

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

N.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION HOSPITAL,)
Gainesville, FL, Employer)

Docket No. 12-1289
Issued: January 15, 2013

Appearances:

Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 28, 2012 appellant, through his attorney, filed a timely appeal from a January 25, 2012 decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of a schedule award. He also appealed from the March 8, 2012 OWCP decision denying his request for reconsideration on the merits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's claim for a schedule award; and (2) whether it properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant, through counsel, contends that OWCP erred in failing to review the merits of his claim and that the March 8, 2012 decision should be reversed. Appellant's counsel contends that OWCP did not review the new medical evidence or properly consider the impact of the newly accepted conditions on his schedule award.

FACTUAL HISTORY

On November 29, 2007 appellant, then a 52-year-old air conditioning equipment mechanic, filed a traumatic injury claim. On November 27, 2007 while he was on a ladder dismantling an actuator in the ceiling with two wrenches, he hurt his back when the nut would not loosen. On February 28, 2008 OWCP accepted appellant's claim for a lumbar strain.

In an October 8, 2008 report, Dr. Gary M. Weiss, a Board-certified neurologist, opined that appellant had work-related injuries on May 4 and November 27, 2007. He noted that on November 27, 2007, while appellant was on a ladder reaching overhead to work on bolts, he was required to utilize a torque movement on an already damaged lumbar spine. Dr. Weiss noted at L4-5 an increase in the small herniated or bulged disc into a large herniation, increased bulging at L5-S1 into a small herniated nucleus pulposus which caused a bulge at L3-4. His opinion was based upon the physical examination, appellant's magnetic resonance imaging (MRI) scan, radiographs of January 20 and April 20, 2008, increased pain with flexion and lateral movements, positive straight leg raising on the left leg with decreased range of motion in all directions and comparison of examinations and radiographs post May 4, 2007 to those after the November 27, 2007 incident. The conditions were permanent and listed restrictions, and noted that appellant's condition would cause him to miss work more than three times per month.

On November 29, 2010 appellant filed a claim for a schedule award. In a report dated May 27, 2010, Dr. Weiss found that appellant had a 100 percent impairment of both his left and right lower extremities. He diagnosed appellant with herniated nucleus pulposus at L3-4 greater than L4-5 and L5-S1, bilateral radicular symptoms and herniated nucleus pulposus at C3-4 and C6-7. Dr. Weiss found that appellant had reached maximum medical improvement without surgery, but did note that he needed further physical therapy and medical management. Utilizing Table 13-12 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*),² he noted appellant's diagnoses of ataxic gait and bilateral lower extremity involvement of the entire lumbosacral plexus bilateral. Dr. Weiss noted that category 4 of Table 13-12 was appropriate and that therefore appellant had a 50 percent whole person impairment. He applied Table 16-10³ to determine that as a rating greater than 40 percent of the whole person equaled a 100 percent impairment of the lower extremity.

On March 9, 2011 an OWCP medical adviser noted that the MRI scan of the spine of January 28, 2008 revealed degenerative disc changes generalized consistent with age of 55. The MRI scan did not reveal any nerve compression consistent with radiculopathy. In the absence of convincing evidence of spinal pathology or related nerve root deficit, there was no impairment.

² A.M.A., *Guides* 336, Table 13-12.

³ *Id.* at 532, Table 16-10.

OWCP's medical adviser recommended a schedule award of zero percent for the right lower extremity.

By letter dated April 19, 2011, OWCP noted that appellant's claim had been accepted for a sprain of the lumbar region. It asked him to submit further medical evidence in support of his claim for a schedule award. Appellant submitted a May 16, 2010 report from Dr. Weiss who reiterated his prior diagnoses and concluded that appellant's cervical and lumbosacral spine condition were due to workers' compensation injuries.

OWCP referred the May 16, 2010 medical report of Dr. Weiss to OWCP's medical adviser. The medical adviser stated that evidence of a genuine spinal nerve root deficit was not found in the record. He noted that motor loss, dermatomal sensory loss, reflex changes, electrodiagnostic studies and imaging were not consistent. The medical adviser found that appellant had a zero percent (no) impairment of either lower extremity.

By decision dated June 6, 2011, OWCP denied appellant's claim for a schedule award.

On June 13, 2011 appellant requested an oral hearing which was held on September 26, 2011.

In a July 26, 2011 report, Dr. Weiss assessed appellant with metal toxicity with worsening of memory; increased low back pain and a herniated nucleus pulposus L4-5 and L5-S1 with radiculopathy; headaches due to metal toxicity; neck pain with herniated nucleus pulposus C3-4 and C6-7 with bulging C4-5; and thoracic spine pain with herniated nucleus pulposus T5-6. In an October 18, 2011 report, he stated that his diagnostic opinion was based on the patient history and symptomology and a comparison of objective tests both before and after November 27, 2007. Dr. Weiss stated that the stark differences in the tests were not attributable to the natural progression of lumbar degenerative disc disease but was consistent with trauma. He opined that the twisting or torquing movement as described in appellant's statements would apply sufficient force to the lumbar region to cause the condition.

On November 25, 2011 OWCP accepted a sprain of the lumbar region; displacement of a lumbar intervertebral disc without myelopathy, aggravation L4-5 only; disc bulge L5-S1 and L3-4.

On December 27, 2011 appellant requested reconsideration.

By decision dated January 25, 2012, OWCP's hearing representative affirmed the denial of appellant's claim for a schedule award. The hearing representative found that appellant did not provide sufficient evidence to establish permanent impairment of the legs due to the accepted back condition.

Appellant requested reconsideration. In a January 10, 2012 report, Dr. Weiss stated that appellant's accepted lumbar condition would not resolve, and referred to his earlier reports. In February 20 and 23, 2012 reports, he reiterated his diagnoses and addressed issues of metal toxicity and worsening memory. Dr. Weiss also noted increased low back pain, a herniated nucleus pulposus L4-5 and L5-S1 with radiculopathy and neck pain with herniated nucleus pulposus C3-4 and C6-7 with bulging C4-5. Appellant, through counsel, contended that, as the

accepted conditions had been expanded, OWCP's medical adviser should review the schedule award claim in light of the recently accepted conditions.

On March 8, 2012 OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and its implementing regulations,⁵ 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 beginning May 1, 2009, the sixth edition of the A.M.A., *Guides*, will be used.⁸

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.⁹ 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 schedule 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.¹⁰

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹¹ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in the July/August 2009 *The Guides Newsletter*.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 09-03 (issued March 15, 2009).

⁹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹² FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 7.

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairments class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH) and if electrodiagnostic testing was done, Clinical Studies (GMCS).¹³ The net adjustment formula is (GMFH-CDX) + (GMCS-CDX).¹⁴

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical consultant for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* and OWCP's medical consultant providing rationale for the percentage of impairment specified.¹⁵

ANALYSIS -- ISSUE 1

OWCP initially accepted appellant's claim for a lumbar strain. On November 25, 2011 it accepted a sprain of the lumbar region; displacement of a lumbar intervertebral disc without myelopathy, aggravation at L4-5; and disc bulge at L5-S1 and L3-4. The hearing representative affirmed the denial of appellant's claim for a schedule award.

Appellant's physician, Dr. Weiss, stated that he had a 100 percent impairment of both lower extremities. He stated that, based on appellant's physical examinations and objective tests, the impairment rating was based on category 4 of Table 13-12 of the A.M.A., *Guides* which amounted to a 50 percent whole person impairment.¹⁶ Dr. Weiss then applied Table 16-10 to determine that this amounted to a 100 percent impairment of each lower extremity.¹⁷ OWCP's medical adviser disagreed, and found that the medical evidence was not sufficient to support any impairment to his lower extremities based on the accepted condition of lumbar strain.

The Board finds the reports of Dr. Weiss to be of limited probative value. Dr. Weiss based his findings on a whole person impairment. FECA does not authorize schedule awards for permanent impairment of the whole person or the spine.¹⁸ Although Dr. Weiss converted this to a 100 percent impairment of the lower spine, he 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.¹⁹ Dr. Weiss did not refer to *The Guides Newsletter* or identify any appropriate table in rating lower extremity

¹³ A.M.A., *Guides* 533.

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹⁵ See Federal (FECA) Procedure Manual at Chapter 2.808.6(d).

¹⁶ A.M.A., *Guides* 336, Table 13-12.

¹⁷ *Id.* at 532, Table 15-10.

¹⁸ *S.B.*, Docket No. 12-819 (issued August 17, 2012).

¹⁹ *R.T.*, Docket No. 12-1133 (issued November 5, 2012).

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.²⁰

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 section 3.700. OWCP's medical adviser noted that OWCP can only recognize extremity impairment resulting from lumbar radiculopathy. He reviewed the record and found no motor loss, dermatomal sensory loss or reflex changes, and accordingly rated a zero percent (no) impairment of both the right and left lower extremities. There is no medical evidence in conformance with the A.M.A., *Guides* showing a greater impairment. Accordingly, OWCP properly denied appellant's claim for a schedule award.

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.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not considered by OWCP; or by submitting relevant and pertinent new evidence not previously considered by OWCP.²¹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²²

ANALYSIS -- ISSUE 2

The Board finds that appellant did not contend that OWCP erroneously applied or interpreted a specific point of law or advance any legal argument not previously considered by OWCP. Furthermore, there is no pertinent new and relevant evidence that indicates that appellant sustained an employment-related impairment entitling him to a schedule award. The evidence consists of Dr. Weiss reiterating points made in his prior reports of records.²³ There is no new medical opinion that properly applies the A.M.A., *Guides*.

²⁰ *T.C.*, Docket No. 12-1319 (issued November 5, 2012).

²¹ 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

²² *Howard A. Williams*, 45 ECAB 853 (1994).

²³ Evidence which is repetitious or duplicative of that already in the record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case. *See Eugene F. Butler*, 36 ECAB 393, 398 (1984).

Appellant contends that OWCP failed to ask OWCP's medical adviser for a further evaluation due to the new accepted conditions. However, there is no indication that any of these conditions resulted in any impairment to appellant's extremities. Furthermore, OWCP's hearing representative already noted in her decision the aggravation of disc bulges at L5-S1 and L3-4 were added to the accepted conditions. Accordingly, appellant has not met any of the criteria for merit review of the claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's claim for a schedule award. The Board further finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 8 and January 25, 2012 are affirmed.

Issued: January 15, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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