

lifting cargo at work. On March 25, 2011 he filed a claim for a schedule award due to his accepted work injury.

In a November 4, 2010 report, Dr. Stephen R. Shaw, an attending Board-certified orthopedic surgeon, discussed the findings of his examination of appellant's extremities. He provided the results of testing related to sensory and motor loss. Dr. Shaw discussed appellant's diagnostic test findings and diagnosed lumbar degenerative disc disease at L5-S1 greater than at L4 and right L5 and S1 radiculopathy.

OWCP referred appellant to Dr. John F. Lawrence, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on the extent of the permanent impairment of his legs. In a June 1, 2011 report, Dr. Lawrence discussed appellant's medical history and reported the findings of his physical examination. He noted that, on the basis of appellant's diagnostic studies, it appeared that a substantial portion of his electrical abnormalities were a result of peripheral neuropathy. Appellant's history, findings on x-ray and magnetic resonance imaging (MRI) scan testing (including studies from 2001 and 2003) and physical examination strongly suggested that there was a radicular component to his pain together with the polyneuropathic component. Dr. Lawrence discussed the findings of electromyography (EMG) testing obtained on May 2, 2011 by Dr. Steven Levine, a Board-certified neurologist, who indicated that appellant had reached maximum medical improvement and stated that it was appropriate to apply the standards of Table 16-12 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). Dr. Lawrence noted:

“Using the [sixth edition of the A.M.A., *Guides*], Table 16-12 for [p]eripheral [n]erve [i]mpairment, page 535 for sciatic nerve; I would rate him as [c]lass 1 on the right side, [four] percent sensory and [nine] percent motor deficit, on the left side, I would rate as [nine] percent motor deficit. I used functional history adjustment [g]rade [m]odifier 1 and clinical studies adjustment [g]rade [m]odifier 1. Both of these would even out to 0 which would be in middle value of the Table on 535. Adding these values yields 22 percent but combining them gives final [w]hole [b]ody [i]mpairment of 21 percent.

“Again, to explain the choices made above, despite Dr. Levine's findings that only on the left side were there motor changes; on my examination, there was an equal amount of weakness in the right and left sides and sensory changes primarily on the right and not on the left with evidence of radicular irritation on both sides. I thus chose to provide [w]hole [b]ody [i]mpairment on both sides but less than would have been the case if he did not have evidence of peripheral neuropathy.”

OWCP sent Dr. Lawrence's report and the relevant medical evidence to Dr. Christopher R. Brigham, a Board-certified occupational medicine physician serving as an OWCP medical adviser. Dr. Brigham was to review the records and provide a calculation of appellant's leg impairment.

In his report dated July 27, 2011, Dr. Brigham indicated that to evaluate the peripheral nerve impairments in appellant's lower extremities resulting from spinal injuries, he was applying the standards contained in *The Guides Newsletter*, “Rating Spinal Nerve Extremity

Impairment Using the Sixth Edition” (July/August 2009). He concluded that appellant had a three percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg. In reaching this conclusion, Dr. Brigham made reference to proposed Table 2 in *The Guides Newsletter* and chose default values for peripheral spinal nerve impairments (related to the L5 and S1 nerve roots) based on the findings of record. He modified these values based on grade modifiers for functional history and clinical studies.

Dr. Brigham explained that there was consistent documentation of sensory loss in the right lower extremity in the distribution of the L5 and S1 nerve roots, but there was no consistent documentation of motor deficits. He stated that, at the time of maximum medical improvement, appellant was reported to have full strength. Dr. Brigham noted that the sixth edition of the A.M.A., *Guides* stated in Chapter 17 at Section 17.3b that, if physical examination findings are determined to be unreliable or inconsistent or they are for conditions unrelated to the condition being rated, they are excluded from the grading process. He indicated that in appellant’s case the left lower extremity findings were not consistently documented and should be disregarded for rating purposes as recent medical examination findings show no deficit. Similarly, with regard to the right lower extremity, Dr. Shaw’s examination did not reveal motor deficits as this was reported to be “intact.” Dr. Brigham indicated that, therefore, the rating for motor deficits in the right lower extremity impairment should not be included. He concluded, “The impairment values for the nerve roots are combined for a total of [three] percent right lower extremity impairment. As discussed, there is no ratable impairment to the left lower extremity impairment, *i.e.*, [zero] percent left lower extremity impairment.”²

In an April 25, 2012 decision, OWCP granted appellant a schedule award for a three percent permanent impairment of his right leg. It was further determined that he had no permanent impairment of his left leg. OWCP based its schedule award on the July 27, 2011 report of Dr. Brigham and noted that the impairment rating of Dr. Lawrence was based on improper standards for calculating permanent impairment for spinal nerve impairment.

In a May 7, 2012 report, Dr. Jacob E. Tauber, an attending Board-certified orthopedic surgeon, stated that he agreed with the impairment rating provided by Dr. Lawrence in his June 1, 2011 report. He indicated that he and Dr. Lawrence had examined appellant, but that Dr. Brigham had not done so. Dr. Tauber stated, “[I]t is clear that Dr. Lawrence’s evaluation of [appellant] is, in fact, accurate and the impairment rating he provided is also accurate. Please note that Dr. Lawrence based his report on his examination findings combined with the EMG studies performed by Dr. Levine documenting pathology and correlated with Dr. Lawrence’s findings.” He asserted that Dr. Brigham used the wrong evaluation tables and misstated the examination findings he reviewed. Dr. Tauber indicated that Dr. Lawrence properly used Table 16-12 of the A.M.A., *Guides* and properly applied its standards.

In an August 13, 2012 brief, appellant’s counsel at the time argued that the July 27, 2011 impairment rating of Dr. Brigham was defective for multiple reasons. He claimed that Dr. Brigham did not use the proper tables, that he did not review all the relevant medical evidence of record and that his report was not properly signed. Counsel further argued that

² Dr. Brigham signed his name at the end of the report.

Dr. Lawrence and Dr. Tauber applied the proper standards of the A.M.A., *Guides*. Appellant, through counsel, requested a review of the written record by an OWCP hearing representative.

In a September 12, 2012 decision, an OWCP hearing representative affirmed OWCP's April 25, 2012 schedule award decision. The hearing representative determined that Dr. Brigham was the only physician of record who used the proper standards of the A.M.A., *Guides* for evaluating appellant's leg impairment and that he correctly applied these standards to the medical findings of record. Therefore, appellant did not meet his burden of proof to establish that he has permanent impairment of his legs in addition to the three percent permanent impairment of his right leg for which he received a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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 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.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶

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.⁷ 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.⁸

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides*

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

Newsletter, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) is to be applied.⁹

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on grade modifier for Functional History (GMFH) and, if electrodiagnostic testing was done, grade modifier for Clinical Studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹¹

ANALYSIS

OWCP accepted that on June 29, 1998 appellant sustained an acute aggravation of degenerative disc disease at L4-5 and L5-S1 due to lifting cargo at work. In an April 25, 2012 decision, it granted him a schedule award for a three percent permanent impairment of his right leg. OWCP was further determined that appellant had a zero percent permanent impairment of his left leg. The Board finds that OWCP properly based this award on the July 27, 2011 report of Dr. Brigham, a Board-certified occupational medicine physician serving as an OWCP medical adviser. Appellant did not submit medical evidence showing entitlement to additional schedule award compensation.

In his report dated July 27, 2011, Dr. Brigham properly indicated that to evaluate the peripheral nerve impairments in appellant’s lower extremities resulting from spinal injuries, he was applying the standards contained in *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009).¹² He concluded that appellant had a three percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg. In reaching this conclusion, Dr. Brigham correctly made reference to Proposed Table 2 in *The Guides Newsletter* and chose default values for peripheral spinal nerve impairments (related to the L5 and S1 nerve roots) based on the findings of record. He modified these values based on grade modifiers for Functional History and Clinical Studies. In reaching these determinations, Dr. Brigham extensively discussed the medical findings of record. For example, he explained that there was consistent documentation of sensory loss in the right lower extremity in the distribution of the L5 and S1 nerve roots, but there was not consistent documentation of motor deficits. Dr. Brigham stated that at the time of maximum medical improvement appellant was reported to have full strength. He further indicated that in appellant’s case the left lower extremity findings were not consistently documented and should be disregarded for rating purposes as recent medical examination findings show no deficit.

On appeal, appellant claimed that Dr. Brigham did not use the proper tables, that he did not review all the relevant medical evidence of record and that his report was not properly

⁹ See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁰ A.M.A., *Guides* 515-21, 533.

¹¹ *Id.* at 521.

¹² See *supra* notes 9 through 11.

signed. However, he did not provide support for these arguments as Dr. Brigham's report reveals that he extensively discussed the medical evidence of record and applied the proper standards of the A.M.A., *Guides* and *The Guides Newsletter*. Moreover, there is no indication that his opinion was not properly signed.

The Board notes that the June 1, 2011 impairment rating of Dr. Lawrence, an attending Board-certified orthopedic surgeon, does not apply the appropriate standards for evaluating peripheral nerve impairment under the A.M.A., *Guides*. In a May 7, 2012 report, Dr. Tauber, an attending Board-certified orthopedic surgeon, stated that he agreed with the impairment rating provided by Dr. Lawrence in his June 1, 2011 report. However, he also provided an improper opinion regarding the standards to be used for evaluating peripheral nerve impairment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has permanent impairment of his legs in addition to the three percent permanent impairment of his right leg for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board