



## **FACTUAL HISTORY**

On December 2, 2004 appellant, then a 47-year-old mail handler, had left lower back pain while pulling a bulk mail carrier. He did not initially stop work. OWCP accepted the claim for a lumbar strain and paid appropriate compensation benefits.

A January 12, 2005 magnetic resonance imaging (MRI) scan read by Dr. Francis Donahue, a Board-certified diagnostic radiologist, revealed: symmetric bulges at L1-2 and L2-3; a posterior annular fissure centrally at L1-2; symmetric disc bulge into both foramina at L3-4 and mild facet and ligamentum flavum hypertrophy; L4-5 bilateral foraminal herniations, which contact the left L4 nerve root; central posterior annular fissure; possible left anterior-inferior L4 nondisplaced fracture. There was bone marrow edema at L4 which was well demarcated. There was markedly decreased marrow signal intensity on T1 in the left half of L5, which might represent bony sclerosis with blastic metastasis. Additionally, there was no disc space narrowing. Appellant advised that other possibilities include marrow infiltrative process.

On April 18, 2012 appellant filed a claim for a schedule award.<sup>2</sup>

By letter dated May 1, 2012, OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days. Appellant was advised that FECA does not allow for an award of permanent impairment to the spine. However, it advised that such awards can be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. OWCP asked that, if appellant had a work-related spinal nerve injury which has caused impairment to the extremities, he should submit an impairment rating of the affected extremities using the article entitled "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" which was published in the July/August 2009 *The Guides Newsletter*, a supplemental publication of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), which has been incorporated into OWCP's procedure manual and was available on OWCP's website.

OWCP received reports dated May 30 to September 5, 2012 from Dr. Christopher Wilson, a Board-certified internist. In a June 1, 2012 report, Dr. Wilson advised that appellant had reached maximum medical improvement and noted certain findings. Regarding impairment of the extremities, he stated that he was unable to furnish a rating and asked OWCP to refer appellant to another physician for such an evaluation as he did not have access to *The Guides Newsletter*. In a July 25, 2012 report, Dr. Wilson examined appellant and provided findings, which included that he had "radicular aspects of pain at times but none currently." In his September 5, 2012 report, he treated appellant and determined that he did not have crepitation defects, masses, effusions, contractures, subluxation or muscle atrophy in the limbs. Dr. Wilson also determined that sensation was intact in all the major dermatomes of the lower limbs bilaterally with the exception of continued hypesthesias over the L5 and S1 dermatomes of the

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<sup>2</sup> The record reflects that appellant previously filed a claim for a schedule award on June 7, 2005. On June 23, 2005 OWCP denied his claim for a schedule award. It found that the medical evidence of record did not support a permanent impairment to a scheduled member or function of the body. On October 21, 2005 appellant requested reconsideration. By decision dated January 19, 2006, OWCP denied modification of the prior decision.

bilateral toes distally over the feet. He diagnosed lumbar herniated nucleus pulposus, myofascial pain, radiculitis, degenerative disc disease and spinal stenosis-lumbar.

An August 1, 2012 lumbar MRI scan read by Dr. S. Dixon Gilbert, a radiologist, revealed: multilevel degenerative disc disease throughout the lumbar spine; no spinal stenosis; neural foraminal stenosis at L4-5 and L5-S1; dorsal annular fissures at L2-3, L3-4 and L4-5; abnormal signal intensity in the L5 vertebral body which is hypointense on the T1 weighted sequence but not well visualized on the T2 weighted sequence.

In a September 6, 2012 report, an OWCP medical adviser noted appellant's history of injury and treatment, which included chronic low back pain with no leg pain. He determined that the MRI scan revealed multilevel degenerative disc disease with neural foraminal stenosis at L4-5 and L5-S1 with no motor or sensory deficits of the lower extremities. The medical adviser indicated that appellant was treated at a pain clinic for intermittent tingling on the toes distally, with opiates for the low back pain and no surgery. He opined that appellant had a zero percent impairment for the right and left lower extremities.

On September 18, 2012 OWCP requested that another OWCP medical adviser provide an impairment rating utilizing the A.M.A., *Guides*. In a September 18, 2012 report, another OWCP medical adviser indicated that appellant had an exacerbation of preexisting multilevel degenerative disc disease with foraminal stenosis at L4-5 and L5-S1. He noted that appellant had pain in the lumbar spine to include radicular pain in the legs which was not currently present. The medical adviser referred to *The Guides Newsletter* and explained that rating spinal nerve extremity, using Table 2, spinal nerve impairment of the lower extremity qualified for class 0, correlating to zero percent impairment for the right and left legs due to the fact that appellant did not have radiculopathy.

By decision dated October 17, 2012, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record did not support a permanent impairment to a scheduled member or function of the body.

### **LEGAL PRECEDENT**

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.<sup>3</sup>

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>4</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all

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<sup>3</sup> *Veronica Williams*, 56 ECAB 367 (2005).

<sup>4</sup> 5 U.S.C. § 8107.

claimants.<sup>5</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.<sup>7</sup>

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.<sup>8</sup> 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 scheduled 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.<sup>9</sup>

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 Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>10</sup> OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.<sup>11</sup>

### ANALYSIS

The evidence of record is insufficient to establish that appellant is entitled to a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP accepted appellant's claim for a lumbar strain. When appellant claimed a schedule award, it advised him on May 1, 2012 of the type of evidence needed to support his claim. Appellant was advised that FECA does not allow for an award of permanent impairment to the spine. However, it advised that an award could be paid for impairment of the upper or lower extremities caused by a spinal nerve injury. OWCP asked that appellant submit an impairment rating of the affected extremities using the article entitled "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" which was published in the July/August 2009 *The Guides Newsletter*. Appellant submitted reports from Dr. Wilson that did not offer any

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<sup>5</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>8</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>9</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>10</sup> *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

<sup>11</sup> *Supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010).

impairment rating. In his June 1, 2012 report, Dr. Wilson advised that he was unable to provide an impairment rating of the extremities as he did not have access to *The Guides Newsletter*.<sup>12</sup> He asked that OWCP refer appellant to another physician for an impairment evaluation. The Board notes that appellant has the burden to establish entitlement to a schedule award.<sup>13</sup> As Dr. Wilson's reports did not address extremity impairment under *The Guides Newsletter* or otherwise under the A.M.A., *Guides*, his reports are insufficient to establish entitlement to a schedule award.

In a September 6, 2012 report, the medical adviser noted appellant's history of injury and treatment, which included chronic low back pain with no leg pain. He determined that the MRI scan revealed multilevel degenerative disc disease with neural foraminal stenosis at L4-5 and L5-S1 with no motor or sensory deficits of the lower extremities. The medical adviser indicated that appellant was treated at a pain clinic for intermittent tingling on the toes distally and no surgery. He opined that appellant had a zero percent impairment for the right and left lower extremities. Another medical adviser explained in his September 18, 2012 report that appellant had an exacerbation of preexisting multilevel degenerative disc disease with foraminal stenosis at L4-5 and L5-S1. He noted that appellant had pain in the lumbar spine but no radiculopathy was currently present. The medical adviser referred to *The Guides Newsletter*<sup>14</sup> and explained that rating spinal nerve extremity, using Table 2, spinal nerve impairment of the lower extremity qualified for class 0, correlating to zero percent for the right and left legs due to the fact that appellant did not have radiculopathy.

The Board notes that OWCP's procedures indicate that *The Guides Newsletter* is the appropriate method of determining extremity impairment in this case. The newsletter provides a specific method for determining impairments such as radiculopathy from a spinal nerve injury.<sup>15</sup>

The Board finds that the medical advisers properly evaluated whether appellant had ratable impairment of his legs. Both physicians reviewed the medical findings of record and neither medical adviser found objective evidence to support impairment to the lower extremities. Appellant did not submit any other medical evidence to support that he was entitled to a schedule award, under the A.M.A., *Guides* or *The Guides Newsletter*, for a scheduled member of the body under FECA. Accordingly, the Board finds that appellant has not established entitlement to a schedule award.

Following issuance of OWCP's October 17, 2012 decision, appellant submitted additional evidence. However, the Board may not consider such evidence for the first time on appeal as its review is limited to the evidence that was before OWCP at the time of its decision.<sup>16</sup>

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<sup>12</sup> OWCP's May 1, 2012 letter to appellant, explaining the need to provide an extremity rating pursuant to *The Guides Newsletter*, provided information on how to access *The Guides Newsletter*.

<sup>13</sup> See *supra* note 3.

<sup>14</sup> See *supra* notes 10 and 11.

<sup>15</sup> See *id.*

<sup>16</sup> See 20 C.F.R. § 501.2(c).

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 met his burden of proof to establish that he has an impairment caused by his accepted employment injuries that would entitle him to a schedule award.

**ORDER**

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

Issued: May 20, 2013  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board