

ISSUE

The issue is whether appellant is entitled to a schedule award for upper and lower extremity impairment related to his accepted spinal injuries.

On appeal appellant contends that the second opinion examination by Dr. Sofia M. Weigel, a Board-certified physical medicine and rehabilitation physician, was insufficient to establish a zero percent impairment rating of his upper and lower extremities.

FACTUAL HISTORY

OWCP accepted that on November 17, 2003 appellant, then a 61-year-old customer service supervisor, sustained displacement of cervical intervertebral disc without myelopathy and degeneration of lumbar intervertebral disc while moving mail in the performance of duty. It authorized L3-4, L4-5 and L5-S1 decompression and fusion surgery. On January 3, 2007 he returned to work part time as a modified customer service mail preparation liaison.

On February 21, 2008 the employing establishment offered appellant a part-time light-duty position as a modified customer service supervisor.

By decision dated March 17, 2008, OWCP found the position suitable for appellant and afforded him 30 days to accept the position or provide a written explanation of his reasons for failure to accept. It noted that appellant abandoned his modified customer service mail preparation liaison position on December 24, 2007 with no apparent valid cause.

On January 29, 2009 appellant filed a claim for a schedule award.

By letter dated April 7, 2009, OWCP notified appellant of the deficiencies of his schedule award claim and allotted 30 days for the submission of additional evidence.

Appellant submitted an October 15, 2007 functional capacity evaluation which noted that he complained of back pain that went down the thighs around to the calves and revealed that the range of motion of the lumbar spine had no limitations.

In an October 11, 2007 report, Dr. Eugene T. O'Brien, a Board-certified orthopedic surgeon, reviewed appellant's medical history and conducted a physical examination. Appellant had minimal strain in leg-raising symptoms, minimal symptoms on straight-leg raising, normal strength and no reflex changes or sensory changes in both lower extremities. Dr. O'Brien concluded that appellant was capable of returning to light-duty work up to four-hour workdays with lifting restrictions.

In a May 13, 2009 note, Dr. Richard Wilson, a Board-certified orthopedic surgeon, assigned appellant to class 3. He indicated that the Functional History (GMFH) adjustment score was 3, the Physical Examination (GMPE) adjustment score was 2 and the Clinical Studies (GMCS) adjustment score was 2. Dr. Wilson generally concluded that appellant had an 18 percent permanent impairment rating.

On December 7, 2009 Dr. Wilson opined that appellant's date of maximum medical improvement was September 2005. He reported that appellant did not have decreased strength.

Dr. Wilson did have ankylosis and loss of sensation in L4 and L5 on the left. He indicated that he would answer “yes” to Questions 1 through 15 on page 600 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) “Pain Disability Questionnaire.” Dr. Wilson also submitted a permanent impairment worksheet from the same day.

In an April 12, 2010 progress report, Dr. Wilson stated that appellant was using a cane for walking, had decreased range of motion on movement of the back, had significant tenderness to palpation along the paraspinal muscles and the lumbar spine and increased pain along the left side with pain into the buttock.

OWCP referred appellant to Dr. Weigel for a second opinion examination.⁴ In a report dated November 22, 2010, Dr. Weigel provided an evaluation of appellant’s permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.⁵ She noted that the impairment rating for a spinal condition is based solely on permanent impairment of the extremities. Dr. Weigel found no evidence of focal spinal nerve involvement or spinal nerve injury. Based on Tables 1 and 2 of *The Guides Newsletter* July/August 2009, she assigned appellant to class 0 as there were no objective sensory or motor findings or deficits for the L4-S1 nerves. Dr. Weigel indicated that grades were not relevant to appellant’s impairment rating and concluded that he had a zero percent permanent impairment of the bilateral upper and lower extremities.

On December 29, 2010 an OWCP medical adviser concurred with Dr. Weigel’s opinion and concluded that appellant had no (zero percent) impairment of any upper or lower extremity based on the sixth edition of the A.M.A., *Guides*. He noted that Dr. Weigel found no focal neurological deficits in the upper and lower extremities and recommended class 0 findings for radiculopathy resulting in no (zero percent) permanent impairment. The medical adviser found that maximum medical improvement was achieved on December 7, 2009.

By decision dated January 6, 2011, OWCP denied appellant’s schedule award claim on the grounds that the medical evidence did not establish a ratable impairment of a scheduled member. It relied upon Dr. Weigel’s November 22, 2010 report and the medical adviser’s December 29, 2010 report in reaching this determination.

On January 25, 2011 appellant requested an oral hearing before an OWCP hearing representative. In a March 2, 2011 report, Dr. Wilson reiterated his 18 percent impairment rating and indicated that appellant had chronic radicular-type pain in the back radiating down to the legs with burning pain and tingling. Appellant also submitted patient status and duty status reports dated February 25, 2011 and an initial injury evaluation dated February 26, 2011 by Dr. Anthony Hicks, a Board-certified internist.

⁴ By decision dated December 1, 2010, OWCP proposed to suspend appellant’s compensation due to his failure to report for a second opinion examination. The record shows that Dr. Weigel examined appellant on November 22, 2010.

⁵ A.M.A., *Guides* (6th ed., 2009).

On May 3, 2011 an oral hearing was held *via* telephone before an OWCP hearing representative.

By decision dated July 12, 2011, an OWCP hearing representative affirmed the January 6, 2011 decision denying appellant's claim for a schedule award finding that Dr. Weigel's November 22, 2010 report constituted the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of her claim, including that she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.⁶

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 effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹⁰ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.¹¹ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.¹²

A schedule award is not payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.¹³ Neither FECA nor the implementing

⁶ See *Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.*

¹⁰ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹¹ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (September 1995). This portion of OWCP procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

¹² See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

¹³ See *Tania R. Keka*, 55 ECAB 354 (2004).

regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine.¹⁴ As FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes such impairment as a result of the employment injury.¹⁵

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁶

ANALYSIS

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body. OWCP accepted his claim for displacement of cervical intervertebral disc without myelopathy and degeneration of lumbar intervertebral disc. Although appellant may not receive a schedule award for permanent impairment to his back or spine,¹⁷ he may be entitled to a schedule award for any permanent impairment to his upper extremities, provided the medical evidence establishes such impairment.¹⁸ The medical evidence of record does not establish that he sustained permanent impairment to his upper extremities due to the accepted cervical conditions.

The Board finds that OWCP properly relied on the December 29, 2010 report from an OWCP medical adviser who, based on the clinical findings and report of a second opinion physician, Dr. Weigel, concluded that appellant had no permanent impairment of either arm under the sixth edition of the A.M.A., *Guides*. OWCP's medical adviser properly reviewed the medical record and found no basis for rating impairment to the arms.¹⁹ He reviewed a November 22, 2010 assessment of Dr. Weigel, the Board-certified physical medicine and

¹⁴ See *id.* FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹⁵ See *George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.

¹⁶ See *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

¹⁷ 5 U.S.C. § 8101(19); *Patricia J. Horney*, 56 ECAB 256 (2005).

¹⁸ See *George E. Williams*, *supra* note 15.

¹⁹ The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (September 1995); *Richard R. LeMay*, 56 ECAB 341 (2006).

rehabilitation physician serving as an OWCP referral physician.²⁰ The medical adviser noted that Dr. Weigel found no focal neurological deficits in the upper extremities and recommended class 0 findings for radiculopathy resulting in zero percent permanent impairment. He properly concluded that there was no medical evidence of impairment to the bilateral upper and lower extremities resulting from the accepted conditions and that, therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

Appellant did not submit sufficient medical evidence to establish that he sustained a permanent impairment to a specified member, organ or function of the body listed in FECA or its implementing regulations. The medical evidence of record supports that he has no impairment to his arms as a result of his cervical condition. The Board finds that appellant is not entitled to a schedule award as a result of his accepted employment-related spinal injury.

On appeal appellant contends that the second opinion examination by Dr. Weigel was insufficient to represent the weight of medical opinion. The record reflects that Dr. Weigel's November 22, 2010 second opinion report was based on a thorough review of appellant's medical records, medical history and a physical examination. She properly provided an evaluation of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. Thus, the Board finds that appellant's arguments are not substantiated.

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 established any ratable upper or lower extremity impairment related to the accepted spinal injuries.

²⁰ In her November 22, 2010 report, Dr. Weigel evaluated appellant's permanent impairment under Tables 1 and 2 of *The Guides Newsletter* July/August 2009 of the sixth edition of the A.M.A., *Guides*. She found no evidence of focal spinal nerve involvement or spine nerve injury. Dr. Weigel indicated that appellant had no objective sensory or motor findings or deficits for the L4-S1 nerves which fell under class 0 on these tables and concluded that appellant had a zero percent permanent impairment of the upper and lower extremities under the sixth edition of the A.M.A., *Guides*. The Board notes that the sixth edition of the A.M.A., *Guides* became effective on May 1, 2009. See *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2012
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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