

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

D.S., Appellant

and

**DEPARTMENT OF THE ARMY, IMA
HEADQUARTERS, Fort Dix, NJ, Employer**

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**Docket No. 11-1485
Issued: April 13, 2012**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director,

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 8, 2011 appellant filed a timely appeal from the February 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 has met his burden of proof to establish a schedule award of the upper or lower extremity.

FACTUAL HISTORY

This case was previously on appeal before the Board. In a decision dated May 12, 2010, the Board found that appellant's case was not in posture for decision regarding whether he was entitled to a schedule award due to an unresolved conflict in medical opinion. The case was

¹ 5 U.S.C. § 8101 *et seq.*

remanded to OWCP to refer him to an impartial medical specialist for examination and opinion on the nature and extent of any impairment related to the accepted conditions.² The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

On remand, in a letter dated May 26, 2010, appellant was referred to Dr. David A. Bundens, Board-certified in orthopedic surgery, for an impartial medical examination. OWCP provided Dr. Bundens 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 a June 22, 2010 report, Dr. Bundens reviewed appellant's history and set forth findings on examination. He advised that, while appellant had some symptoms in his arms and legs, he was neurologically normal. Dr. Bundens assessed that appellant had injuries to the cervical, thoracic and lumbar spines and currently had degenerative disc disease in these regions and had symptoms in his upper and lower extremities as a result of his spinal problems. In rating impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*), he determined appellant's impairment of the spine. Dr. Bundens referred to tables in Chapter 17, The Spine and Pelvis, including Table 17-2, Table 17-3 and Table 17-4,³ explained grade modifier adjustments and opined that appellant had 2 percent impairment for the thoracic spine, 9 percent impairment for the cervical spine and 10 percent impairment of the lumbar spine.

On July 1, 2010 OWCP requested that an OWCP medical adviser review Dr. Bundens' report and provide an impairment rating. In a report dated July 12, 2010, the medical adviser reviewed Dr. Bundens' report and noted that Dr. Bundens' found whole person impairment ratings based on the cervical thoracic and lumbar spine. He explained that Dr. Bundens did not find any objective evidence of upper or lower extremity radiculopathy. The medical adviser explained that peripheral neuropathy impairment tables could not be used if there was no objective radiculopathy. He therefore found that appellant had a zero percent rating for the upper and lower extremities.

In an August 16, 2010 decision, OWCP denied appellant's request for a schedule award, finding that the medical evidence did not support permanent impairment of the upper or lower extremities.

On August 23, 2010 appellant's representative requested a hearing, which was held on December 16, 2010.

By decision dated February 23, 2011, OWCP's hearing representative affirmed the August 16, 2010 decision. The hearing representative found that the July 12, 2010 report of OWCP's medical adviser represented the weight of the medical evidence.

² Docket No. 09-1290 (issued May 12, 2010). The relevant facts include that on December 6, 1995 appellant twisted his neck and low back at work while subduing a prisoner. OWCP accepted his claim for a lumbar sprain, lumbar radiculitis and permanent aggravation of these conditions. Appellant also has a claim for a contusion to his buttocks and low back strain sustained on June 12, 1996. This claim was doubled into the present claim.

³ A.M.A., *Guides* 565, 567, 571.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ 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, 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 regulation as the appropriate standard for evaluating schedule losses.⁶ For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides*, is used for evaluating permanent impairment.⁷

Section 8123(a) of FECA provides, in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁸ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁹

OWCP’s medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹⁰

ANALYSIS

The Board finds that this case is not in posture for decision as OWCP improperly relied upon the report of OWCP’s medical adviser, instead of the impartial medical examiner, to resolve the conflict in medical evidence.

In a June 22, 2010 report, Dr. Bundens, the impartial medical examiner, opined that appellant had an impairment of 2 percent for the thoracic spine, 9 percent for the cervical spine and 10 percent for the lumbar spine. However, this was not sufficient to establish entitlement to

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*; see *W.D.*, Docket No. 10-274 (issued September 3, 2010).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010); A.M.A., *Guides* (6th ed. 2008).

⁸ 5 U.S.C. § 8123(a); see also *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

⁹ See *Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

¹⁰ *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004); see also *Richard R. LeMay*, 56 ECAB 341 (2005).

a schedule award under FECA as FECA and OWCP regulations do not provide for payment of a schedule award for the permanent loss of use of the back or spine.¹¹ Dr. Bundens did not specifically address whether appellant's accepted conditions caused impairment in either his legs or arms. Thus, his opinion was insufficient to resolve the medical conflict regarding whether appellant had ratable impairment in his legs or arms causally related to his accepted conditions.

OWCP referred Dr. Bundens' report to OWCP's medical adviser. In a July 12, 2010 report, the medical adviser reviewed Dr. Bundens' report and noted that he only rated spinal impairment. He explained that appellant did not have any objective evidence of upper or lower extremity radiculopathy such that the impairment tables for peripheral neuropathy could not be used. The medical adviser opined that appellant had no impairment rating for the upper and lower extremities. OWCP's hearing representative's February 23, 2011 decision found that the July 12, 2010 report of the medical adviser represented the weight of the medical evidence. This was improper. To properly resolve the conflict of medical opinion, it is the impartial medical specialist who should provide a reasoned opinion regarding the extent of permanent impairment. Although an OWCP medical adviser may review the opinion, the resolution of the conflict is the responsibility of the impartial medical specialist. Where the opinion of the impartial specialist requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect.¹² As Dr. Bundens' report was insufficient to resolve the medical conflict, it had an obligation to request a supplemental report from Dr. Bundens. As OWCP has not requested a supplemental report from Dr. Bundens, an unresolved conflict remains.

Accordingly, OWCP's February 23, 2011 decision must be set aside and the case remanded for OWCP to request a supplemental report from Dr. Bundens regarding whether appellant has ratable impairment in his arms or legs attributable to his accepted conditions

¹¹ 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); *Gordon McNeil*, 42 ECAB 140 (1990).

¹² *See V.G.*, *supra* note 10. *See also Charles H. Miller*, Docket No. 93-2000 (issued March 22, 1995) (in a situation where there exists a medical conflict, if the weight of the medical evidence lies anywhere, it must be with the opinion of the specialist chosen to resolve the outstanding conflict).

pursuant to the A.M.A., *Guides* and OWCP procedures.¹³ After such further development as OWCP deems necessary, it should issue an appropriate merit decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2011 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: April 13, 2012
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

¹³ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4) (adopts *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition*, The Guides Newsletter (A.M.A., Chicago, Ill.), July/August 2009, as an approach for rating impairment to the upper or lower extremities caused by a spinal injury).