

FACTUAL HISTORY

This case has previously been before the Board. By decision dated December 12, 2008, the Board reversed OWCP decisions dated January 8, 2008 and July 26, 2007. The Board found that OWCP did not meet its burden of proof to establish that the constructed position of sales attendant fairly and reasonably represented appellant's wage-earning capacity because OWCP did not consider his accepted malignant melanoma and carpal tunnel syndrome prior to reducing his compensation.² The law and the facts of the previous Board decision are incorporated herein by reference.

On April 14, 2009 appellant filed separate schedule award claims for both his accepted back condition and his accepted bilateral carpal tunnel.³ By letter dated May 27, 2009, OWCP informed him of the type evidence needed to support his schedule award claims, to include a report by his physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

In a report dated June 11, 2009, Dr. Richard T. Katz, an attending Board-certified physiatrist, reviewed medical records and provided examination findings. He advised that appellant had bilateral S1 radiculopathy and stated that, as the sixth edition of the A.M.A., *Guides* did not have tables in regard to spinal root pain in the upper and lower extremity chapters, it was most appropriate to rate appellant under Table 16-12, peripheral nerve impairment. Dr. Katz advised that a mild sensory deficit of the lateral plantar nerve yielded a one percent deficit of each lower extremity. Following a review of a December 8, 2005 nerve conduction study, on July 2, 2009, he advised that appellant had a two percent impairment of each upper extremity. By report dated August 20, 2009, Dr. Daniel D. Zimmerman, an OWCP medical adviser who is Board-certified in internal medicine, noted his review of Dr. Katz' report and agreed with his conclusions that appellant had two percent impairments of each upper extremity and one percent impairments of each lower extremity.

On December 17, 2009 appellant was granted a schedule award for a two percent impairment of the right upper extremity and a two percent impairment of the left upper extremity, for a total of 12.48 weeks, to run from June 11 to September 6, 2009. On

² Docket No. 08-1111 (issued December 12, 2008). On January 19, 2006 OWCP accepted that appellant, then a 51-year-old lock and dam operator, sustained employment-related melanoma of the right cheek. On April 10, 2006 the employing establishment informed him that it could not accommodate his restriction to avoid sunlight. Appellant stopped work and was placed on the periodic rolls. On October 31, 2006 OWCP accepted that he sustained employment-related bilateral carpal tunnel syndrome under file number xxxxxx358. By decision dated January 24, 2007, it reduced appellant's compensation benefits, effective February 17, 2007, based on his capacity to earn wages as a sales attendant. On March 22, 2007 OWCP accepted that he sustained employment-related displacement of lumbar intervertebral disc without myelopathy under file number xxxxxx567. On April 24, 2007 appellant underwent an L4-5 posterior lumbar interbody fusion procedure. In decisions dated July 26 and October 9, 2007 and January 8, 2008 OWCP denied modification of the January 24, 2007 wage-earning capacity decision. On March 24, 2008 it combined appellant's claim numbers xxxxxx793, xxxxxx358 and xxxxxx567, with the former being the master file.

³ *Id.*

⁴ A.M.A., *Guides* (6th ed. 2008).

December 21, 2009 he was granted a schedule award for a one percent impairment of the right lower extremity and a one percent impairment of the left leg, for a total of 5.76 weeks, to run from June 11 to July 21, 2009. On January 6, 2010 appellant, through his attorney, requested hearings for each schedule award decision.⁵

The hearings were held separately on April 1, 2010. At the hearing regarding the carpal tunnel claim, appellant's attorney indicated that both Dr. Katz and an OWCP medical adviser accurately assessed appellant's impairment and that he was not in disagreement regarding the rating awarded. At the hearing regarding his lower extremities, appellant testified that he continued to have constant pain and numbness in his legs. Following the hearings, he submitted additional medical evidence including a December 7, 2009 operative report of a left carpal tunnel release from the Department of Veterans Affairs (VA) and a VA pain clinic procedure note for a lumbar facet injection. In decisions dated June 10, 2010, an OWCP hearing representative affirmed the December 17, 2009 schedule award decision regarding appellant's upper extremities and the December 21, 2009 schedule award decision regarding his lower extremities.⁶

On January 7, 2011 appellant, through his attorney, requested reconsideration of the June 10, 2010 schedule award decision regarding his lower extremity impairment. He submitted additional medical evidence including a July 30, 2010 report in which Dr. Martin Fritzhand, a Board-certified urologist, noted his review of medical evidence.⁷ Counselor provided physical examination findings and provided an impairment evaluation in accordance with the fifth edition of the A.M.A., *Guide*. He concluded that appellant had impairments of 2.5 percent to each lower extremity.

On April 27, 2011 Dr. Zimmerman, an OWCP medical adviser, reviewed the MRI scan study and Dr. Fritzhand's report. He noted that it was inappropriate to evaluate impairments under the fifth edition of the A.M.A., *Guides* and that the record contained no new information in accordance with the sixth edition to establish that appellant was entitled to increased awards for his lower extremities. By decision dated June 8, 2011, OWCP found that appellant was not entitled to increased schedule awards for his lower extremities.

⁵ Appellant elected FECA benefits effective February 1, 2010 and was returned to the periodic compensation rolls in November 2010.

⁶ Appellant did not file an appeal with the Board from the June 10, 2010 decision regarding his upper extremity impairments.

⁷ The evidence submitted also included VA progress notes dated January 21, 2009 to February 16, 2011, x-ray reports of bilateral wrists and right hand and a lumbar spine x-ray and a March 1, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine. In a February 27, 2011 work capacity evaluation, Dr. A. Paul Rauwolf, Board-certified in family medicine, advised that appellant must work indoors.

LEGAL PRECEDENT

The schedule award provision of FECA⁸ and its implementing federal regulations,⁹ 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.¹⁰ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.¹¹ For decisions issued after May 1, 2009, the sixth edition is to be used.¹²

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.¹³ In 1960, amendments to FECA modified the schedule award provisions to provide 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. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹⁴

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹⁵ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.¹⁶

ANALYSIS

The Board finds that appellant has a one percent impairment of the right lower extremity and one percent impairment on the left. OWCP accepted that appellant sustained displacement of intervertebral disc without myelopathy. The Board finds that the weight of the medical

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.* at § 10.404(a).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹² FECA Bulletin No. 09-03 (issued March 15, 2009).

¹³ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁴ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁵ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁶ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 11.

evidence rests with the opinions of Dr. Katz, an attending physiatrist, and Dr. Zimmerman, an OWCP medical adviser, the only impairment evaluations of record that comport with the sixth edition of the A.M.A., *Guides*. By letter dated May 27, 2009, OWCP informed appellant that, in order to support his schedule award claim, he should submit a report from his physician that was in accordance with the sixth edition of the A.M.A., *Guides*. In a June 11, 2009 report, Dr. Katz provided examination findings and advised that appellant had bilateral S1 radiculopathy. He indicated that the sixth edition of the A.M.A., *Guides* did not have tables in regard to spinal root pain in the upper and lower extremity chapters and advised that it was most appropriate to rate appellant under Table 16-12, peripheral nerve impairment. Dr. Katz properly advised that a mild sensory deficit of the lateral plantar nerve yielded a one percent deficit of each lower extremity.¹⁷

On reconsideration, appellant submitted a July 30, 2010 report in which Dr. Fritzhand evaluated appellant's lower extremity impairments under the fifth edition of the A.M.A., *Guides* and concluded that he had a 2.5 percent impairment of each lower extremity. However, as noted above, subsequent to May 1, 2009, the applicable edition of the A.M.A., *Guides* to be used in determining impairments is the sixth edition. Dr. Fritzhand based his impairment rating on the fifth edition. A medical opinion not based on the appropriate edition of the A.M.A., *Guides* is of diminished probative value in determining the extent of a claimant's permanent impairment.¹⁸ While appellant submitted additional medical evidence, he did not submit an additional impairment evaluation.

The Board finds that the opinions of Dr. Katz and Dr. Zimmerman, an OWCP medical adviser, who evaluated appellant's bilateral lower extremities impairment in accordance with Table 16-12 of the sixth edition of the A.M.A., *Guides*, constitute the weight of the medical evidence. There is no medical evidence in conformance with the proper edition of the A.M.A., *Guides* showing a greater impairment.

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 did not establish that he has more than a one percent impairment of the right lower extremity and one percent impairment on the left.

¹⁷ *Supra* note 4 at 536.

¹⁸ *Shalanya Ellison*, 56 ECAB 150 (2004).

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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