

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

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**R.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Lock Haven, PA, Employer**

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**Docket No. 12-527  
Issued: July 16, 2012**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 5, 2012 appellant, through counsel, filed a timely appeal from an October 26, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative denying his claim for a schedule award. 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 sustained permanent impairment warranting a schedule award.

**FACTUAL HISTORY**

On August 14, 2002 appellant, then a 48-year-old part-time clerk, filed a traumatic injury claim alleging a lower back injury when he leaned over to remove a tray of mail from a machine

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

on August 12, 2002. OWCP accepted his claim for a herniated disc at L4-5. Appellant stopped work on August 17, 2002 and returned to light duty on November 14, 2003.

This case was previously before the Board with respect to the termination of compensation benefits. By decision dated September 24, 2007, the Board affirmed the August 21 and March 1, 2006 OWCP decisions to terminate appellant's medical and wage-loss compensations benefits effective March 1, 2006 as he no longer had any employment-related medical residuals or disability.<sup>2</sup> It found that the weight of the medical evidence rested with the impartial medical examiner, Dr. Charles R. Levine, a Board-certified orthopedic surgeon, who determined that appellant no longer had residuals or disability related to his accepted employment injury. The facts and history as set forth in the prior decision are incorporated by reference.

In a December 3, 2009 report, Dr. David Weiss, an orthopedic surgeon, examined appellant for injuries sustained during the course of his employment. He described a November 18, 1999 incident at work when appellant felt a popping sensation in his right arm after lifting heavy garbage containers and appellant's August 12, 2002 injury.<sup>3</sup> Dr. Weiss related appellant's current complaints including low back pain and radicular pain into both lower extremities. Appellant complained that he had difficulty with activities of daily living and lifting weights greater than 25 pounds.

Examination of the lumbar spine revealed no tenderness to palpation. Range of motion revealed forward flexion of 65/80 degrees, backward extension of 15/30 degrees, left lateral flexion of 10/30 degrees and right lateral flexion of 10/30 degrees. Straight leg raise tests revealed midline low back pain on the right at 90 degrees and on the left at 75 degrees. Dr. Weiss opined that the November 18, 1999 and August 12, 2002 injuries at work were the competent producing factors for appellant's subjective and objective findings. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6<sup>th</sup> ed. 2008) (A.M.A., *Guides*) Chapter 16, he stated that appellant had a 9 percent impairment for the left lower extremity based on a class 1 sensory deficit of the left S1 nerve root, and a 12 percent impairment for the right lower extremity based on a class 1 sensory deficit of the right L4 and S1 nerve roots. Dr. Weiss noted that appellant was at maximum medical improvement.

OWCP referred the case to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and district medical adviser, on March 15, 2010, together with a statement of accepted facts, to determine whether appellant sustained any permanent impairment as a result of his accepted herniated lumbar disc and the extent of any impairment in accordance with the A.M.A., *Guides* (6<sup>th</sup> ed 2008). Dr. Berman provided an accurate history of the August 12, 2002 work-related injury and reviewed Dr. Weiss' December 3, 1999 impairment evaluation. Regarding Dr. Weiss' recommendations for the lower extremities, the district medical adviser stated that the examination results did not reveal a nerve root injury, but rather the impairment should be related

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<sup>2</sup> Docket No. 07-945 (issued September 24, 2007).

<sup>3</sup> Dr. Weiss assessed appellant's impairment to the upper extremities resulting from the 1999 injury. The issue of impairment of appellant's upper extremities is not before the Board in the present appeal.

to appellant's accepted herniated lumbar disc, which would support impairment of the L5 nerve root. Utilizing Chapter 16 of the A.M.A., *Guides* (6<sup>th</sup> ed. 2008), he determined that appellant had seven percent impairment of both the right and left lower extremities.<sup>4</sup> The district medical adviser noted the date of maximum medical improvement as December 3, 2009.

Appellant resubmitted Dr. Weiss' December 3, 2009 report with additional information. He noted diagnoses of distal biceps tendon tear to the right arm, chronic post-traumatic lumbosacral strain and sprain, herniated nucleus pulposus L3-L4, L4-L5, and L5-S1, lumbar radiculitis and aggravation of preexisting age-related quiescent osteoarthritis of the lumbar spine. Dr. Weiss examined the lumbar spine and noted restricted and painful range of motion on forward flexion, backward extension and left and right lateral flexion. Straight leg raise testing produced complaints of midline low back pain on the right at 90 degrees above the horizontal and low back pain on the left at 75 degrees.

In a March 22, 2010 note, Dr. Stephen Goykovich, an orthopedic surgeon, stated that he reviewed Dr. Weiss' December 3, 2009 evaluation and agreed with the finding that appellant had 12 percent impairment of the right lower extremity.

In a March 31, 2011 decision, OWCP denied appellant's claim for a schedule award. It based its determination on the prior termination of compensation benefits on March 1, 2006.

On April 7, 2011 appellant submitted a request for a hearing, which was held on August 10, 2011. Counsel for appellant noted that Dr. Weiss properly applied the sixth edition of the A.M.A., *Guides* (2008) to determine that appellant sustained 9 percent impairment to the left leg and 12 percent impairment to the right leg based on the class 1 sensory deficit at the S1 and L4 nerve roots. He also pointed out that the medical adviser found seven percent impairment to each lower extremity in accordance with the sixth edition of the A.M.A., *Guides*, (2008) but OWCP's denial only referred to the prior report of Dr. Levine, which was the basis for the termination decision. He contended that it was improper to rely upon appellant's prior termination as there was a difference between physical impairment and disability for wage loss. Counsel contended that OWCP did not properly consider the reports from the district medical adviser and Dr. Weiss.

By decision dated October 26, 2011, an OWCP hearing representative affirmed the March 31, 2011 decision denying a schedule award. He found that Dr. Weiss had not provided any medical rationale to support that appellant's condition was causally related to the accepted employment injury. The hearing representative also found that the district medical adviser's report merely applied the A.M.A., *Guides* to the findings of record, but did not establish permanent impairment causally related to the accepted injury.

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<sup>4</sup> Based on Table 17-4, page 570 of the A.M.A., *Guides* (6<sup>th</sup> ed. 2008), class 1 for intervertebral disc herniation, the medical adviser determined that appellant had a default value of seven percent impairment. Utilizing the grade modifiers for Functional History on Table 17-6, page 575, grade modifier 1, Physical Examination on Table 17-7, page 576, grade modifier 1, and Clinical Studies on Table 17-9, page 581, grade modifier 0, he determined that an adjustment of -1 was necessary. As applied to the *Lumbar Spine Regional Grid*, Table 17-4, page 570, appellant's grade was reduced from C to B to six percent whole person impairment. The medical adviser converted the whole personal impairment to lower extremity utilizing *Impairment Values Calculated for Lower Extremity*, Table 16-10, page 530 to reach 14 percent total lower extremity impairment.

## LEGAL PRECEDENT

The schedule award provision of FECA<sup>5</sup> and its implementing federal regulations<sup>6</sup> 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.<sup>9</sup> OWCP procedures provide that to support a schedule award the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>10</sup>

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.<sup>11</sup> Neither FECA nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.<sup>12</sup> However, a claimant may be entitled to a schedule award where the employment-related back condition affects the upper and/or lower extremities.<sup>13</sup>

When a claimant's compensation is terminated, but the termination is not based on his refusal of suitable work under 5 U.S.C. § 8106(c), he or she is not barred from receiving a schedule award for permanent impairment related to the accepted injury.<sup>14</sup>

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.*

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b) (January 2010).

<sup>11</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>12</sup> 5 U.S.C. § 8107(c) (2006); 20 C.F.R. § 10.404(a) (2011); *see Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

<sup>14</sup> *Wayne B. Carlton*, Docket No. 98-1994 (issued July 14, 2000); *see also B.S.*, Docket No. 07-1786 (issued January 11, 2008).

## ANALYSIS

Appellant's claim was accepted for a herniated disc at L4-L5. OWCP terminated appellant's compensation on March 1, 2006. As the termination was not based upon a refusal of suitable work, appellant is not precluded from receiving a schedule award if the medical evidence of record established permanent impairment causally related to the employment injury.

On January 25, 2011 appellant filed a claim for a schedule award. As noted, FECA does not provide for a schedule award based on impairment to the back or spine.<sup>15</sup> Appellant may receive a schedule award for impairment to the lower extremities if such impairment is established as being due to her accepted lumbar condition.<sup>16</sup> By decisions dated March 31 and October 26, 2011, OWCP denied appellant's claim for a schedule award finding that the medical evidence failed to establish that he sustained a permanent impairment causally related to the accepted employment injury. The Board finds that this case is not in posture for decision.

In support of his claim, appellant submitted a December 3, 2009 report from Dr. Weiss, who opined that appellant had 9 percent impairment for the left lower extremity, and 12 percent impairment for the right lower extremity based on the sixth edition of the A.M.A., *Guides*. On March 15, 2010 at OWCP's request an OWCP medical adviser reviewed Dr. Weiss' report. The issue presented to Dr. Berman was "what is the extent of permanent partial impairment due to the employment in accordance with the A.M.A., *Guides* to the evaluation of permanent impairment (sixth edition) is there any permanent impairment as a result of the work-related injury?" He reported that appellant's impairment should be related to appellant's accepted herniated lumbar disc, and would support impairment to the L5 nerve root from the herniated disc. Utilizing the sixth edition of the A.M.A., *Guides* (2008), the medical adviser concluded that appellant sustained 7 percent impairment of each lower extremity.

OWCP denied appellant's schedule award claim finding that the prior termination of benefits in 2006 precluded consideration of a schedule award for permanent impairment.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>17</sup>

The Board notes that Dr. Berman did not reference The AMA *Guides* July/August 2009 Newsletter regarding spinal nerve extremity impairments. OWCP procedures indicate that the Newsletter would be the appropriate method of determining lower extremity impairment in this case. The Newsletter provides a specific method for determining impairments such as

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<sup>15</sup> *Supra* note 10.

<sup>16</sup> *Supra* note 11; *see also* C.H., Docket No. 11-981 (issued January 11, 2012).

<sup>17</sup> *Horace L. Fuller*, 53 ECAB 775, 777 (2002).

radiculopathy.<sup>18</sup> It explains that in the sixth edition, impairment for radiculopathy is reflected in the diagnosis-based impairment for the spinal region.<sup>19</sup>

On remand, OWCP should further develop the medical evidence of record. It should request a medical opinion properly applying the sixth edition of the A.M.A., *Guides*, including the 2009 Newsletter. Thereafter, OWCP shall issue an appropriate final decision on appellant's entitlement to a schedule award.<sup>20</sup>

### **CONCLUSION**

The Board finds that this case was not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 26, 2011 Office of Workers' Compensation Programs' hearing representative's decision is set aside and remanded for further action consistent with this decision of the Board.

Issued: July 16, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>18</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). The Newsletter is included as Exhibit 4.

<sup>19</sup> *P.G.*, Docket No. 12-30 (issued May 15, 2012).

<sup>20</sup> *S.G.*, Docket No. 09-2310 (issued July 6, 2010).