

lumbar radiculopathy.² A March 19, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine showed a right posterolateral herniation at L4-5 and hypertrophic facet joint change on the left at L5-S1 with evidence of a previous laminectomy at that level.

In an August 2, 2010 report, Dr. John J. Dusseau, a Board-certified neurological surgeon, related that appellant experienced lower back and right leg pain that was consistent with recurrent right L4-5 disc protrusion. On examination, he observed limited lumbar range of motion (ROM), right tibialis anterior and extensor hallucis longus muscle weakness, diminished right L5 dermatome sensation, right sciatic notch pain, positive right straight leg raise test and hypoactive reflexes of the bilateral lower extremities. Dr. Dusseau diagnosed lumbar intervertebral disc without myelopathy.

Appellant filed a schedule award claim on December 8, 2010 and submitted additional evidence. In a November 29, 2010 report, Dr. Gene D. Mahaney, a Board-certified anesthesiologist, noted that appellant complained of right lower extremity radicular pain and numbness. He conducted a physical examination, which was unremarkable and diagnosed lumbar radiculopathy.

OWCP asked Drs. Mahaney and Dusseau in December 17, 2010 and January 28, 2011 letters, respectively, to provide within 30 days an impairment rating report in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),³ specifically the supplemental publication “Rating Spinal Nerve Extremity Impairment Using the sixth edition” (hereinafter *The Guides Newsletter*).⁴ It pointed out that a schedule award cannot be issued for permanent impairment of the spine, but may be paid for permanent impairment of the lower extremity resulting from a spinal nerve injury. Nothing from Drs. Mahaney or Dusseau was received by OWCP.

By decision dated March 4, 2011, OWCP denied appellant’s schedule award claim, finding that the medical evidence did not sufficiently demonstrate permanent impairment of a scheduled member.

Following issuance of the March 4, 2011 decision, OWCP received a March 11, 2011 impairment rating report from Dr. Dusseau, who calculated a 37 percent permanent impairment for “unilateral spinal nerve root affecting the lower extremity” based on the Florida Uniform Permanent Impairment Rating Schedule. Dr. Dusseau identified August 4, 2008 as the date of maximum medical improvement.⁵

² By decision dated March 17, 2009, OWCP denied appellant’s claim for disability compensation for the period December 23, 2008 to January 3, 2009.

³ A.M.A., *Guides* (6th ed. 2008).

⁴ Christopher R. Brigham, M.D., “Rating Spinal Nerve Extremity Impairment: Using the sixth edition,” *The Guides Newsletter* (July-August 2009).

⁵ Dr. Dusseau essentially reiterated the injury history and objective findings contained in his earlier August 2, 2010 report.

Appellant's counsel requested a telephonic hearing, which was held on June 7, 2011. Appellant testified that his right leg remained symptomatic.⁶

On August 23, 2011 OWCP's hearing representative affirmed the March 4, 2011 decision.

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.⁷ 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.⁸

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 upper 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).⁹ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁰

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 rating spinal nerve impairments consistent with sixth edition methodology.¹¹ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹²

⁶ During the hearing, counsel acknowledged that Dr. Dusseau's March 11, 2011 report did not comport with any standard set forth in the A.M.A., *Guides*. On June 27, 2011 he requested a 90-day extension to submit additional medical reports. OWCP did not receive any new evidence prior to August 23, 2011.

⁷ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁸ *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

⁹ *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

¹⁰ *J.W.*, Docket No. 11-289 (issued September 12, 2011).

¹¹ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

ANALYSIS

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

Appellant sustained aggravation of lumbar radiculopathy while in the performance of duty on March 18, 2003, which was accepted by OWCP. He thereafter filed a claim for a schedule award. August 2 and November 29, 2010 reports from Drs. Dusseau and Mahaney presented health histories, objective findings and diagnoses, but failed to furnish an impairment rating for a scheduled member. In December 17, 2010 and January 28, 2011 notices to these physicians, OWCP expressly requested an impairment rating report using *The Guides Newsletter's* standard for evaluating spinal nerve extremity injuries, correctly pointing out that the back by itself did not qualify as a scheduled member.¹³ No such reports were submitted and OWCP accordingly denied the claim on March 4, 2011. Prior to the June 7, 2011 telephonic hearing, OWCP received a March 11, 2011 from Dr. Dusseau calculating an impairment rating of 37 percent for the lower extremity. This figure, however, was based on the Florida Uniform Permanent Impairment Rating Schedule.¹⁴ The Board has held that an opinion that is not based upon standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of limited probative value in determining the extent of permanent impairment.¹⁵ Dr. Dusseau did not provide any rating of impairment under the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*. Appellant presented no other evidence evaluating permanent impairment pursuant to the standards adopted by OWCP. Hence, OWCP's hearing representative properly affirmed the denial on August 23, 2011.

Counsel contends that the August 23, 2011 decision was contrary to fact and law. As noted, none of the medical evidence of record identified permanent impairment of a scheduled member or offered rationalized opinion as to the percentage of impairment under *The Guides Newsletter*.

The Board notes that appellant submitted new evidence after issuance of the August 23, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.¹⁶ 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 did not sustain a ratable impairment.

¹³ *J.Q.*, 59 ECAB 366 (2008). See 5 U.S.C. § 8101(19).

¹⁴ See, e.g., *T.K.*, Docket No. 08-2077 (issued May 6, 2009).

¹⁵ *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

¹⁶ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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