

OWCP accepted for lumbar strain. The claim was expanded to include aggravation of lumbar degenerative disc disease.

On September 10, 2002 Dr. Michael M. Haglund, Board-certified in neurosurgery, performed a left L5-S1 microlumbar discectomy on appellant to repair a herniated disc at L5-S1.

On September 6, 2004 appellant filed a Form CA-2 claim for benefits under case number xxxxxx952, alleging that he developed a lower back condition causally related to employment factors. OWCP accepted this claim for aggravation of degenerative disc disease at L4 and L5-S1.

On January 12, 2006 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left lower extremity.

In a June 5, 2006 report, Dr. Haglund found that appellant had a 15 percent permanent impairment rating due to verifiable radiculopathy. He also stated that appellant had reached maximum medical improvement on August 3, 2004.

In a July 18, 2006 report, Dr. William A. Somers, a second opinion physician and a Board-certified orthopedic surgeon, stated that appellant had a 10.5 percent impairment rating due to sensory deficit under Table 15-15 and Table 15-18 pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (fifth edition).

On July 31, 2006 the record was reviewed by an OWCP medical adviser who indicated that appellant had reached maximum medical improvement on August 3, 2004, and that he concurred with Dr. Somer's rating of 11 percent permanent impairment.

By letter dated August 8, 2006, OWCP informed appellant that, although the medical evidence supported an 11 percent impairment rating for the left lower extremity, it was not able to process his claim for a schedule award at the same time he was totally disabled and receiving compensation for wage loss under case number xxxxxx952. It indicated that it would adjudicate his claim for a schedule award when he returned to work and was no longer receiving compensation for wage loss.

On July 27, 2007 OWCP combined case numbers xxxxxx952 and xxxxxx967.

On February 6, 2009 appellant returned to work as a modified mail handler.

On May 28, 2009 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left lower extremity.

In order to determine whether appellant had any permanent impairment rating from his accepted lumbar condition, OWCP referred him to Dr. Edward R. Mulcahy, Board-certified in orthopedic surgery. In a report dated June 4, 2009, Dr. Mulcahy found that appellant had a 15 percent permanent impairment of the left lower extremity, due to radiculopathy, pursuant to the A.M.A., *Guides* (sixth edition). He found that appellant had a class 3 impairment under Table 17-2 at page 566 of the A.M.A., *Guides*, which yielded a 15 percent impairment at Figure 17-7 of the A.M.A., *Guides*.

In a June 25, 2009 impairment evaluation, Dr. James W. Dyer, Board-certified in orthopedic surgery and an OWCP medical adviser, reviewed Dr. Mulcahy's report and determined that appellant had a one percent impairment of the left lower extremity pursuant to Table 16-12 of the A.M.A., *Guides*.

Appellant's case was referred to a different OWCP medical adviser, Dr. Howard P. Hogshead, Board-certified in orthopedic surgery, who stated in a report dated August 3, 2009 that appellant had a two percent impairment of the left lower extremity under the A.M.A., *Guides*. Dr. Hogshead found that the finding of 15 percent impairment for radiculopathy/sensory deficit was not adequately explained or verified under the A.M.A., *Guides*.²

By decision dated August 12, 2009, OWCP granted appellant an award for a one percent permanent impairment of the left lower extremity for the period June 11 to July 1, 2008, for a total of 2.88 weeks of compensation. This award noted his date of maximum medical improvement as June 1, 2008.

On August 17, 2009 appellant requested a review of the written record. In a letter accompanying his request, he noted that both his treating physician, Dr. Haglund, and the second opinion physician, Dr. Mulcahy, had rated a 15 percent left lower extremity impairment.

By decision dated October 15, 2009, an OWCP hearing representative vacated the August 12, 2009 decision. She stated that the record contained differing opinions from two different OWCP medical advisers and that neither of these physicians had reviewed the combined, consolidated record in its entirety. The hearing representative therefore instructed the case to be remanded to the second OWCP medical adviser to review both of the claims, with all medical reports, and determine whether he still believed appellant had a two percent impairment rating for the left lower extremity. She directed OWCP, following any necessary development, to issue a *de novo* decision regarding appellant's entitlement to a schedule award.

In a report dated October 26, 2009, Dr. Hogshead, after reviewing the combined records from case numbers xxxxxx952 and xxxxxx967, reiterated that appellant had a two percent impairment of the left lower extremity under the A.M.A., *Guides*. He stated that he had originally reviewed appellant's schedule award claim in a report dated July 31, 2006, at which time he accorded appellant an 11 percent left lower extremity impairment rating for sensory deficit under the fifth edition of the A.M.A., *Guides*.

By decision dated November 5, 2009, OWCP granted appellant an additional 10 percent award for the left lower extremity for the period July 2, 2006 to January 19, 2009, for a total of 28.8 weeks of compensation.

On September 21, 2010 appellant filed a Form CA-7 claim for an additional four percent schedule award based on a partial loss of use of his left lower extremity.

² OWCP's medical adviser also noted that the results of an electrodiagnostic study performed on June 3, 2008 were normal.

By letter dated October 14, 2010, appellant requested reconsideration of the November 5, 2009 OWCP schedule award decision. He stated that both his treating physician, Dr. Haglund, and the second opinion referral physician, Dr. Mulcahy, accorded him a 15 percent impairment rating for the left lower extremity stemming from appellant's accepted lumbar condition.

In order to determine whether appellant had any additional impairment from his accepted lumbar condition, OWCP referred for a second opinion examination with Dr. Robert M. Moore, Board-certified in orthopedic surgery. In a November 19, 2010 report, Dr. Moore found that appellant had a one percent permanent impairment of the left lower extremity pursuant to the sixth edition of the A.M.A., *Guides*. He stated:

“[Appellant] has a mild sensory deficit in the left L5 distribution on physical examination today, and this is consistent with several previous, recent examinations. There is no demonstrable motor deficit in the lower extremities on physical examination today, and this also is consistent with several previous, recent examinations. Electrodiagnostic testing on June 3, 2008 showed no abnormality in the lower extremities. [Appellant] reports subjective pain and intermittent numbness predominantly in the U distribution of the left lower extremity. Utilizing the A.M.A., *Guides* Newsletter, Table 2, he therefore has a class 1 impairment of the left L5 nerve root, with mild sensory deficit, resulting in a default lower extremity impairment of one percent.”

Applying the net adjustment formula at pages 521-22 of the A.M.A., *Guides*,³ Dr. Moore found that appellant had a class 1 impairment, the rating utilized for a mild problem/mild deficit for the lower extremity, with an adjusted grade of B. He found that the grade modifier at Table 16-6 for functional history was 1, for a mild problem; the grade for physical examination at Table 16-7 and Table 16-8 for clinical studies was 0. Dr. Moore then subtracted the grade modifier of 1 from 0; this yielded a one percent impairment of the left lower extremity. He also noted that appellant's treating neurosurgeon had judged appellant to be at maximum medical improvement as of August 3, 2004.

In a January 7, 2011 report, Dr. Dyer, an OWCP medical adviser, reviewed Dr. Moore's findings and concurred that appellant had a one percent impairment pursuant to the A.M.A., *Guides*. He stated that appellant had a mild sensory impairment based on examination and EMG studies of the L5 nerve root. Dr. Dyer stated that the previous rating of 11 percent was unfounded, incorrect and based on erroneous findings.

By decision dated January 19, 2011, OWCP found that appellant was entitled to an award for no more than a one percent impairment of the left lower extremity causally related to his accepted lumbar condition. It stated that he had apparently been erroneously awarded an additional 10 percent impairment in the November 5, 2009 decision and that the correct entitlement should be the one percent that was paid in accordance with the August 12, 2009 schedule award decision. In addition, OWCP noted that appellant had been receiving compensation for total disability for his lumbar condition under case file number xxxxxx952 during the period of the schedule award; therefore, he received dual benefits.

³ A.M.A., *Guides* 521-22.

OWCP made the following additional findings: the 15 percent rating from appellant's treating physician, Dr. Haglund, received on June 5, 2006, was not useable because Dr. Haglund did not provide any calculations and appellant was receiving compensation for wage loss which would have constituted dual benefits; the 15 percent rating from the second opinion physician, Dr. Mulcahy, in his June 4, 2009 report, was not useable because it was not derived in accordance with the amended A.M.A., *Guides* for lumbar spine ratings; the 10 percent awarded in the November 13, 2009 OWCP decision, based on Dr. Hogshead's July 31, 2006 report, was incorrect as it was based on the fifth edition of the A.M.A., *Guides* and lastly, he was receiving dual benefits from June 11 to July 1, 2008 when he was receiving compensation for total wage loss at the same time he received a schedule award for a one percent impairment rating.

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 regulations as the appropriate standard for evaluating schedule losses.⁶ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁷

ANALYSIS

In its January 19, 2011 decision, OWCP granted appellant a schedule award for a one percent left lower extremity impairment, using the applicable table of the sixth edition of the A.M.A., *Guides*.

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries for extremity impairments. Recognizing that certain jurisdictions, such as 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, pursuant to the A.M.A., *Guides* Newsletter (A.M.A., Chicago, Il.),

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁶ *Id.*

⁷ *Veronica Williams*, 56 ECAB 367, 370 (2005).

July/August 2009. OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.⁸

Dr. Moore explained in his November 19, 2010 report that utilizing the A.M.A., *Guides* Newsletter, Table 2, appellant had a class 1 impairment of the left L5 nerve root, with mild sensory deficit, resulting in a default lower extremity impairment of one percent. He stated that using the net adjustment formula outlined at pages 516-18 and 521-22 of the A.M.A., *Guides*, appellant had a class 1 impairment for functional history at Table 16-6, which yielded a grade of 1; he then applied the net adjustment formula at pages 521-22 of the A.M.A., *Guides*, subtracting a grade modifier of 1 from 0, for a net, adjusted total of 1. Dr. Moore then applied the net adjustment formula for physical examination and clinical studies at Table 16-7 and Table 16-8, finding that appellant had a grade modifier of 0 for physical examination and clinical studies at Table 16-7 and Table 16-8, which he subtracted from the grade of 1 at each table; this equaled a net one percent impairment, as adjusted. Based on this calculation, he found that appellant had an adjusted one percent left lower extremity impairment. Dr. Dyer, an OWCP medical adviser, reviewed Dr. Moore's findings and properly found that appellant had a one percent impairment pursuant to the A.M.A., *Guides* based on a mild sensory impairment, from physical examination and EMG studies of the L5 nerve root.

The Board finds that appellant has a one percent permanent impairment of his left lower extremity, as this rating was based on the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*.

None of the other reports of record provided an impairment rating sufficient to entitle him to a greater schedule award. As OWCP stated in its January 19, 2011 decision, OWCP erred in awarding appellant an additional 10 percent impairment in its November 5, 2009 decision. The Board notes that Dr. Haglund and Dr. Somer both provided opinions regarding appellant's permanent impairment pursuant to the fifth edition of the A.M.A., *Guides*. Furthermore, while the ratings from Dr. Hogshead, in his July 31, 2006 report, and Dr. Mulcahy were made pursuant to the sixth edition of the A.M.A., *Guides*, they were not probative because they were not consistent with the applicable tables and protocols of the updated, sixth edition of the A.M.A., *Guides* for lumbar spine ratings. Dr. Hogshead stated a conclusion, but did not explain how appellant's impairment was rated pursuant to specific findings, as applicable to the sixth edition of the A.M.A., *Guides*. Dr. Mulcahy cited the sixth edition of the A.M.A., *Guides*, but utilized sections of the A.M.A., *Guides* from Table 17-2 applicable to the upper, not lower extremities.

The Board therefore affirms OWCP's finding of a one percent impairment rating, as it was rendered in conformance with the A.M.A., *Guides*.⁹

The Board also finds that OWCP improperly determined appellant's date of maximum medical improvement and therefore improperly concluded that appellant was receiving benefits

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4). *See also E.P.*, Docket No. 11-614 (issued November 2, 2011); *P.M.*, Docket No. 11-1072, (issued November 23, 2011).

⁹ Appellant may submit to OWCP new evidence of an increased impairment at any time.

for a schedule award at the same time he was receiving compensation for temporary total disability. It is well settled under Board law that an employee cannot concurrently receive compensation under a schedule award and compensation for wage loss.¹⁰ However, OWCP improperly made a finding that appellant's date of maximum medical improvement was June 11, 2008 and that he received dual benefits from June 11 to July 1, 2008.

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the injury. The question of when maximum medical improvement has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.¹¹ Dr. Hagland, in his June 5, 2006 report, and Dr. Moore in his November 19, 2010 report both concluded that appellant's date of maximum medical improvement was August 3, 2004, OWCP therefore improperly concluded that the schedule award was payable as of June 11, 2008.

CONCLUSION

The Board finds that appellant has no more than a one percent permanent impairment of his left lower extremity, for which he received a schedule award. The Board also finds that appellant's date of maximum medical improvement was August 3, 2004.

¹⁰ See *S.W.*, Docket No. 10-2071 (issued July 11, 2011); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a)(3) (January 2010).

¹¹ *L.H.*, 58 ECAB 561 (2007); *Marie J. Born*, 27 ECAB 623 (1976).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2011 decision of the Office of Workers' Compensation Programs be affirmed in part, reversed in part and remanded in part.

Issued: February 24, 2012
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