

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

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**D.W., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL AIR  
DEPOT, Cherry Point, NC, Employer**

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**Docket No. 13-278  
Issued: April 15, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 20, 2012 appellant, through his attorney, filed a timely appeal from an October 24, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his schedule award claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

**ISSUE**

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the right or left upper extremity.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## FACTUAL HISTORY

This case has previously been before the Board.<sup>2</sup> In a decision dated November 4, 2010, the Board set aside a December 30, 2009 decision denying appellant's schedule award claim. The Board remanded the case for OWCP to refer an October 27, 2009 impairment evaluation by Dr. Martin Fritzhand, an attending Board-certified urologist, to an OWCP medical adviser for review. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

On December 15, 2010 Dr. H.P. Hogshead, an OWCP medical adviser, reviewed Dr. Fritzhand's October 27, 2009 report and noted that he used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*) in his impairment rating. He also found that appellant had no diagnostic evidence of radiculopathy at C6 and advised that Dr. Fritzhand's opinion was of diminished probative value.

By letter dated February 17, 2011, OWCP requested that Dr. Fritzhand review and discuss OWCP's medical adviser's report. On March 9, 2011 Dr. Fritzhand noted that his October 27, 2009 examination was unclear as to whether he found a loss of sensation in only the right upper extremity or in both upper extremities. Citing to *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009), he found that appellant had a one percent impairment due to sensory loss of the right upper extremity and a four percent impairment due to a mild motor deficit bilaterally according to Table 15-14 on page 42. Dr. Fritzhand concluded that appellant had an impairment of five percent of the right upper extremity and four percent of the left upper extremity.<sup>3</sup> He stated, "However, if we assume that he actually has diminished sensation in both upper limbs, [appellant] would then have permanent partial impairments of each upper extremity of five percent."

On April 6, 2011 Dr. Hogshead reviewed Dr. Fritzhand's report and stated that *The Guides Newsletter* did not contain Table 15-14. He further noted that diagnostic studies did not reveal evidence of radiculopathy. Dr. Hogshead concluded that appellant had no impairment of either upper extremity.

By decision dated April 27, 2011, OWCP denied appellant's claim for an increased schedule award.

On May 5, 2011 counsel requested a telephone hearing before an OWCP hearing representative. Following the telephone hearing, held on August 11, 2011, appellant submitted an August 16, 2011 report from Dr. Fritzhand, who related that, contrary to the medical adviser's finding, the sixth edition contained Table 15-14 and it was used to calculate impairment ratings pursuant to *The Guides Newsletter*. Dr. Fritzhand maintained that appellant's findings on

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<sup>2</sup> Docket No. 10-817 (issued November 4, 2010). On November 20, 2003 appellant, then a 50-year-old machinist, filed an occupational disease claim alleging that he sustained osteoarthritis and bone spurs on his neck causally related to factors of his federal employment. OWCP accepted the claim for an aggravation of cervical degenerative disc disease and an aggravation of osteoarthritis of the cervical spine.

<sup>3</sup> 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.

examination “revealed diminished muscle strength involving both upper extremities, some atrophy of the left upper limb and some diminished sensation involving the upper extremities. These are objective findings illustrative of bilateral C6 radiculopathy. [Appellant’s] allowed condition has resulted in a C6 nerve root impairment.”

In a decision dated November 10, 2011, an OWCP hearing representative vacated the April 27, 2011 decision. She found that Dr. Fritzhand’s August 16, 2011 opinion was sufficient to warrant further development regarding whether appellant had any upper extremity impairment due to his accepted employment injury.

On December 16, 2011 OWCP referred appellant to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for a second-opinion examination. It requested that he determine whether appellant had residuals of his work injury and the percentage of any impairment of the upper extremities pursuant to *The Guides Newsletter*.

In a report dated January 3, 2012, Dr. Moore discussed appellant’s complaints of neck pain without radiation and some numbness “in the ulnar aspects of both hands.” He diagnosed cervical degenerative disc disease and opined that appellant had continued residuals of his degenerative disc disease and osteoarthritis of the cervical spine. On examination Dr. Moore found grade 5 motor strength of the upper extremities with no atrophy. Regarding the extent of any permanent impairment of the upper extremities, he stated:

“There is no objective evidence of cervical radiculopathy in [appellant]. Electrodiagnostic testing has demonstrated no evidence of radiculopathy, and multiple clinical progress notes from 2004 through 2009 by his attending spine surgeon have described axial neck pain, without radicular pain or objective physical findings of radiculopathy. [Appellant] today confirms that his pain is in the neck region, without a radicular pain pattern. In the absence of evidence of spinal nerve root impairment, the percentage of impairment of the right and left upper extremities is zero percent.”

On January 6, 2012 OWCP requested that Dr. Fritzhand review Dr. Moore’s report and address whether he agreed with the findings. By letter dated February 7, 2012, Dr. Fritzhand discussed his physical examination of appellant on October 27, 2009 and his responses to OWCP’s request for additional information. He stated:

“Dr. Moore examined [appellant] on January 3, 2012. I examined [him] on October 27, 2009. My impairment rating based on the [s]ixth [e]dition and *The Guides Newsletter* July/August 2009 is included in my March 9, 2011 letter to you and is based on my October 27, 2009 examination. Dr. Moore is basing all statements on a physical examination performed last month. I performed my history and physical examination on [appellant] when requested in a timely fashion on October 27, 2009. I am requesting that Dr. Moore review my report and base his impairment rating on my examination of that date.”

On March 7, 2012 an OWCP medical adviser concurred with Dr. Moore’s finding that appellant had no impairment of either upper extremity.

By decision dated April 3, 2012, OWCP denied appellant's claim for an increased schedule award. On April 12, 2012 counsel requested a telephone hearing.

In a report dated May 31, 2012, Dr. Scot E. Reeg, a Board-certified orthopedic surgeon, discussed appellant's complaints of continuing pain in his neck and upper back. He stated, "I am not entirely sure why he is here, but at this point he will again be discharged from my care. [Appellant] was given a three percent rating years ago which I still stand by."

At the telephone hearing, held on August 8, 2012, counsel requested that the case be remanded for further diagnostic studies to determine whether he had radiculopathy. He noted that the medical adviser mistakenly indicated that the A.M.A., *Guides* did not contain a Table 15-14.

In a report dated August 23, 2012, Dr. Ashraf F. Guirgues, a Board-certified orthopedic surgeon, diagnosed back and neck pain, paravertebral muscle spasms, cervical sprain and osteoarthritis, degenerative joint disease, spondylosis and degenerative disc disease of the cervical spine. He referred appellant for diagnostic studies.

A cervical magnetic resonance imaging scan study performed on September 22, 2012, revealed mild-to-moderate degenerative disc disease, borderline central canal stenosis at C5-6 and mild-to-moderate neural foraminal stenosis at the lower levels. An electromyogram (EMG) and nerve conduction study (NCS) of the upper extremities dated September 26, 2012 was interpreted as normal. On October 2, 2012 Dr. Guirgues noted that an EMG and NCS was normal and did not show radiculitis. He recommended physical therapy.

In a decision dated October 24, 2012, an OWCP hearing representative affirmed the April 3, 2012 decision.

### **LEGAL PRECEDENT**

FECA<sup>4</sup> provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.<sup>5</sup> In such cases, FECA compensates an employee for loss of wage-earning capacity. In cases of physical impairment, FECA, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.<sup>6</sup>

A claimant seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *Lyle E. Dayberry*, 49 ECAB 369 (1998).

<sup>6</sup> *Renee M. Straubinger*, 51 ECAB 667 (2000).

entitling him or her to a schedule award.<sup>7</sup> The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his or her current condition and the employment injury.<sup>8</sup> The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.<sup>9</sup>

The schedule award provision of FECA,<sup>10</sup> and its implementing federal regulations,<sup>11</sup> 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.<sup>12</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>13</sup>

### ANALYSIS

OWCP accepted that appellant sustained an aggravation of cervical degenerative disc disease and an aggravation of cervical osteoarthritis causally related to factors of his federal employment. Appellant submitted an impairment evaluation dated October 27, 2009 from Dr. Fritzhand in support of his schedule award claim. Using the fifth edition of the A.M.A., *Guides*, Dr. Fritzhand opined that appellant had 14 percent permanent impairment due to sensory and motor loss of the upper extremities as a result of radiculopathy at C6. On March 9, 2011 he applied the sixth edition of the A.M.A., *Guides* to his findings from the October 27, 2009 examination. Citing *The Guides Newsletter*, Dr. Fritzhand found that appellant had a five percent right upper extremity impairment for sensory and motor loss and a four percent left upper extremity impairment for motor loss.

An OWCP medical adviser disagreed with Dr. Fritzhand's impairment rating, noting that diagnostic studies revealed no evidence of radiculopathy. In a report dated August 16, 2011, Dr. Fritzhand asserted that his clinical findings of loss of strength and sensation of the upper extremities with atrophy on the left side constituted objective findings of radiculopathy at C6 bilaterally.

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<sup>7</sup> See *Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

<sup>8</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>9</sup> *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> 20 C.F.R. § 10.404(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

OWCP referred appellant to Dr. Moore for a second-opinion examination to determine whether he had a permanent impairment of the upper extremities. The Board finds that Dr. Moore's opinion constitutes the weight of the evidence and establishes that appellant had no impairment of either upper extremity. In a report dated January 3, 2012, Dr. Moore noted that he complained of neck pain without radiculopathy into the extremities. On examination he found no loss of strength or atrophy of the extremities. Dr. Moore determined that diagnostic studies failed to show radiculopathy and that progress reports from 2004 through 2009 failed to describe any subjective complaints or objective findings indicative of radiculopathy. He further noted that appellant did not complain of radiculopathy on examination. Dr. Moore concluded that he had no impairment of the right or left upper extremities as he had no evidence of an impairment of a spinal nerve root. He provided rationale for his opinion by explaining that, based on the diagnostic studies, a review of progress reports and his examination, appellant did not have cervical radiculopathy and had thus no impairment of an extremity. As Dr. Moore's opinion is detailed, well rationalized and based on a complete and accurate medical and factual history, the Board finds that it represents the weight of the evidence and establishes that appellant is not entitled to a schedule award.<sup>14</sup>

The remaining evidence is insufficient to establish that appellant sustained a permanent impairment of the upper extremities. On February 7, 2012 Dr. Fritzhand noted that Dr. Moore based his findings on a January 2012 examination while he based his rating on an October 27, 2009 examination. As Dr. Moore's report is more recent by over two years, it is more probative as to appellant's current condition and extent of any impairment.

On May 31, 2012 Dr. Reeg related that he had previously given appellant a rating for three percent impairment. As he did not explain the protocols used in reaching his conclusion, his opinion is insufficient to establish permanent impairment.<sup>15</sup>

On August 23, 2012 Dr. Guirgues referred appellant for diagnostic studies. On October 2, 2012 he noted that an EMG showed no radiculopathy. Dr. Guirgues did not provide any impairment evaluation and thus his opinion is not probative on the pertinent issues of the extent of any upper extremity 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 has not established that he is entitled to a schedule award for a permanent impairment of the right or left upper extremity.

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<sup>14</sup> See *J.L.*, Docket No. 09-1726 (issued June 8, 2010).

<sup>15</sup> See *Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2013  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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