extremity under the A.M.A., *Guides*. He noted that appellant underwent surgery to ameliorate bilateral S1 radiculopathy; he stated, however, that Dr. Becan found she had an extensor hallucis deficit which, he stated, was not consistent with S1 radiculopathy.

OWCP found that there was a conflict in the medical evidence between these two physicians and referred appellant to Dr. Andrew Hutter, Board-certified in orthopedic surgery, for an impartial medical examination. OWCP provided Dr. Hutter with a statement of accepted facts and asked him to provide a permanent impairment calculation for appellant and to establish the date of maximum medical improvement.

In an April 20, 2009 report, Dr. Hutter stated that appellant complained of low back pain radiating into both legs and noted that she underwent lumbar fusion surgery on June 9, 2006. He advised that appellant underwent an EMG on July 26, 2007; however, he failed to mention that this test revealed bilateral radiculopathy, or that appellant underwent additional surgery on September 18, 2007 in an attempt to ameliorate this condition. Dr. Hutter stated that she had subjective complaints but no objective abnormalities on examination. He concluded that appellant had a five percent impairment of the lumbar spine under Chapter 17 of the A.M.A., *Guides*.

OWCP referred Dr. Hutter's report to OWCP's medical adviser and, by report dated June 1, 2009, stated that Dr. Hutter did not provide a rating for the extremities and was evidently unaware that the A.M.A., *Guides* contained no provision for rating the spine for permanent impairment. He noted that an impairment rating for the involved extremities can be rendered only if there is radiculopathy coming from the spinal condition. OWCP's medical adviser stated that, as Dr. Hutter found no objective abnormalities on examination, a rating for the peripheral nerves in the lower extremities under the A.M.A., *Guides* was not warranted. He therefore found that appellant had a zero percent rating for the lower extremities under Table 16-12 at page 534 of the A.M.A., *Guides*.

By decision dated March 10, 2010¹, OWCP, apparently relying on OWCP's medical examiner's opinion, denied appellant's request for a schedule award, finding that she had no ratable impairment of the lower extremities.

Appellant requested a telephone hearing, which was held on June 2, 2010. By decision dated July 20, 2010, OWCP's hearing representative affirmed the March 10, 2010 decision.

¹ This decision was later reissued on May 28, 2010 as the earlier decision had been returned to OWCP.

Section 8123(a) of the Federal Employees' Compensation Act (FECA) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.² In order to properly resolve the conflict, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An OWCP medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.³

On appeal, appellant's attorney contends that Dr. Hutter's opinion did not merit the weight of an impartial medical examiner and that OWCP erred by relying on his opinion.

The Board finds that OWCP improperly relied upon OWCP's medical adviser to resolve the conflict in medical evidence. The independent medical specialist did not properly utilize the A.M.A. *Guides*, did not adequately state his findings nor discuss or analyze the findings of radiculopathy in Dr. Becan's report and in other parts of the record.⁴ He merely found that appellant had a five percent impairment rating based on the spine -- a rating not rendered in accordance with the A.M.A., *Guides*⁵ -- because she showed no objective findings on examination. Although OWCP's medical adviser reviewed Dr. Hutter's report and stated that, because he found there were no objective abnormalities, a rating for the peripheral nerves in the lower extremities under the A.M.A., *Guides* was not warranted, Dr. Hutter's report is insufficiently rationalized or based on proper factual background to be accorded special weight. The medical adviser's evaluation of the impartial medical specialist's report is insufficient to resolve the conflict in medical evidence.

Accordingly, the case will be set aside and remanded for referral to a new medical specialist, along with an updated statement of accepted facts, to resolve the outstanding conflict in medical evidence as to whether appellant has any permanent impairment stemming from her accepted conditions, and to render findings pursuant to the applicable tables and protocols of the A.M.A., *Guides*. After such further development as OWCP deems necessary, it should issue an appropriate decision to protect appellant's appeal rights.

² *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

³ *Thomas J. Fragale*, 55 ECAB 619 (2004); *Cf.*, 55 ECAB 564 (2004).

⁴ As noted above, Dr. Hutter stated that appellant complained of low back pain radiating into both legs and that she had lumbar fusion surgery on June 9, 2006. While he stated that appellant underwent an EMG on July 26, 2007, he failed to mention that this test showed bilateral radiculopathy and that she underwent additional surgery on September 18, 2007 to ameliorate this condition.

⁵ Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. FECA itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000). However, a schedule award is payable for a permanent impairment of any of the extremities that is due to an employment-related back condition. *Denise D. Cason*, 48 ECAB 530, 531 (1997); *S. Gordon McNeil*, 42 ECAB 140 (1990).

IT IS HEREBY ORDERED THAT the decision dated July 20, 2010 be set aside and the case remanded for reconsideration of whether appellant has any permanent impairment to her lower extremities stemming from her accepted lower back conditions.

Issued: November 15, 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