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

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| **P.G., Appellant** | ) | |
| **and** | ) | **Docket No. 12-30** |
| | ) | **Issued: May 15, 2012** |
| **DEPARTMENT OF DEFENSE, DEFENSE INTELLIGENCE AGENCY, Washington, DC, Employer** | ) | |

*Appearances:*
*Stephen Scavuzzo, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On October 11, 2011 appellant, through his attorney, filed a timely appeal from a June 9, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 permanent impairment to a scheduled member or function of the body entitling him to a schedule award under 5 U.S.C. § 8107.

### *FACTUAL HISTORY*

On November 4, 2004 appellant, then a 55-year-old senior program manager, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury as a result of a motor

[1] 5 U.S.C. § 8101 *et seq.*

vehicle accident on October 19, 2004. The reverse of the claim form indicated that he was off work from October 19 through 24, 2004. By letter dated November 9, 2004, OWCP accepted the claim for spinal cord concussive syndrome. A March 8, 2010 statement of accepted facts reported that the accepted conditions were spinal cord injury and radiculopathy.

On November 13, 2008 appellant claimed a schedule award. He submitted an attending physician's report from Dr. Martin Jones, an osteopath, which stated that appellant had persistent myofascial pain, paresthesias and headaches. Dr. Jones checked a box "yes" that the conditions found were employment related.

OWCP prepared a statement of accepted facts and referred appellant to Dr. Jahan Joubin, a Board-certified orthopedic surgeon, for an opinion as to permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a report dated March 29, 2010, Dr. Joubin reviewed a history of injury and results on examination. He noted that appellant was referred for cervical x-rays. By report received on May 10, 2010, Dr. Joubin diagnosed left median nerve compression and ulnar nerve neuropathy. He stated that appellant did not have any permanent impairment.

The case was referred to an OWCP medical adviser for review. In a report dated May 21, 2010, the medical adviser recommended that appellant be referred for an electromyogram (EMG) and nerve conduction studies (NCS) to confirm the diagnoses and properly establish a permanent impairment rating. Appellant was referred for a second opinion examination by Dr. Kevin Hanley, a Board-certified orthopedic surgeon, and to Dr. Salim Mansoor, a physiatrist, for NCS and EMG testing.

In a report dated July 8, 2010, Dr. Hanley provided a history and results on examination. He diagnosed evidence by history of cervical injury causing transient paraparesis of the left side and EMG evidence (March 25, 2005) of radiculopathy in the left upper extremity. Dr. Hanley found that the only objective finding in the medical record was a positive electrodiagnostic study suggesting some lower cervical radiculopathy and the A.M.A., *Guides* required that a specific peripheral nerve be identified. He stated that this would be difficult to do because the tingling involved all of the fingers, which means that at least two peripheral nerves are involved and the motor examination does not disclose any significant weakness in a fashion that would identify a single nerve. Dr. Hanley stated that the current findings were "soft" and could not serve as a firm basis of objective abnormality. As to permanent impairment, he found no ratable permanent impairment under the A.M.A., *Guides*.

By report dated August 8, 2010, Dr. Mansoor provided a history, results on examination and discussed EMG and NCS results. He diagnosed "left ulnar neurapraxia, no sign of denervation, the lesion is at the elbow" and EMG of the left arm and left cervical paraspinals did not reveal motor root compression.

In a report dated October 14, 2010, Dr. Hanley advised that he had reviewed the current electrodiagnostic studies. He noted that the diagnosis of neurapraxia of the ulnar nerve at the elbow was not an accepted condition nor did the record suggest that it was a consequence of the employment injury. Dr. Hanley concluded, "It is still my belief that we do not have signs of

radiculopathy, cannot isolate a single peripheral nerve as a source of symptomatology and therefore my feeling on [zero percent] impairment remain unchanged for [appellant]."

The case was referred to an OWCP medical adviser. In a report dated October 26, 2010, the medical adviser opined that the left elbow neurapraxia would "in no way whatsoever" relate to the accepted spinal cord injury and radiculopathy. He stated that this was a peripheral nerve injury that does not relate to the spinal cord nerve roots. The medical adviser concluded that appellant did not have a permanent impairment under the A.M.A., *Guides*.

By decision dated November 15, 2010, OWCP found that appellant was not entitled to a schedule award under 5 U.S.C. § 8107. It found that the medical evidence was insufficient to establish an employment-related permanent impairment.

Appellant requested a review of the written record by an OWCP hearing representative. In a statement dated April 28, 2011, his representative argued that the medical evidence from the attending physicians showed that left arm damage was causally related to the employment injury. He argued that the medical adviser's opinion was not rationalized and the opinion of Dr. Hanley conflicted with the other physicians of record. On May 5, 2011 appellant submitted additional medical evidence, including physical therapy reports and treatment records from his attending physicians commencing in 2004. In a report dated March 20, 2009, Dr. Julie Sim, an internist, stated that since a 2004 motor vehicle accident he had chronic neck pain, with intermittent tingling in left hands and toes and headaches. In a report dated August 20, 2009, Dr. Paul Millea, a family practitioner, stated that appellant was involved in a motor vehicle accident in 2003 and he had residual numbness and tingling in the fingertips and toes. He diagnosed cervical radiculopathy. Dr. Sim completed an attending physician's report (Form CA-20) dated October 6, 2009, diagnosing chronic neck pain and left cervical radiculopathy. She checked a box "yes" that the conditions were employment related.

By decision dated June 9, 2011, the hearing representative affirmed the November 15, 2010 OWCP decision. He found that the medical evidence was not sufficient to establish an employment-related permanent impairment.

## ***LEGAL PRECEDENT***

Section 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.[2] 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

[2] 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).

adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[3] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[4]

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the A.M.A., *Guides* Newsletter "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[5]

## ***ANALYSIS***

In the present case, OWCP accepted that appellant sustained a spinal cord injury and radiculopathy as a result of a motor vehicle accident in the performance of duty on October 19, 2004. The issue in the case is whether the evidence establishes a permanent impairment to a schedule member or function of the body, causally related to the employment injury, under the sixth edition of the A.M.A., *Guides*. The Board notes that appellant submitted medical reports regarding treatment after the October 19, 2004 employment injury. But none of these medical reports provide the basis for a schedule award pursuant to 5 U.S.C. § 8107. There are no reports with a detailed description of a permanent impairment to a scheduled member, such as the left arm, an opinion as to causal relationship with employment or any reference to the A.M.A., *Guides*.

OWCP developed the medical evidence and referred appellant for second opinion examinations and diagnostic studies. Dr. Joubin's reports were of diminished probative value as he did not provide any explanation for his opinion that appellant had no permanent impairment. Appellant was then examined by both Dr. Hanley and Dr. Mansoor. The results of current EMG and NCS studies were discussed by Dr. Mansoor, who provided a diagnosis of a left elbow neurapraxia.

Dr. Hanley and an OWCP medical adviser opined that this diagnosis was not employment related. Although appellant generally argues that the attending physicians' reports establish that all left arm conditions were related to the employment injury, none of the attending physicians' reports discussed a diagnosis of elbow neurapraxia or provided an opinion on causal relationship with employment. If he believes that there are additional conditions that are employment related, he may pursue the issue with OWCP. But the current issue before the Board is a permanent impairment under the A.M.A., *Guides*.

With respect to a permanent impairment under the A.M.A., *Guides*, Dr. Hanley and the medical adviser opined that there was no impairment under the A.M.A., *Guides*. But neither physician referred to the A.M.A., *Guides* July/August 2009 Newsletter regarding spinal nerve extremity impairments. OWCP procedures indicate that the Newsletter would be the appropriate method of determining an upper extremity impairment in this case. The Newsletter provides a

[3] *A. George Lampo*, 45 ECAB 441 (1994).

[4] FECA Bulletin No. 09-03 (March 15, 2009).

[5] *See G.N.* Docket No. 10-850 (issued November 12, 2010); s*ee also* 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.

specific method for determining impairments such as radiculopathy from a spinal nerve injury. The Newsletter explains that "[i]n the [s]ixth [e]dition, impairment for radiculopathy is reflected in the diagnosis-based impairment for the spinal region. In developing an alternative approach to rating isolated radiculopathy, it is important to provide consistency in impairment ratings between the chapters…." Dr. Hanley referred generally to peripheral nerve impairments under the A.M.A., *Guides* and noted that he could not isolate a single nerve root as the cause of appellant's impairment. He did not discuss the July/August 2009 Newsletter, which explains that radiculopathy is not isolated, but rather rated based upon the spinal region. The medical adviser also failed to discuss the Newsletter.

When OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues.[6] The case will be remanded to OWCP to properly resolve the schedule award issue in accord with its procedures. After such further development as OWCP deems necessary, it should issue an appropriate decision.

## ***CONCLUSION***

The Board finds that the case requires further development of the medical evidence.

[6] *See Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 9, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 15, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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