

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

J.D., Appellant)	
)	
and)	Docket No. 12-482
)	Issued: July 20, 2012
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Tucson, AZ, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2012 appellant filed a timely appeal from August 17 and December 22, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 schedule award issue.

ISSUE

The issue is whether appellant sustained a ratable impairment entitling him to a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 26, 2008 appellant, then a 60-year-old customs and border protection officer, injured his lower back while in the performance of duty.² A January 14, 2009 magnetic resonance imaging (MRI) scan obtained by Dr. Lawrence D. Buadu, a Board-certified diagnostic radiologist, confirmed significant degenerative changes at L4-5 and L5-S1. Appellant underwent bilateral L4-5 laminectomy for decompression on March 3, 2009.³ OWCP accepted his traumatic injury claim for permanent aggravation of L4-5 stenosis and degenerative disc disease resulting in L4-5 intervertebral disc displacement and radiculitis. Appellant received disability compensation accordingly.⁴

A July 2, 2010 MRI scan obtained by Dr. Nicholas C. Fraley, a Board-certified diagnostic radiologist, exhibited L4-5 facet arthropathy, degenerative disc disease and central stenosis, *inter alia*. On September 22, 2010 appellant underwent L4-5 posterolateral and posterior lumbar interbody fusion and decompressive laminectomy. Postoperative x-rays conducted on September 26, 2010 by Dr. Jae K. Kim, a Board-certified diagnostic radiologist, showed satisfactory alignment without complications.

Dr. Stephen L. Curtin, a Board-certified orthopedic surgeon, remarked in a March 22, 2011 report that appellant, who complained of residual right leg numbness, was otherwise “doing quite well” after his recent lumbar surgery. On examination, he observed a well-healed surgical scar as well as normal bilateral extremity strength and sensation. X-rays demonstrated good lumbar alignment and early consolidation of fusion. Dr. Curtin opined that appellant reached maximum medical improvement and recommended an impairment examination.

In an April 21, 2011 report, Dr. Caryl S. Brailsford-Gorman, a Board-certified occupational physician, examined appellant and found limited lumbar range of motion and diffuse muscle pain. She also observed the absence of Achilles reflex, nonreactive toes, poor balance and a “sensory deficit in wheel in a stocking formation through [appellant’s] lower extremity mid calf.” Following a review of the medical file, including Dr. Fraley’s July 2, 2010 MRI scan and Dr. Curtin’s March 22, 2011 report, Dr. Brailsford-Gorman diagnosed work-related lumbar spondylosis spinal stenosis and post-laminectomy syndrome. Applying Table 17-4 (Lumbar Spine Regional Grid) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ she assigned an impairment class (CDX) of 2 for lumbar stenosis based on evidence of motion segment instability, facet hypertrophy and neurogenic claudication.⁶ Dr. Brailsford-Gorman calculated a 12 percent

² Appellant previously filed a claim concerning an April 23, 1998 thoracic spine injury, which OWCP accepted as employment related. OWCP File No. xxxxxx171.

³ The foregoing information was incorporated into the June 11, 2009 statement of accepted facts.

⁴ Appellant retired effective June 30, 2011.

⁵ A.M.A., *Guides* (6th ed. 2008).

⁶ *Id.* at 571.

impairment rating of the whole person and determined that no further adjustments were warranted.

Appellant filed a claim for a schedule award on May 5, 2011.

In a July 28, 2011 report, Dr. Christopher R. Brigham, OWCP's medical adviser and a Board-certified occupational physician, reviewed Dr. Brailsford-Gorman's April 21, 2011 report and disagreed with her opinion. He indicated that a schedule award could not be issued for permanent impairment of the spine or the whole person. Because Dr. Brailsford-Gorman identified neurological symptoms involved the lower extremities, Dr. Brigham commented that she should have based her impairment rating on the supplemental publication "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (*The Guides Newsletter*).⁷ After he reviewed the June 11, 2009 statement of accepted facts and medical file, he pointed out that Dr. Brailsford-Gorman's findings conflicted with Dr. Curtin's March 22, 2011 report, which documented full lower extremity strength and motor function notwithstanding appellant's subjective complaint of residual right leg numbness. In addition, Dr. Brailsford-Gorman's view that the sensory deficit was in a stocking formation "does not follow a dermatomal distribution and cannot be rated." In the absence of consistent evidence showing sensory or motor deficits in the distribution of a specific spinal nerve root, Dr. Brigham concluded that appellant did not sustain a ratable lower extremity impairment.

By decision dated August 17, 2011, OWCP denied appellant's schedule award claim, finding that the medical evidence did not sufficiently demonstrate permanent impairment of a scheduled member.

Appellant requested reconsideration on October 7, 2011 and submitted new medical evidence. In a September 26, 2011 report, Dr. Curtin advised that appellant was taking medication for leg cramps and numbness, but was "clinically doing well" one year after L4-5 decompression fusion. On examination, he observed full strength motor function and light touch sensation of the lower extremities. Dr. Curtin noted blunted bilateral ankle jerk reflexes, but could not elicit bilateral knee reflexes. X-rays exhibited solid L4-5 fusion. Citing Table 17-4 of the A.M.A., *Guides*, Dr. Curtin assigned a CDX of 1 for resolved radiculopathy with loss of motion segment.

In a November 11, 2011 report, Dr. Brigham reviewed Dr. Curtin's September 26, 2011 report and disagreed with his opinion. He reiterated that a schedule award could not be issued for permanent impairment of the spine and that the impairment rating should be based on *The Guides Newsletter*. Dr. Brigham determined that appellant did not sustain a ratable lower extremity impairment, pointing out that Dr. Curtin found appellant's motor function and sensation intact.

On December 22, 2011 OWCP denied modification of the August 17, 2011 decision.

⁷ Christopher R. Brigham, M.D., "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition," *The Guides Newsletter* (July and August 2009).

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body.⁸ 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

Although the A.M.A., *Guides* presents methods for estimating impairment to the spine and to the whole person,¹⁰ FECA does not authorize schedule awards for loss of use of the back or the body as a whole.¹¹ Amendments to FECA, however, modified the schedule award provision to allow 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. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹²

The A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For lower extremity impairments, 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). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹³

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to

⁸ 5 U.S.C. § 8107; 20 C.F.R. § 10.404. No schedule award is payable for a member, function or organ of the body not specified under FECA or the implementing regulations. *J.Q.*, 59 ECAB 366 (2008).

⁹ *K.H.*, Docket No. 09-341 (issued December 30, 2011).

¹⁰ *See B.M.*, Docket No. 09-2231 (issued May 14, 2010); *Janae J. Triplette*, 54 ECAB 792 (2003).

¹¹ *J.Q.*, *supra* note 8. 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. *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

¹² *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹³ *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

rating spinal nerve impairments consistent with sixth edition methodology.¹⁴ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹⁵

ANALYSIS

The Board finds that appellant did not sustain a ratable impairment.

OWCP accepted that appellant sustained permanent aggravation of L4-5 stenosis and degenerative disc disease resulting in L4-5 intervertebral disc displacement and radiculitis, for which he had a L4-5 laminectomy for decompression on March 3, 2009, as a result of an August 26, 2008 work injury. Thereafter, he filed a claim for a schedule award and furnished medical evidence. Dr. Brailsford-Gorman calculated a 12 percent impairment rating of the whole person in an April 21, 2011 report. Dr. Curtin also diagnosed a lumbar impairment due to resolved radiculopathy and loss of motion in a September 26, 2011 report. As noted, FECA does not permit schedule awards for impairment of the back or the body as a whole. Furthermore, as Dr. Brigham correctly pointed out, neither Dr. Brailsford-Gorman nor Dr. Curtin used the appropriate scheme set forth in *The Guides Newsletter* for rating extremity impairment resulting from an injury to the spine. Therefore, these reports were insufficient to establish permanent impairment of a scheduled body member.¹⁶

On the other hand, the Board finds that Dr. Brigham's opinion constitutes the weight of the medical evidence. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁷ In his July 28 and November 11, 2011 reports, Dr. Brigham comprehensively reviewed the June 11, 2009 statement of accepted facts and the medical file. He found that the totality of the evidence showed full lower extremity strength, motor function and sensation as well as the absence of any sensory or motor deficits in the distribution of a specific spinal nerve root. Thereafter, Dr. Brigham concluded that a schedule award was not warranted under *The Guides Newsletter*. In view of this rationalized medical opinion, the Board finds that OWCP properly denied appellant's claim.

Appellant contends on appeal that the mere fact that he has undergone fusion surgery and has four screws in his lower back sufficiently establishes permanent impairment. The Board has held that an employee's entitlement to a schedule award must be supported by the medical

¹⁴ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁶ The Board further notes that notwithstanding their citations to Table 17-4 of the A.M.A., *Guides*, neither Dr. Brailsford-Gorman nor Dr. Curtin offered a rationalized opinion as to the percentage of permanent impairment. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a)-(c) (January 2010).

¹⁷ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *James Mack*, 43 ECAB 321, 329 (1991).

evidence, not his personal belief.¹⁸ Appellant also asserts that Dr. Curtin's impairment rating sufficiently established his claim. The Board has already addressed the deficiencies of his report. Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment.

CONCLUSION

The Board finds that appellant has not established that he sustained a ratable impairment to a scheduled member of the body.

ORDER

IT IS HEREBY ORDERED THAT the December 22 and August 17, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 20, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ See, e.g., *D.W.*, Docket No. 11-940 (issued October 18, 2011); *J.J.*, Docket No. 10-1758 (issued May 16, 2011); *K.D.*, Docket No. 07-1584 (issued December 14, 2007).