

without myelopathy and degeneration of a cervical intervertebral disc when she was involved in an automobile accident at work.² On October 2, 2006 she underwent an anterior cervical discectomy with decompression at C5-6 and fusion at C5-6 with allograft and instrumentation. The procedures were authorized by OWCP.

On June 6, 2006 appellant filed a claim for a schedule award due to permanent partial impairment incurred as a result of an accepted employment injury.

In a report dated January 16, 2008, Dr. David Weiss, an attending osteopath, provided an evaluation of appellant's permanent impairment under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He concluded that appellant had a three percent permanent impairment of her left arm due to pain and a six percent permanent impairment of her left leg, comprised of a three percent impairment due to pain and a three percent impairment due to left calf atrophy.

In a May 15, 2008 decision, OWCP denied appellant's schedule award claim finding that she did not submit sufficient probative medical evidence to show that she sustained work-related permanent impairment to a scheduled member of her body.

By letter dated May 19, 2008, appellant, through counsel, requested an oral hearing with an OWCP hearing representative. An oral hearing was held on October 22, 2008 and on December 9, 2008 the hearing representative set aside the May 15, 2008 decision and remanded the case for additional development and issuance of a *de novo* decision. OWCP was directed to send the January 16, 2008 report of Dr. Weiss to an OWCP medical adviser for evaluation.

On February 10, 2009 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that he did not see any lumbar spine condition that was accepted as work related, but indicated that it was possible that some long tract cervical spine impingement on the cord could have caused appellant's left calf atrophy. On May 4, 2009 Dr. Magliato indicated that OWCP could accept Dr. Weiss' assessment, made on January 16, 2008, that appellant had a three percent impairment of her left arm under the standards of the fifth edition of the A.M.A., *Guides*.

In a January 8, 2010 report, Dr. Weiss provided an assessment of appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. He concluded that appellant had a four percent impairment of her left arm due to left shoulder impingement syndrome under Table 15-5 on page 402 of the sixth edition of the A.M.A., *Guides*. Dr. Weiss also found that appellant had a one percent impairment of her left leg to a left knee contusion under Table 16-3 on page 509.³

² On May 12, 2006 appellant filed a claim alleging that she sustained a new injury to her neck due to performing her work duties over time. OWCP initially developed this claim under a different file number and accepted that appellant sustained displacement of a cervical intervertebral disc without myelopathy and degeneration of a cervical intervertebral disc. It then combined these records with the file created for the August 17, 2005 work injury.

³ Dr. Weiss used the examination findings from his January 16, 2008 report.

Due to the applicability of the sixth edition of the A.M.A., *Guides*, OWCP referred appellant to Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation of her permanent impairment under this edition of the A.M.A., *Guides*. In a May 28, 2010 report, Dr. Lakin evaluated appellant's permanent impairment under Table 17-2 (Cervical Spine Regional Grid) on pages 564 through 566 of the sixth edition of the A.M.A., *Guides*. He noted that appellant had a cervical disc herniation without radiculopathy which fell under class 1 on this table. Dr. Lakin applied grade modifiers from Table 17-6 through 17-9 on pages 575 through 581 and concluded that appellant had a seven percent permanent impairment of her whole person under the sixth edition of the A.M.A., *Guides*.

In a July 12, 2010 report, Dr. Magliato concluded that appellant did not have any work-related permanent impairment of a scheduled member. He stated that the evaluations of the physicians of record, including Dr. Weiss, did not show any objective cervical radiculopathy in appellant's left arm. Dr. Magliato noted that Dr. Lakin calculated seven percent impairment by using the Cervical Spine Regional Grid for a cervical disc herniation without radiculopathy. He stated, "However, these are whole person awards and not extremity awards. If radiculopathy were present, he would have to use the Peripheral Nerve Impairment Tables to get a schedule award. Since he found no radiculopathy, the [schedule award] would be [zero percent] for the upper extremity."

In an August 24, 2010 decision, OWCP denied appellant's schedule award claim on the grounds that the medical evidence did not support that appellant had work-related permanent impairment of a scheduled member. It relied upon Dr. Magliato's July 12, 2010 report in reaching this determination.

Appellant requested a video hearing with an OWCP hearing representative. During the December 16, 2010 hearing, counsel argued that the medical evidence showed that appellant had a cervical radiculopathy which justified the finding of permanent impairment.

In a February 28, 2011 decision, OWCP's hearing representative affirmed OWCP's August 24, 2010 decision again noting the probative value of the July 12, 2010 report of Dr. Magliato.

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.⁴

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a

⁴ 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.

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.⁵

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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.⁸ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁹ 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.¹⁰ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.¹¹

ANALYSIS

OWCP accepted that on August 17, 2005 appellant sustained a neck sprain/strain, displacement of a cervical intervertebral disc without myelopathy and degeneration of a cervical intervertebral disc when she was involved in an automobile accident at work.¹² It denied appellant's claim that she had permanent impairment of a scheduled member due to a work-related condition.

The Board finds that OWCP properly relied on a July 12, 2010 report from Dr. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. Dr. Magliato concluded that appellant had no permanent impairment of a scheduled member under the sixth

⁵ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). 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."

¹¹ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

¹² OWCP also accepted that in mid-2006 appellant sustained an occupational disease in the form of displacement of a cervical intervertebral disc without myelopathy and degeneration of a cervical intervertebral disc.

edition of the A.M.A., *Guides*. He reviewed a May 28, 2010 assessment of Dr. Lakin, a Board-certified orthopedic surgeon serving as an OWCP referral physician.¹³ Dr. Magliato noted that Dr. Lakin did not provide a rating of impairment caused by a peripheral nerve deficit stemming from the cervical area and moving into an arm because no such impairment had been established. The Board notes that OWCP has not accepted that appellant had a work-related cervical injury which caused any radiculopathy in her arms. OWCP accepted displacement of a cervical intervertebral disc without myelopathy.¹⁴ In evaluating Dr. Lakin's report, Dr. Magliato properly noted that a schedule award was not payable under FECA for an impairment of the whole person.¹⁵ For these reasons, Dr. Magliato properly concluded that appellant did not have permanent impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

On appeal, counsel asserted that the opinion of Dr. Magliato conflicted with the opinion of Dr. Weiss as expressed in his January 8, 2010 report. Although Dr. Weiss found a four percent impairment of appellant's left arm and a one percent impairment of her left leg under the sixth edition of the A.M.A., *Guides*, these ratings were based on conditions not accepted as work related, *i.e.*, left shoulder impingement syndrome and left knee contusion. The January 8, 2010 report is of limited probative value. Appellant has not submitted medical evidence to establish permanent impairment due to her accepted work injuries.

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 did not meet her burden of proof to establish that she is entitled to a schedule award due to her accepted work injuries.

¹³ In his May 28, 2010 report, Dr. Lakin evaluated appellant's permanent impairment under Table 17-2 (Cervical Spine Regional Grid) on pages 564 through 566 of the sixth edition of the A.M.A., *Guides*. He noted that appellant had a cervical disc herniation without radiculopathy which fell under class 1 on this table and concluded that appellant had a seven percent permanent impairment of her whole person 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 9.

¹⁴ Moreover, the medical record does not reflect that appellant had a preexisting impairment in her arms. *See supra* note 10. In any event, where a claimant has not demonstrated any permanent impairment caused by the accepted occupational exposure, the claim is not ripe for consideration of any preexisting impairment. *Thomas P. Lavin*, 57 ECAB 353 (2006).

¹⁵ *See supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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