

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

D.N., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
EDWARDS AIR FORCE BASE, CA, Employer)

**Docket No. 11-906
Issued: January 23, 2012**

Appearances:

*Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 1, 2011 appellant, through his attorney, filed a timely appeal from a February 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. 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 met his burden of proof to establish entitlement to a schedule award for a bilateral leg impairment, pursuant to 5 U.S.C. § 8107.

FACTUAL HISTORY

On September 25, 2007 appellant, then a 36-year-old lead firefighter, filed a traumatic injury claim alleging that on that day he injured his low back while walking to his vehicle wearing an air pack. OWCP accepted the claim for bilateral radiculitis, lumbar sprain, thoracic

¹ 5 U.S.C. § 8101 *et seq.*

or lumbosacral neuritis and lumbar disc displacement. It authorized low back surgery, which occurred on February 18, 2008. Appellant stopped work on September 25, 2007 and returned to full-duty work on April 19, 2008.

On September 9, 2008 appellant filed a schedule award claim.

In a January 20, 2009 report, Dr. Richard Yu, a treating physician, conducted a physical examination, reviewed objective tests and provided an impairment rating. He diagnosed lumbar radiculopathy status post February 18, 2008 surgery and that maximum medical improvement had been reached on January 20, 2009. Pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (fifth edition, 2001), Dr. Yu concluded that appellant had a 10 percent whole person spinal impairment using Table 15-3 on page 384.

In a November 19, 2009 report, Dr. G. Hanna, an examining Board-certified physiatrist, provided physical findings and an impairment rating based on the fifth edition of the A.M.A., *Guides*. Using Table 15-3 on page 384, he concluded that appellant had a 10 to 13 percent whole person impairment based on category III lumbar condition. Dr. Hanna concluded that appellant was entitled to an additional impairment for persistent low back pain, which increased the whole person impairment rating to 13 percent and the date of maximum medical improvement was November 19, 2009.

On March 27, 2010 Dr. Leonard A. Simpson, an OWCP medical adviser, reviewed the medical evidence of record. Using the sixth edition of the A.M.A., *Guides*, he determined that appellant had a zero percent permanent impairment to the lower extremities. Dr. Simpson utilized Table 16-12 on pages 534 to 536 based to find class 0 impairment due to the lack of radicular symptomatology, *i.e.*, no pain, altered sensation, numbness or tingling and no lower extremity range of motion loss.

By decision dated July 6, 2010, OWCP denied appellant's claim for a schedule award.

On July 12, 2010 appellant's counsel requested a telephonic hearing, which was held on November 8, 2010.

On July 26, 2010 Dr. William N. Grant, an examining Board-certified internist, diagnosed lumbar sprain, lumbar disc displacement and lumbosacral neuritis and provided an impairment rating using the sixth edition of the A.M.A., *Guides*. He noted that he did not physically examine appellant but determined the following based on a telephone conversation with appellant. Appellant experienced lumbar spine tenderness to the touch and had complaints of paresthesias radiating down the posterior part of both legs, pain, bilateral leg weakness and discomfort with any weight bearing or repetitive motion. In accordance with the sixth edition of the A.M.A., *Guides*, Dr. Grant utilized the adjustment grid tables and found a grade modifier of 3 for functional history under Table 17-6 on page 575, a grade modifier of 2 for clinical studies as per Table 17-9, page 581,² a grade modifier of 2 for physical examination under Table 17-7 on

² Although Dr. Grant referenced Table 17-4, page 571 of the A.M.A., *Guides* for the clinical studies modifier, it is actually found at Table 17-9, page 581.

page 576. He concluded that appellant had a net adjustment of 1 percent, resulting in a 13 percent impairment to each lower extremity.

By decision dated February 1, 2011 and finalized on February 2, 2011, OWCP's hearing representative affirmed the denial of appellant's schedule award claim.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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.⁵ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁶

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁷ As neither FECA nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.⁸ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.⁹ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹⁰ A schedule award is not payable for an impairment of the whole body.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *Thomas J. Engelhart*, 50 ECAB 319 (1999); *S.K.*, Docket No. 08-848 (issued January 26, 2009).

⁸ *See D.N.*, 59 ECAB 576 (2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

⁹ 5 U.S.C. § 8101(19).

¹⁰ *J.Q.*, 59 ECAB 366 (2008); *Thomas J. Engelhart*, *supra* note 7.

¹¹ *N.M.*, 58 ECAB 273 (2007); *Marilyn S. Freeland*, 57 ECAB 607 (2006); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

and Health (ICF).¹² Under the sixth edition, the evaluator identifies 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).¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹⁵

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹⁶

ANALYSIS

Appellant filed a traumatic injury claim, which OWCP accepted for bilateral radiculitis, lumbar sprain, thoracic or lumbosacral neuritis and lumbar disc displacement. Following lumbar surgeries on February 18, 2008, he filed a claim for a schedule award on September 9, 2008.

The medical evidence relevant to an impairment rating includes a January 20, 2009 report from Dr. Yu and a November 19, 2009 report from Dr. Hanna. Both physicians based their impairment rating on the fifth edition of the A.M.A., *Guides* and used Table 15-3 under the chapter relevant to determine spinal impairment to find a 10 percent whole person impairment. Dr. Hanna found appellant was entitled to an additional three percent for his pain, resulting in a total 13 percent whole person impairment. Both Drs. Hanna and Yu provided a whole-person impairment rating for appellant's employment-related lumbar condition based on the chapter pertaining to the spine. As noted, FECA does not permit a schedule award for impairment of the spine, back or the body as a whole.¹⁷ Consequently, OWCP properly determined that the reports from Drs. Hanna and Yu were insufficient to establish permanent impairment of the legs due to the accepted lumbar conditions.

¹² A.M.A., *Guides* (6th ed., 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹³ *Id.* at 383-419.

¹⁴ *Id.* at 411.

¹⁵ *Id.* at 23-28.

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010); see *Frantz Ghassan*, 57 ECAB 349 (2006); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

¹⁷ FECA expressly defines organ as a part of the body that performs a special function, and for purposes of this subchapter excludes the brain, heart and back. 5 U.S.C. § 8101(19). Also, a description of impairment in terms of whole person or whole body is not probative as to the extent of loss of use of a specific scheduled member of the body under section 8107 of FECA. *Paul A. Zoltek*, 56 ECAB 325 (2005); *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

Appellant also submitted a July 26, 2010 impairment rating from Dr. Grant who concluded that appellant had a 13 percent impairment in the left lower extremity and a 13 percent impairment in the right lower extremity. Dr. Grant applied the chapter relevant to the spine and cited to Table 17-9 on page 581, Table 17-6 on page 575 and Table 17-7 on page 575. While he referenced tables and grade modifiers in his report, he did not adequately explain how he arrived at his impairment rating based on the absence of a physical examination of appellant. This report is of limited probative value without additional explanation as to how he arrived at his calculation. Dr. Grant did not examine appellant and provided no clinical findings upon which the extent of impairment could be considered. The Board finds that his opinion as to the degree of impairment is of diminished probative value.¹⁸

On March 27, 2010 Dr. Simpson, an OWCP medical adviser, concluded that appellant had a zero percent permanent impairment. He applied Table 16-12 on pages 534 to 536 in the sixth edition of the A.M.A., *Guides* relevant to determining impairment to the lower extremities. Dr. Simpson found that appellant was not entitled to a schedule award based on a bilateral leg impairment. He explained that the class 0 rating was based on the lack of radicular symptomatology, such as the absence of pain, altered sensation, numbness and tingling. The Board finds that Dr. Simpson applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to the clinical findings provided by Drs. Hanna and Yu. Neither Dr. Hanna nor Dr. Yu provided an impairment rating based on proper application of the sixth edition of the A.M.A., *Guides*. Therefore, OWCP properly relied on its medical adviser's determination there was no ratable lower extremity impairment.

Without a well-reasoned medical opinion explaining how the accepted conditions of bilateral radiculitis, lumbar sprain, thoracic or lumbosacral neuritis and lumbar disc displacement caused permanent physical impairment of appellant's lower limbs under the sixth edition of the A.M.A., *Guides*, the evidence is insufficient to support his schedule award claim. The Board finds that he has not met his burden of proof. The Board will therefore affirm OWCP's hearing representative's decision dated February 1, 2011.

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 met his burden of proof to establish that he sustained permanent impairment as a result of his accepted employment injury.

¹⁸ See *Mary L. Henninger*, 52 ECAB 408 (2001) (the medical evidence as to the degree of permanent impairment was not based on proper identification and application of specific tables in the A.M.A., *Guides* and was not sufficient to create a conflict under 5 U.S.C. § 8123(a)). See also *J.G.*, Docket No. 09-1128 (issued December 7, 2009) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2011 is affirmed.

Issued: January 23, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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