

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

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M.R., Appellant	)	
	)	
and	)	<b>Docket No. 12-416</b>
	)	<b>Issued: July 2, 2012</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Cincinnati, OH, Employer	)	
	)	

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*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 21, 2011 appellant, through his attorney, filed a timely appeal from a November 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 any employment-related permanent impairment to a member or function of the body entitling him to a schedule award under 5 U.S.C. § 8107.

**FACTUAL HISTORY**

On September 30, 2004 appellant, then a 48-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained a cervical injury causally related to his federal employment. In an accompanying statement, he identified work duties that included bending, stooping, reaching and lifting above shoulder. On March 16, 2006 OWCP accepted the claim for

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

cervical strain and temporary aggravation of cervical degenerative disc disease at C4-5 and C5-6.<sup>2</sup>

In a report dated July 28, 2009, Dr. Martin Fritzhand, a Board-certified urologist, provided a history and results on examination. He stated that muscle strength was graded at 4+/5 over the shoulder abductors and rotators bilaterally and pinprick and light touch were diminished over the radial aspect of the forearms and both thumbs. Dr. Fritzhand opined that appellant had a 10 percent impairment to each arm under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).

In a report dated August 26, 2009, an OWCP medical adviser recommended a second opinion evaluation. Appellant was referred to Dr. Theodore Toan Le, an orthopedic surgeon, for examination. In a November 8, 2010 report, Dr. Toan Le reviewed a history and results on examination. He found strength of the upper extremities within normal limits and normal sensation to all peripheral nerves in the upper extremities. Dr. Toan Le opined that under Table 17-2 appellant had a class 1 cervical spine impairment of one to eight percent.

In a report dated November 30, 2010, an OWCP medical adviser stated that a peripheral nerve impairment was properly determined using *The Guides Newsletter* July/August 2009 (hereinafter *The Guides Newsletter*). OWCP's medical adviser opined that appellant did not have any sensory or motor impairment.

By report dated April 19, 2011, Dr. Toan Le stated that there was no sensory or motor deficit in any upper extremity peripheral nerve. He found that appellant had no impairment under the A.M.A., *Guides*. Dr. Toan Le noted that appellant did have some limited neck range of motion and pain with repetitive neck extension or overhead activities.

By decision dated April 27, 2011, OWCP determined that appellant was not entitled to a schedule award under 5 U.S.C. § 8107.

Appellant, through his representative, requested a telephonic hearing before an OWCP hearing representative, which was held on August 11, 2011.

In a report dated June 17, 2011, Dr. Fritzhand stated that he did find slight muscle weakness, as well as diminished sensation, as was noted in his prior report. He stated that, under *The Guides Newsletter*, there was a five percent impairment for sensory impairment under proposed Table 1 for the C6 nerve. Dr. Fritzhand also found a mild motor impairment under the same table resulted in a nine percent arm impairment bilaterally. He concluded that appellant had a 14 percent impairment to each arm.

In a decision dated November 10, 2011, an OWCP hearing representative affirmed the April 27, 2011 decision. The hearing representative found that Dr. Fritzhand's findings were inconsistent with other physicians of record and provided insufficient explanation in support of his impairment estimate.

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<sup>2</sup> A statement of accepted facts (SOAF) dated October 4, 2010 stated the claim was accepted for cervical disc degeneration, C4-5 and C5-6, without reference to aggravation.

## LEGAL PRECEDENT

Section 8017 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>4</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>5</sup>

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) is to be applied.<sup>6</sup>

FECA provides that, if there is a 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 the examination.<sup>7</sup> The implementing regulations state that if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>8</sup>

## ANALYSIS

The Board finds a conflict in medical opinion between appellant’s physician, Dr. Fritzhand, and the physician selected to perform a second opinion evaluation for OWCP, Dr. Toan Le. Dr. Fritzhand described results on examination and found motor and sensory deficits to the upper extremities that he related to the accepted cervical conditions. He applied *The Guides Newsletter* for peripheral nerve impairments and found appellant had 14 percent arm impairment bilaterally. Dr. Toan Le found no sensory or motor deficits or any ratable permanent impairment.

FECA provides that, when there is a disagreement between an attending physician and a second opinion physician, the case should be referred for a referee examination. In this case,

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<sup>3</sup> This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>4</sup> *A. George Lampo*, 45 ECAB 441 (1994).

<sup>5</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>6</sup> *See P.G.*, Docket No. 12-30 (issued May 15, 2012); *G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> 20 C.F.R. § 10.321 (1999).

OWCP found that Dr. Fritzhand did not adequately explain his physical examination findings. But he described his physical examination results and he reported a mild motor deficit and some sensory deficit. This contrast with the results noted by Dr. Toan Le and necessitates referral to an impartial physician to resolve the conflict in the medical evidence.

The case will be remanded to OWCP to select a referee physician in accord with established procedures. The referee physician should provide a rationalized medical opinion as to any permanent impairment under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. After such further development as OWCP deems necessary, it should issue an appropriate decision.

**CONCLUSION**

The Board finds that the case must be remanded to OWCP for further development of the medical evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 10, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 2, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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