



effective February 6, 1994.<sup>2</sup> By decision dated September 6, 2001, the Board found that OWCP had not met its burden of proof in reducing appellant's monetary compensation to zero effective May 24, 1998 on the grounds that he failed to demonstrate a good faith effort in the vocational rehabilitation process. Accordingly, the Board reversed OWCP's decisions of July 19 and August 17, 1999.<sup>3</sup> The facts as set forth in the Board's prior decisions are hereby incorporated by reference. The relevant facts are set forth below.

The record reflects that appellant, then a 51-year-old mechanical work inspector, injured his back while in the performance of duties on October 19, 1988 and stopped work the following day. OWCP accepted the claim for a back strain, herniated disc at L4-5, L5-S1, and authorized an April 1989 discectomy. All appropriate benefits were paid.

In a June 25, 2003 report, Dr. Stephen A. Smith, a Board-certified orthopedic surgeon, noted that appellant had persistent problems with weakness of his left extensor hallucis longus with diminished sensation in the left L5 distribution. The May 27, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated spinal stenosis and foraminal stenosis with degenerative disc disease. Dr. Smith opined that appellant had significant problems as a result of his lumbar spinal stenosis and associated lumbar radiculopathy.

In an October 27, 2003 report, Dr. Mahendra Nath, a Board-certified physiatrist and OWCP referral physician, noted that appellant's continued complaints of pain in the lumbar spine with radiation to the left lower extremity with residual left foot drop. He diagnosed left lumbar radiculopathy, left foot drop, low back pain, lumbar disc disease and degenerative arthritis right knee. Examination findings revealed atrophy in the left lower leg with associated left foot drop. Weakness in the left foot plantar and dorsiflexion and of the extensor hallucis longus was exhibited.

On December 1, 2003 an OWCP medical adviser reviewed appellant's medical record for purposes of calculating a schedule award. Based on the medical record, he diagnosed status post percutaneous discectomy L4 and L5-S1, April 4, 1989 and chronic L5 radiculopathy. The medical adviser opined that appellant reached maximum medical improvement on October 27, 2003. Based on Dr. Nath's medical findings and the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), the medical adviser opined that appellant had 39 percent impairment of the left leg based on residual muscle weakness and pain which interfered with function. He further opined that impairment to the left leg was the sole impairment due to the October 19, 1988 work injury.

By decision dated December 12, 2003, OWCP awarded appellant 39 percent permanent impairment for loss of use of the left lower extremity. The award ran for 112.32 weeks during the period November 30, 2003 through January 24, 2006.

In a June 26, 2006 report, Dr. Smith diagnosed degenerative disc disease of the lumbosacral spine with severe spinal stenosis at L4-5 and moderate stenosis L1-2 and L3-4 with

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<sup>2</sup> Docket No. 94-1219 (issued September 7, 1995).

<sup>3</sup> Docket No. 00-101 (issued September 6, 2001).

left L5-S1 radiculopathy; chronic compression fracture T11 and T12; degenerative disc disease and osteoarthritis of thoracic and lumbosacral spine with bilateral L3-S1 facet joint syndrome; severe osteoarthritis of both knees, right greater than left; lateral epicondylitis of both elbows, left greater than right.

On August 25, 2009 appellant requested a schedule award for loss of use of his arms and a mid-back condition. He subsequently requested a schedule award for loss of use of his left leg. In a September 3, 2009 letter, OWCP informed appellant that it had not accepted any arm, left leg or mid-back condition. Thus, it could not process a schedule award or authorize medical treatment for a nonaccepted condition.<sup>4</sup>

On September 2, 2009 appellant filed a claim for an additional schedule award.<sup>5</sup> On October 8, 2009 OWCP advised her of the medical evidence necessary to justify an additional schedule award. Reports and diagnostic testing of record pertained to appellant's medical care of his lumbar spine as well as multiple other medical problems. A March 10, 2009 MRI scan of the lumbar spine demonstrated degenerative joint/degenerative disc disease with lumbar spinal stenosis L1-2, L2-3, L3-4, L4-5 and L5-S1.

In a March 29, 2010 report, Dr. Jeryl J. Wiens, a Board-certified physiatrist, reviewed the medical record and set forth examination findings.<sup>6</sup> He reported that appellant ambulated without assistance in a relatively symmetric manner. There was no obvious foot drop on ambulation, but some give way weakness was noted in the quads. Lumbar spine range of motion was about 50 percent of normal with pain on palpation throughout lumbosacral region and with no obvious neurologic deficit in either lower extremity. Dr. Wiens noted a discrepancy between subjective and objective diagnostic impression. A diagnostic impression of L4-5 severe central stenosis, L5-S1 moderate central stenosis without evidence of upper motor neuron signs or radiculopathy was provided. Dr. Wiens opined that appellant reached maximum medical improvement one year following surgery or April 1990. Under the fifth edition of the A.M.A., *Guides*, he opined that appellant had a diagnostic-related-estimates lumbar category III impairment. Dr. Wiens did not provide an assessment of the percentage impairment of appellant's lower extremities.

On May 1, 2010 OWCP's medical adviser reviewed appellant's case file for purposes of determining schedule award for the left leg. He noted that Dr. Wiens calculated his impairment rating based on lumbar Category III DRE, which provides impairment for mechanical low back pain, radiculopathy documented spinal pathology on diagnostic studies, including MRI scan. The medical adviser stated, however, that schedule awards were only payable for loss of use/impairments in the lower extremities and not for spinal pain. Based on Dr. Wiens' examination findings and the sixth edition of the A.M.A., *Guides*, the medical adviser opined

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<sup>4</sup> In previous letters, OWCP informed appellant that it had not accepted any conditions involving the arms, mid back or left leg and that, thus, it could not authorize him to see a physician for conditions which were not accepted.

<sup>5</sup> In a September 23, 2009 letter, the employing establishment expressed its concerns over appellant's claim for compensation.

<sup>6</sup> On March 18, 2010 OWCP authorized a change of treating physicians to Dr. Wiens, a Board-certified physiatrist.

that appellant had 10 percent left leg impairment. This was based on six percent impairment of the left leg for residual problems with severe pain/impaired sensation from left L5 lumbar radiculopathy and four percent impairment of left leg for residual problems with severe pain/impaired sensation from left S1 lumbar radiculopathy. The medical adviser further opined that appellant's condition had markedly improved since Dr. Nath's October 27, 2003 evaluation as Dr. Wiens did not document any weakness in the left leg in his March 29, 2010 evaluation. Thus, he concluded there would be no increase in appellant's prior schedule award of 39 percent left leg impairment.

By decision dated July 22, 2010, OWCP denied appellant's claim for an additional schedule award.

On July 26, 2010 appellant requested a review of the written record before an OWCP hearing representative. In July 26 and October 25, 2010 letters, he provided reasons why he felt he should receive an additional schedule award. Appellant indicated that he had never been properly compensated for his legs, arms and back pain, which he claimed was due to the October 19, 1988 work injury. Duplicative copies of medical evidence and diagnostic testing previously of record was submitted.<sup>7</sup>

By decision dated December 7, 2010, an OWCP hearing representative affirmed the prior decision.

### **LEGAL PRECEDENT**

The schedule award provision of FECA and its implementing regulations<sup>8</sup> 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.<sup>9</sup> 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.<sup>10</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>11</sup>

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<sup>7</sup> Comments from the employing establishment as well as appellant's response were also received. However, none of these comments were probative to the issue of permanent impairment of appellant's left lower extremity.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

<sup>10</sup> *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>12</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>13</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to its medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*. The medical adviser is to provide rationale for the percentage of impairment specified.<sup>14</sup>

### ANALYSIS

OWCP accepted appellant's claim for lumbar sprain, herniated discs L4-5 and L5-S1 and spinal surgery of April 4, 1989. Appellant was previously awarded compensation for 39 percent impairment of the left lower extremity. He subsequently claimed an increased schedule award. Appellant's physician, Dr. Wiens, evaluated appellant's condition in a March 29, 2010 report, noting examination findings and discussion of the applicable DRE lumbar category under the fifth edition of the A.M.A., *Guides*. Under FECA, a schedule award is not payable for the loss or loss of use of any member of the body or function that is not specifically enumerated in section 8107 of FECA or its implementing regulations.<sup>15</sup> The spine, or back, is specifically excluded from coverage of the schedule award provisions of FECA.<sup>16</sup> Although a schedule award may not be issued for an impairment to the back under FECA, such an award may be payable for permanent impairment of the lower extremities that is due to an employment-related back condition.<sup>17</sup> Dr. Wiens did not provide a recommendation with regard to appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. It is well established that, when the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by the medical adviser.<sup>18</sup>

The medical adviser reviewed Dr. Wiens' March 29, 2010 report and concluded that appellant had 10 percent permanent impairment of the left leg based on the sixth edition of the A.M.A., *Guides*. He stated that appellant had six percent impairment for residual problems with severe pain/impaired sensation from left L5 lumbar radiculopathy and four percent impairment for residual problems with severe pain/impaired sensation from left S1 lumbar radiculopathy.

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<sup>12</sup> A.M.A., *Guides* 494-531.

<sup>13</sup> *Id.* at 521.

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010).

<sup>15</sup> See *Leroy M. Terska*, 53 ECAB 247 (2001).

<sup>16</sup> 5 U.S.C. § 8101(19); see also *Vanessa Young*, 55 ECAB 575 (2004).

<sup>17</sup> *Vanessa Young*, *supra* note 16.

<sup>18</sup> See *J.Q.*, 59 ECAB 366 (2008).

The medical adviser did not, however, explain how he applied the sixth edition of the A.M.A., *Guides* in reaching his determination. The A.M.A., *Guides* noted that a clear, accurate and complete report must be provided to support a rating of permanent impairment.<sup>19</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, including FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>20</sup> OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.<sup>21</sup> The Board will remand the case for further appropriate development and proper application of the A.M.A., *Guides* regarding the extent of permanent impairment to appellant's lower extremities.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>19</sup> A.M.A., *Guides* 28.

<sup>20</sup> Rating Spinal Nerve Extremity Impairment using the sixth edition, the A.M.A., *Guides* Newsletter (A.M.A., *Guides* Chicago, IL), July/August 2009.

<sup>21</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibit 1, 4). *G.N.*, Docket No. 10-850 (issued November 12, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 7, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion of the Board.

Issued: October 6, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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