

accepted the claim for lumbar strain and herniated L5-S1 disc. On August 30, 2004 appellant filed a claim for compensation (Form CA-7) indicating that he was claiming a schedule award.

In a report dated February 12, 2004, Dr. David Weiss, an osteopath, provided a history and results on examination. He indicated that appellant had radicular pain in his left leg, and he opined that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) appellant had a 27 percent left leg permanent impairment. Dr. Weiss indicated that appellant had sensory and motor deficits, as well as an impairment for pain.

By report dated October 4, 2004, an OWCP medical adviser, Dr. Arnold Berman, opined that appellant had an eight percent left leg impairment for sensory and motor deficit. In a decision dated November 9, 2004, OWCP issued a schedule award for an eight percent left leg permanent impairment. The period of the award was 23.04 weeks commencing February 12, 2004.

Appellant requested a hearing before an OWCP hearing representative. In a decision dated June 10, 2005, the hearing representative set aside the November 9, 2004 decision and remanded the case for further development. The hearing representative found that a conflict in the medical evidence existed between Dr. Weiss and Dr. Berman.²

OWCP referred appellant to Dr. David Bundens, a Board-certified orthopedic surgeon, selected as a referee physician, who submitted a report dated October 4, 2005. In a supplemental report dated October 25, 2005, Dr. Bundens stated that while appellant had pain in the left leg, there was no impairment to the leg. By letter dated December 22, 2005, OWCP indicated that it was referring appellant for another referee examination, as Dr. Bundens did not address the level of leg impairment.

The record indicates that appellant initially did not appear for a rescheduled referee examination. Eventually he was referred to Dr. Bong Lee, a Board-certified orthopedic surgeon, selected as a referee physician. In a report dated September 6, 2007, Dr. Lee provided a history and results on examination. He opined that appellant had a 14 percent whole person impairment. OWCP requested clarification and an opinion as to an impairment to a scheduled member of the body. In a report dated March 3, 2008, Dr. Lee again found a 14 percent whole person impairment.

² 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. 5 U.S.C. § 8123(a). 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. 20 C.F.R. § 10.321 (1999).

On October 28, 2009 OWCP received a medical report from Dr. Weiss. The report contained the February 12, 2004 history and physical examination, with an opinion as to permanent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Weiss opined that appellant had a 23 percent left leg impairment for sensory and motor deficit. He also found appellant had a nine percent right lower extremity impairment.

OWCP again referred appellant for a referee examination and selected Dr. Howard Zeidman, a Board-certified orthopedic surgeon. In a report dated December 10, 2009, Dr. Zeidman reviewed the medical records, provided a history and results on examination. He noted in his examination results that motor and sensory functions were intact and deep tendon reflexes were symmetrical and brisk. As to a permanent impairment, Dr. Zeidman stated that there was no evidence of a specific lower extremity problem. He indicated that appellant did have an impairment to the lumbar spine based on the diagnosis of an intervertebral disc herniation with resolved radiculopathy. Dr. Zeidman opined that under the A.M.A., *Guides* there was a six percent whole person impairment based on Table 17-4.

The medical evidence was again reviewed by Dr. Berman, an OWCP medical adviser. In a report dated January 30, 2010, Dr. Berman opined that appellant had a five percent whole person impairment based on the lumbar diagnosis. The medical adviser then applied Table 16-10, a general table converting whole person impairments to lower extremity impairments, and opined that appellant had a 12 percent lower extremity impairment, which “could represent either right or left or combined right and left lower extremity.”

By decision dated March 4, 2010, OWCP issued a schedule award for an additional two percent impairment for the left and right legs. The period of the award was 11.52 weeks from December 10, 2009.

Appellant requested a hearing before an OWCP hearing representative, which was held on June 23, 2010. By decision dated September 20, 2010, the hearing representative found that: (1) Dr. Zeidman’s report did not require further explanation or justification, (2) OWCP appropriately determined that appellant had a 12 percent leg impairment, and (3) the submission of the additional report from Dr. Weiss was sufficient to require further development.

OWCP referred the case to another medical adviser, Dr. Craig Uejo, for an opinion. In a report dated October 13, 2010, Dr. Uejo indicated that Dr. Weiss did not provide new physical examination results, and therefore he was relying on examination results that were six years old. He reviewed the medical report from Dr. Zeidman and concurred that appellant had no lower extremity impairment.

By decision dated October 14, 2010, OWCP found appellant was not entitled to an additional schedule award. Appellant requested a hearing before an OWCP hearing representative, which was held on February 12, 2011. By decision dated April 14, 2011, the hearing representative affirmed the October 14, 2010 decision. The hearing representative found that Dr. Zeidman was a second opinion physician.

LEGAL PRECEDENT

5 U.S.C. § 8107 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.³ 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.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁵

ANALYSIS

The schedule award issue in this case has undergone significant development, and in view of the inconsistent findings of OWCP (such as whether Dr. Zeidman is a referee physician), the Board will attempt to clarify the issue. The first question concerns the conflict in the medical evidence and the report of Dr. Zeidman. OWCP initially issued a schedule award for an eight percent left leg impairment on November 9, 2004. There was a disagreement between the attending physician, Dr. Weiss, and OWCP's medical adviser, Dr. Berman, regarding the extent of an employment-related permanent impairment to a scheduled member of the body. OWCP determined that a conflict under 5 U.S.C. § 8123(a) existed and referred appellant to several physicians in an attempt to resolve the conflict. Dr. Bundens found that there was no leg impairment, but OWCP found that he did not provide a probative medical opinion on impairment and continued to develop the issue. Appellant was then referred to Dr. Lee who also did not provide an adequate response to the schedule award issue in his September 6, 2007 and March 3, 2008 reports.

Since the conflict remained unresolved, OWCP selected Dr. Zeidman as a referee physician in November 2009. As noted above, the sixth edition of the A.M.A., *Guides* is the applicable edition for any decision issued after May 1, 2009. The Board has held that when there is a conflict in the medical evidence that arose under the fifth edition, but remains unresolved, the physician selected as a referee for an opinion under the sixth edition is considered a referee physician.⁶

Therefore Dr. Zeidman is a referee physician under 5 U.S.C. § 8123(a) and 20 C.F.R. § 10.321. Having established Dr. Zeidman as a referee physician, the next question is whether his report constitutes a rationalized medical opinion. It is well established that a rationalized medical opinion from a referee physician is entitled to special weight.⁷ In his December 10,

³ 5 U.S.C. § 8107. 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).

⁴ A. *George Lampo*, 45 ECAB 441 (1994).

⁵ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁶ *See V.P.*, Docket No. 11-605 (issued January 12, 2012).

⁷ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

2009 report, Dr. Zeidman reviewed medical records in detail and provided results on examination. He offered an unequivocal opinion that appellant did not have a lower extremity impairment. Dr. Zeidman explained that the diagnosed condition was a lumbar condition and there was no impairment to the legs. Table 17-4, referenced by Dr. Zeidman, is relevant in determining impairments to the lumbar spine.⁸ FECA specifically excludes the back as an organ of the body, and impairments to the spine under Table 17-4 do not establish an impairment to a scheduled member or function of the body.⁹

The Board finds that Dr. Zeidman provided a rationalized medical opinion on the issue presented. He provided a complete report and found no employment-related permanent impairment to the lower extremities. The opinion of Dr. Zeidman is entitled to special weight and represents the weight of the medical evidence.

Appellant argued that OWCP erred in allowing Dr. Berman to review the case. The Board concurs that it was unnecessary to refer the case to OWCP's medical adviser because Dr. Zeidman resolved the issue. Dr. Berman was on one side of the conflict and should not have been asked to review the report of Dr. Zeidman.¹⁰ In addition, Dr. Zeidman as a referee physician must resolve the schedule award issue presented, not the medical adviser.¹¹ Dr. Berman not only made a new finding as to a lumbar impairment under Table 17-4, he then converted the impairment to a lower extremity impairment without a clear explanation.

While the Board therefore agrees with appellant that there were errors made with respect to the medical development, it is evident that the errors were not adverse to appellant. Appellant received a schedule award for an additional four percent permanent impairment based on Dr. Berman's November 30, 2010 report. There was no evidence that the unnecessary additional development of the evidence resulted in an adverse finding to appellant. OWCP also referred the case to another medical adviser, Dr. Uejo, who concurred that there was no lower extremity impairment. While an OWCP medical adviser may review the referee's report, the Board reiterates that it is the referee that must resolve the conflict.

There remains a question as to the report from Dr. Weiss received on October 8, 2009. This report reviewed the February 12, 2004 physical examination results. Dr. Weiss was on one side of the conflict, and his report was submitted prior to the referee examination by Dr. Zeidman. As noted above, Dr. Zeidman resolved the existing conflict in the medical evidence. Appellant can submit new medical evidence showing progression of an employment-related condition resulting in increased impairment, and request an increased schedule award at any time before OWCP.

On appeal, appellant asserts that Dr. Zeidman's report was deficient as he did not provide complete examination results, but he provided results on examination, and specifically stated that

⁸ A.M.A. *Guides* 570, Table 17-4.

⁹ *L.B.*, Docket No. 11-517 (issued December 1, 2011).

¹⁰ See *Richard R. LeMay*, 56 ECAB 341 (2005).

¹¹ *Id.*; see also *Thomas J. Fragale*, 55 ECAB 619 (2004).

he found motor and sensory functions were intact. Dr. Zeidman examined appellant, reviewed medical records and explained his opinion that there was no lower extremity impairment. For these reasons the Board finds Dr. Zeidman represented the weight of the medical evidence. As noted, appellant can submit new medical evidence with a request for an increased schedule award.

CONCLUSION

The Board finds the weight of the medical evidence in this case does not establish that appellant has more than a 10 percent left leg and 2 percent right leg permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 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