

instrumentation at L3-4, L4-5 and L5-S1 in 2006. OWCP accepted the claim for lumbago, displacement of lumbar intervertebral disc without myelopathy, encephalopathy, constipation, adjustment disorder with mixed anxiety and depressed mood and other psychogenic pain and paid disability compensation accordingly. Appellant stopped work on October 9, 2006 and did not return. He was subsequently implanted with a spinal cord stimulator on January 24, 2008, which was later revised on December 2, 2010.²

Appellant filed a claim for a schedule award on May 6, 2011. In a June 13, 2011 report, Dr. Steven C. Poletti, his attending physician and a Board-certified orthopedic surgeon, noted that appellant experienced bilateral lower extremity weakness and atrophy. Citing an unspecified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (A.M.A., *Guides*), Dr. Poletti assigned a whole-person impairment rating of 25 percent.⁴

On July 5, 2011 Dr. James W. Dyer, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Poletti's report. He pointed out that the impairment rating was not based on the standard set forth in the A.M.A., *Guides* supplement "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition"⁵ (*The Guides Newsletter*). Dr. Dyer recommended a second opinion examination.

OWCP referred appellant for a second opinion examination to Dr. William L. Lehman, Jr., a Board-certified orthopedic surgeon. In an August 22, 2011 report, Dr. Lehman reviewed the July 12, 2011 statement of accepted facts and medical file. On examination he observed restricted lumbar flexion and diminished bilateral ankle jerk reflex as well as the absence of bilateral lower extremity sensory and motor deficits, edema, atrophy and deformity. Dr. Lehman opined that appellant did not sustain spinal nerve extremity impairment as described in *The Guides Newsletter*. He explained that there was no objective evidence of any specific muscle atrophy or loss of strength that would suggest ongoing radiculopathy. Dr. Lehman stated that electrical studies were normal and that motor and sensory examination of both legs was normal. He alternatively assigned a three-percent whole-person impairment rating due to pain.

On September 28, 2011 Dr. Dyer reviewed Dr. Lehman's August 22, 2011 report and agreed that appellant did not sustain spinal nerve extremity impairment. He noted that Dr. Lehman's whole-person impairment rating of three percent was inappropriate.

By decision dated October 4, 2011, OWCP denied appellant's schedule award claim, finding the medical evidence insufficient to establish permanent impairment of a scheduled member.

² The foregoing information was incorporated into a July 12, 2011 statement of accepted facts.

³ See *infra* note 7.

⁴ Appellant also submitted records from physician assistants dated January 25 and August 2, 2011. None addressed the issue of permanent impairment.

⁵ Christopher R. Brigham, M.D., "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition," *The Guides Newsletter* (July and August 2009).

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 or loss of use of scheduled members or functions of the body.⁶ 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.⁷

Although the A.M.A., *Guides* presents methods for estimating impairment to the spine and to the whole person,⁸ FECA does not authorize schedule awards for loss of use of the back, spine or the body as a whole.⁹ Amendments to FECA, however, modified the schedule award provision to allow 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. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.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

ANALYSIS

The Board finds that appellant did not sustain a ratable impairment of a scheduled body member.

⁶ 5 U.S.C. § 8107; 20 C.F.R. § 10.404. No schedule award is payable for a member, function or organ of the body not specified under FECA or the implementing regulations. *J.Q.*, 59 ECAB 366 (2008).

⁷ *K.H.*, Docket No. 09-341 (issued December 30, 2011). See generally A.M.A., *Guides* (6th ed. 2008).

⁸ See *B.M.*, Docket No. 09-2231 (issued May 14, 2010); *Janae J. Triplette*, 54 ECAB 792 (2003).

⁹ *J.Q.*, *supra* note 6. FECA expressly defines “organ” as “a part of the body that performs a special function and for purposes of this subchapter excludes the brain, heart and back.” 5 U.S.C. § 8101(19). Also, a description of impairment in terms of “whole person” or “whole body” is not probative as to the extent of loss of use of a specific scheduled member of the body under section 8107 of FECA. *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

¹⁰ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Rozella L. Skinner*, 37 ECAB 398 (1986).

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).

OWCP accepted that appellant sustained lumbago, displacement of lumbar intervertebral disc without myelopathy, encephalopathy, constipation, adjustment disorder with mixed anxiety and depressed mood and other psychogenic pain as a result of a March 23, 2001 injury. Thereafter, appellant filed a claim for a schedule award and submitted medical evidence. Dr. Poletti, appellant's attending physician, assigned a 25-percent whole-person impairment rating in a June 13, 2011 report. As noted, FECA does not permit schedule awards for impairment of the back or the body as a whole. As Dr. Dyer correctly pointed out, Dr. Poletti did not utilize the standard set forth in *The Guides Newsletter* for rating impairment to the lower extremities caused by a spinal injury. He only alluded to an unspecified version of the A.M.A., *Guides*. Thus, Dr. Poletti failed to establish permanent impairment of a scheduled body member.¹³

Dr. Lehman's August 22, 2011 report constitutes the weight of the medical evidence with regard to whether appellant has a ratable impairment of his legs. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁴ Dr. Lehman reviewed the July 12, 2011 statement of accepted facts, the medical file and performed a comprehensive physical evaluation. He observed the lack of bilateral lower extremity sensory and motor deficits and concluded that a schedule award for impairment of the legs was not warranted under *The Guides Newsletter*.¹⁵ Although Dr. Lehman found three percent whole person impairment due to pain, FECA, as noted, does not allow schedule awards for impairment of the spine or the body as a whole. An OWCP medical adviser reviewed the matter and concurred with Dr. Lehman that appellant had no ratable impairment of either leg. In view of the totality of the medical evidence, the Board finds that OWCP properly denied appellant's claim.

Appellant contends on appeal that the medical evidence sufficiently established that he sustained a ratable impairment of a scheduled member. He also asserts that Dr. Lehman fabricated his report. The Board has noted the deficiencies in Dr. Poletti's report. The case record does not provide evidence corroborating appellant's allegation of misconduct. The Board notes that he submitted new evidence after issuance of the October 4, 2011 decision. However, 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.

¹³ The Board adds that Dr. Poletti did not offer a rationalized opinion as to the percentage of permanent impairment. See *id.* at Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a)-(c) (January 2010).

¹⁴ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *James Mack*, 43 ECAB 321, 329 (1991).

¹⁵ The Board agrees with Dr. Dyer that Dr. Lehman's whole-percent impairment rating of three percent was improper. See *supra* note 9.

¹⁶ 20 C.F.R. § 501.2(c).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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