

OWCP accepted the claim for L3-4 disc herniation and lumbar radiculopathy. It also authorized a June 9, 2011 left L3-4 hemilaminectomy. Appellant received compensation benefits.

In a December 6, 2011 report, Dr. Daniel J. Tomes, a Board-certified neurological surgeon, examined appellant and noted that she ambulated while favoring the left leg. He advised that the right leg was neurologically intact. Regarding the left leg, Dr. Tomes found weakness of dorsiflexion with strength rated at 4/5. He determined that left plantar flexion appeared quite strong; appellant had reduced sensation in the anterior tibial area of the left lower leg, but that it was intact on the right side in the same distribution. There did not appear to be any significant pain upon straight leg raise testing. Dr. Tomes diagnosed left leg radiculopathy, left foot drop and prior left L3-4 discectomy on June 9, 2011.

On April 16, 2012 appellant filed a claim for a schedule award.

In a report dated August 17, 2012, OWCP's medical adviser recommended that appellant be evaluated by a second opinion physician for an impairment rating. He noted that Dr. Tomes did not state that appellant had reached maximum medical improvement and the impairment appeared due to radicular pain, sensory deficit or weakness affecting the left lower extremity.

On September 4, 2012 OWCP referred appellant to Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon. In a September 21, 2012 report, Dr. Agarwal noted appellant's history of injury and treatment. He utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) (A.M.A., *Guides*). Dr. Agarwal's findings on examination included: reduced sensation in the anterior tibial area of the left leg and no abnormal sensation; decreased muscle tone in the left leg, left leg weakness of dorsiflexion and strength of four out five; no appreciable atrophy in the muscles of the lower extremities and superficial touch pain and vibratory sensation decreased on the left side. He diagnosed left leg radiculopathy, left foot drop, status post left L3-4 hemilaminectomy with mesial facetectomy and foraminotomy for nerve root decompression with discectomy on June 9, 2011. Dr. Agarwal referred to Table 16-12, Peripheral Nerve Impairment.² He noted that appellant fell into a moderate category with moderate motor deficit and mild sensory deficits for a class 2 diagnosis. Dr. Agarwal applied the net adjustment formula and grade modifiers. He referred to Table 16-11 of the A.M.A., *Guides*³ and determined the grade modifier for Physical Examination (GMPE) findings correlated to a 1. Dr. Agarwal advised that grade modifiers for Functional History (GMFH) and Clinical Studies (GMCS) were not applicable. He utilized the net adjustment formula and explained that the net adjustment was minus one moved from the default score C to B equaling 15 percent permanent impairment of the left leg. Dr. Agarwal noted that appellant reached maximum medical improvement on December 6, 2011.

In an October 10, 2012 report, Dr. David D. Zimmermann, an OWCP medical adviser noted appellant's history of injury and treatment. He concurred with Dr. Agarwal that appellant had a 15 percent impairment of the left leg and that maximum medical improvement was reached on December 6, 2011. The medical adviser noted that appellant had radicular residuals of her

² A.M.A., *Guides* 534.

³ *Id.* at 533.

lumbar condition and referred to the lower extremity peripheral nerve and the grade modifier tables.

On October 19, 2012 OWCP granted appellant a schedule award for 15 percent permanent impairment of the left leg. The award covered a period of 43.2 weeks from September 22, 2012 to July 21, 2013. OWCP noted that it moved the date of maximum medical improvement to September 21, 2012 as this was more advantageous to appellant.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing federal regulations⁵ 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.⁶ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷ For decisions issued after May 1, 2009, the sixth edition will be used.⁸

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).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 A.M.A., *Guides* 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

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁰ *Id.* at 521.

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 this case is not in posture for decision. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹³

OWCP accepted appellant's traumatic injury claim for L3-4 disc herniation and lumbar radiculopathy and granted a schedule award for 15 percent permanent impairment of the left lower extremity.

The Board notes that both the second opinion physician and OWCP's medical adviser cited various tables in the A.M.A., *Guides* and calculated an impairment rating of 15 percent for the left lower extremity. While FECA does not authorize schedule awards for loss of use of the spine, a claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*.¹⁴

In this case, neither Dr. Agarwal nor OWCP's medical adviser utilized the standard set forth in *The Guides Newsletter* or explained why it was not applicable.¹⁵ Their opinions on the extent of appellant's permanent impairment are of reduced probative value.¹⁶

The Board finds that the case is not in posture for decision as none of the physicians properly explained how they arrived at their impairment ratings. For nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures contemplate that the examiner should apply the July to August 2009 *The Guides Newsletter*.¹⁷ The Board will thus remand the case for proper application of the A.M.A., *Guides* regarding the extent of appellant's permanent impairment of the left lower extremity. After such development as it deems necessary, OWCP shall issue an appropriate decision on the extent of the permanent impairment of appellant's left lower extremity.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹³ *Horace L. Fuller*, 53 ECAB 775, 777 (2002).

¹⁴ *See supra* note 11.

¹⁵ Furthermore, in rating impairment under Table 16-12, Dr. Agarwal stated that grade modifiers for functional history and clinical studies did not apply but he offered no explanation regarding this.

¹⁶ *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

¹⁷ *See supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: August 15, 2013
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