

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

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**H.J., Appellant**

**and**

**U.S. POSTAL SERVICE, HUDSON PARK  
STATION, Philadelphia, PA, Employer**

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**Docket No. 13-144  
Issued: August 7, 2013**

*Appearances:*

*Jeffrey P. Zeelander, 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  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On October 29, 2012 appellant, through counsel, filed a timely appeal from an October 17, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. 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 merits of this case.

**ISSUE**

The issue is whether appellant has established that he is entitled to more than a 12 percent impairment of the right upper extremity, for which he received a schedule award.

On appeal appellant's counsel contends that OWCP erred in excluding an impairment rating and failing to include consequential conditions when rating appellant's impairment.

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

## **FACTUAL HISTORY**

On January 10, 1995 appellant, then a 30-year-old letter carrier, filed an occupational disease claim alleging that his cervical condition was due to his employment duties. He stated that he first became aware of cervical herniation and deterioration on June 18, 1994, but did not realize that it was employment related until October 18, 1994. OWCP accepted the claim for aggravation of degenerative cervical disc at C6-7 and a C6-7 disc herniation.

On June 13, 2012 appellant filed a claim for a schedule award. In support of his request, he submitted a May 15, 2012 report from Dr. David Weiss, an examining osteopath specializing in family practice, who reviewed medical evidence, provided physical findings and diagnosed cumulative and repetitive trauma disorder, occupational cervical spine syndrome, myeloradiculopathy, C4-5 and C6-7 herniated nucleus pulposus, progressive multilevel discogenic cervical disease at C3-4, C4-5, C5-6 and C6-7, progressive cervical spine discogenic disease with compressed myelopathy at C3-4 and C5-6 and status post C6-7 anterior cervical discectomy and fusion. Dr. Weiss determined that appellant had a 25 percent right upper extremity impairment using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> In reaching this determination, Dr. Weiss found a one percent impairment for a class 1 sensory deficit of the right C7 nerve root (radial) using Table 15-7, Table 15-9 and Table 15-21, pages 406, 410 and 441. Next, he found a one percent impairment for a sensory deficit of the right C6 nerve root (axillary) using Table 15-21, page 436. Dr. Weiss then found a 23 percent right upper extremity impairment for a class 2 moderate motor strength deficit of the right wrist (extensor/radial) using Table 15-21, page 441.

An OWCP medical adviser reviewed Dr. Weiss' impairment rating and concluded that his use of the A.M.A., *Guides* was incorrect as Dr. Weiss used nerves rather than nerve roots in his calculations. He also noted that Dr. Weiss incorrectly used the radial axillary and femoral nerves in his impairment rating when these nerves were not involved. Using Proposed Table 1, Spinal Nerve Impairment, Upper Extremity Impairments, OWCP's medical adviser found a one percent impairment due to mild sensory deficit and a five percent impairment due to motor deficit at the C6 and C7. Combining the impairment ratings resulted in a six percent right upper extremity impairment based on C6 sensory and motor deficits and a six percent right upper extremity based on C7 sensory and motor impairment. Adding these together totals 12 percent right upper extremity impairment.

By decision dated October 17, 2012, OWCP granted appellant a 12 percent permanent impairment of his right upper extremity. The award was for 37.44 weeks of compensation for the period May 15, 2012 to February 1, 2013.

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<sup>2</sup> Dr. Weiss also calculated a 24 percent right lower extremity impairment based on the femoral and sciatic nerve roots and right hip flexor motor strength deficits. He also found a one percent left upper extremity impairment based on radial nerve sensory deficits.

## LEGAL PRECEDENT

Under section 8107 of FECA<sup>3</sup> and section 10.404 of the implementing federal regulations,<sup>4</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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.<sup>5</sup>

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.<sup>6</sup> Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,<sup>7</sup> no claimant is entitled to such an award.<sup>8</sup>

Amendments to FECA, however, 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. 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.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>10</sup> OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in Chapter 3.700 of its procedures.<sup>11</sup> For peripheral nerve impairments to the upper or lower extremities resulting from

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404

<sup>5</sup> *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>6</sup> *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

<sup>7</sup> FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

<sup>8</sup> *W.D.*, *supra* note 6; *Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>9</sup> *W.D.*, *supra* note 6; *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, FECA Transmittal No. 10-04 (issued January 9, 2010); Exhibit 4 (January 2010).

<sup>11</sup> *Id.* at (Exhibits 1, 4).

spinal injuries, OWCP procedures indicate that *The Guides Newsletter Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) is to be applied.<sup>12</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.<sup>13</sup>

### ANALYSIS

OWCP accepted appellant's occupational disease claim for aggravation of degenerative cervical disc at C6-7 and a C6-7 disc herniation. By decision dated October 17, 2012, OWCP granted appellant a 12 percent right upper extremity impairment. The issue on appeal is whether appellant has established that he is entitled to a schedule award for a greater impairment.

Appellant's physician, Dr. Weiss, opined that appellant had a 25 percent right upper extremity impairment based on sensory deficits of the nerve root at C6 and C7 and motor deficits of the right wrist. OWCP's medical adviser disagreed and opined that Dr. Weiss incorrectly applied the A.M.A., *Guides*. In support of his opinion, OWCP's medical adviser related that Dr. Weiss incorrectly used the radial axillary nerve in his impairment rating and that using nerve roots was the more appropriate calculation method.

The Board finds Dr. Weiss' report to be of limited probative value. Dr. Weiss did not apply the A.M.A., *Guides* properly. As noted above, for peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* using the sixth edition (July/August 2009) is to be applied.<sup>14</sup> Dr. Weiss did not refer to *The Guides Newsletter* or identify any appropriate table in rating upper extremity impairment under the A.M.A., *Guides*. Accordingly, the Board finds that Dr. Weiss did not properly apply the A.M.A., *Guides* when rating appellant's permanent impairment. 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.<sup>15</sup>

The Board finds that OWCP's medical adviser properly reviewed the medical record and evaluated appellant's impairment in accordance with the procedures found at Exhibit 4 of Chapter 3.700.<sup>16</sup> OWCP's medical adviser noted that OWCP can only recognize extremity

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<sup>12</sup> See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also *supra* note 10 at Exhibit 1. *The Guides Newsletter* is included as (Exhibit 4).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>14</sup> *R.T.*, Docket No, 12-1133 (issued November 5, 2012).

<sup>15</sup> *T.C.*, Docket No. 12-1319 (issued November 5, 2012).

<sup>16</sup> *Supra* note 10.

impairment resulting from the nerve roots. He reviewed the record and found a six percent impairment due to sensory and motor deficits of the C7 nerve root and a six percent impairment due to sensory and motor deficits of the C6 nerve root, resulting in a total 12 percent right upper extremity impairment. There is no medical evidence in conformance with the A.M.A., *Guides* showing a greater impairment. Accordingly, OWCP properly granted appellant a schedule award for a 12 percent right upper extremity impairment.

On appeal appellant's attorney asserted that OWCP erred in failing to consider appellant's consequential injuries in calculating an impairment rating. For conditions not accepted by OWCP as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>17</sup> Dr. Weiss did not provide any medical rationale explaining why conditions of cumulative and repetitive trauma disorder, occupational cervical spine syndrome myeloradiculopathy, C4-5 herniated nucleus pulposus, progressive multilevel discogenic cervical disease at C3-4, C4-5, C5-6 and C6-7, progressive cervical spine discogenic disease with compressed myelopathy at C3-4 and C5-6 were caused by the accepted conditions and, thus, his opinion is insufficient to establish causal relationship.<sup>18</sup>

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 entitlement to a greater than 12 percent impairment of the right upper extremity.

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<sup>17</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>18</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 17, 2012 is affirmed.

Issued: August 7, 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