

He stated that he first injured his back in 1995 and that the claim was accepted as well as a recurrence in 1999. OWCP accepted appellant's claim for lumbar sprain on December 10, 2007.

In a letter dated July 31, 2009, appellant alleged that he developed a consequential injury, severe generalized anxiety disorder, as a result of his back condition. She submitted medical evidence in support of this claim. OWCP accepted a severe generalized anxiety disorder with depressive features on June 24, 2010.

Appellant filed a claim for a schedule award on December 16, 2009. On August 21, 2010 appellant's attending physician, Dr. Angel Perez Toro, Board-certified in physical medicine and rehabilitation, noted the accepted conditions of generalized anxiety disorder and low back pain. He stated that appellant had low back pain with radiation into both legs. Appellant had an antalgic gait and used a cane for ambulation. On physical examination, he demonstrated adequate muscle strength and symmetrical reflexes. Appellant had no sensory deficit to pin prick. Dr. Toro reviewed a November 29, 2007 magnetic resonance imaging (MRI) scan and found degenerative disc disease with bulging discs at L2-3 and L3-4. He diagnosed lumbosacral muscle spasm, discogenic disease and lumbar radiculopathy L3-4. Dr. Toro stated that maximum medical improvement occurred in 2007 or 2008. He provided an impairment rating under the sixth edition of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment*.² Appellant had a spinal nerve impairment of moderate sensory deficit of L3-4 or 3 percent impairment and moderate motor deficit of L3-4 or 11 percent impairment resulting in 14 percent combined impairment of each lower extremity.

In a report dated August 31, 2010, OWCP's medical adviser reviewed Dr. Toro's report. He noted that findings on physical examination demonstrated no gross deficits, no sensory deficits and an essentially normal examination with bilaterally symmetric deep tendon reflexes. The medical adviser requested a supplemental report from Dr. Toro explaining how he rated impairment.

In a letter dated September 14, 2010, OWCP requested a supplemental report from Dr. Toro, who responded on September 29, 2010 and stated that appellant reached maximum medical improvement on December 8, 2007. Appellant had no current clinical evidence of radiculopathy, but was in constant pain exacerbated by minimal physical activity. He found diffuse tenderness at cervical dorsal and lumbar paravertebral muscles with associated muscle spasm. Dr. Toro noted that appellant had an antalgic slow gait and needed to use a cane for ambulation.

OWCP's medical adviser reviewed this report on December 13, 2010 and stated that Dr. Toro did not provide sufficient evidence regarding neurological deficit, sensory deficit or other findings upon which to base a schedule award. He recommended a second opinion evaluation.

By decision dated September 22, 2011, OWCP denied appellant's claim for a schedule award. It found that he did not submit sufficient medical evidence to establish permanent impairment to a scheduled member.

² A.M.A., *Guides* (6th ed. 2009).

Appellant requested a review of the written record on October 11, 2011. By decision dated December 9, 2011, OWCP's hearing representative set aside the September 22, 2011 decision and remanded the case to refer appellant for a second opinion evaluation to determine the extent of permanent impairment for schedule award purposes.

OWCP referred appellant to Dr. Olga Rios, a Board-certified neurologist, for a second opinion examination. In a report dated March 14, 2012, Dr. Rios reviewed appellant's history of employment injuries and performed a physical examination. She noted that appellant reported severe pain bilateral foot numbness and paresthesias. On examination, Dr. Rios found that appellant demonstrated great tenderness which seemed to be increased to a nonphysiological degree with slight enhancement of his overall weakness and tenderness throughout the examination. Appellant demonstrated give-way weakness with minimal effort on motor testing. Dr. Rios stated that he complained of straight leg pain and that his power was -4/5 in the lower extremities. She noted that sensory testing was patchy and that appellant complained of feeling pinprick in a nondermatomal distribution. Appellant's deep tendon reflexes were -2 throughout. Dr. Rios stated that he was able to stand and walk slowly without his cane, completely lifting his feet and moving about the room, but that appellant shuffled his feet when asked to heel, toe and tandem walk. She reviewed a November 29, 2007 magnetic resonance imaging (MRI) scan.

In response to OWCP's questions, Dr. Rios stated that appellant had reached maximum medical improvement on December 8, 2007. She applied the A.M.A., *Guides* and stated that at L3 appellant had a mild sensory deficit of one percent and mild motor deficit of eight percent. Dr. Rios classified history grade modifier as class 2 and Clinical Studies (GMCS) grade modifier as class 1. She found 10 percent left lower extremity impairment at L3. At the L4 level, Dr. Rios found mild sensory impairment of 2 percent and moderate motor impairment of 13 percent impairment for 15 percent impairment of the lower extremity at the L4 level.

Dr. Rios noted that it was difficult to assess impairment due to appellant's nonphysiological enhancement of his symptoms. She stated that he had mild motor and sensory deficit, but that she did not believe that appellant's condition was as severe as he presented. Dr. Rios noted that appellant's clinical findings did not correlate with his imaging studies.

By decision dated April 6, 2012, OWCP denied appellant's claim for a schedule award finding that Dr. Rios was unable to provide an accurate rating of impairment.

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 for loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of

³ 5 U.S.C. §§ 8101-8193, 8107.

⁴ 20 C.F.R. § 10.404.

tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.⁶ Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.⁷ 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,⁸ no claimant is entitled to such an award.⁹

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.¹⁰

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.¹¹ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.¹² Specifically, OWCP will address lower extremity impairments originating in the

⁵ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).

⁷ *W.D.*, *supra* note 6; *William Edwin Muir*, 27 ECAB 579 (1976).

⁸ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

⁹ *W.D.*, *supra* note 6. *Timothy J. McGuire*, 34 ECAB 189 (1982).

¹⁰ *W.D.*, *id.* *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4).

spine through Table 16-11¹³ and upper extremity impairment originating in the spine through Table 15-14.¹⁴

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 Functional History (GMFH), Physical Examination (GMPE) and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵

ANALYSIS

OWCP accepted that appellant sustained a low back condition and an consequential emotional condition in the performance of his federal duties. Appellant filed a claim for a schedule award alleging impairment of his lower extremities due to his accepted back condition.

Appellant's attending physician, Dr. Toro, did not provide physical findings supportive of his conclusions that appellant had permanent impairment of his lower extremities due to his accepted employment injury. OWCP's medical adviser reviewed his reports and recommended a second opinion evaluation.

OWCP referred appellant to Dr. Rios for a second opinion examination. Dr. Rios reviewed appellant's medical history, provided physical findings and offered an impairment rating. The claims examiner denied appellant's claim for a schedule award on the grounds that Dr. Rios opined that appellant had exaggerated his symptoms.

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁶ OWCP did not follow these established procedures in this case, instead determining without medical advice that appellant's impairment rating as determined by Dr. Rios was not reliable. Dr. Rios provided findings on physical examination and provided an impairment rating under the aspics of the A.M.A., *Guides*. While she noted that appellant magnified his symptoms, she also continued that he did have permanent impairment of his lower extremities due to his accepted back condition. Given all the aspects of Dr. Rios' report, OWCP should have referred this medical evidence to the medical adviser to determine the reliability of the findings by Dr. Rios and the extent of appellant's permanent impairment.

On remand, OWCP should refer Dr. Rios' report to OWCP's medical adviser for determination of whether there are adequate findings for an impairment rating. After this and

¹³ A.M.A., *Guides* 533, Table 16-11.

¹⁴ *Id.* at 425, Table 15-14.

¹⁵ *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

such other development as OWCP deems necessary, OWCP should issue an *de novo* decision on appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that OWCP did not follow its procedures in determining appellant's permanent impairment for schedule award purposes and that the case must be remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: January 7, 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