

picnic table in the performance of his work duties. OWCP accepted the claim for lumbar sprain and left hip contusion. Appellant had preexisting spondylosis at L5-S1 with degenerative disc disease. OWCP accepted a recurrence of disability in September 1988 and eventually placed him on the compensation rolls. By decision dated September 10, 2008, it terminated appellant's compensation benefits effective September 10, 2008. Determinative weight was accorded to the July 23, 2008 opinion of Dr. Bryant A. Bloss, a Board-certified orthopedic surgeon and OWCP referral physician, who found appellant no longer suffered residuals of the accepted work-related conditions. By decision dated June 21, 2010, OWCP denied reconsideration of its decision on the grounds it was untimely filed and did not present clear evidence of error.

On September 9, 2009 appellant claimed schedule award compensation. In a July 22, 2010 letter, OWCP requested he provide medical evidence supporting a permanent impairment related to the work incident. No further evidence was received. By decision dated August 25, 2010, OWCP denied the schedule award claim on the grounds that the medical evidence of file failed to demonstrate a measurable impairment.

Appellant requested a telephonic hearing, which was held on January 4, 2011. In an October 1, 2010 report, Dr. Martin Fritzhand, a Board-certified urologist, opined that appellant reached maximum medical improvement by 1990. He also opined that appellant sustained 17 percent impairment to his left lower extremity as a result of the work injuries under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Fritzhand stated that appellant had 6 percent sensory impairment and 11 percent motor impairment and cited to various figures and tables in the A.M.A., *Guides*.

By decision dated February 15, 2011, OWCP's hearing representative remanded the case for OWCP's medical adviser to review Dr. Fritzhand's October 1, 2010 report.

In a February 24, 2011 report, OWCP's medical adviser reviewed the medical evidence of record and opined that appellant reached maximum medical improvement on June 2, 1990. He reviewed Dr. Frizhand's report and found appellant had chronic lower back pain and left leg pain with lumbar degenerative disc disease with disc degeneration and spinal stenosis at L5-S1 with mild left disc bulge, producing left S1 radiculopathy with mild sensory and mild motor deficit left leg. The medical adviser noted that Dr. Frizhand incorrectly used the peripheral nerve impairment grids of the A.M.A., *Guides*. He stated that *The Guides Newsletter* July/August 2009 edition mandated the use of Table 2 for ratings pertaining to spinal nerve root extremity impairment. Using those tables, the medical adviser found that a mild-to-moderate sensory deficit of left S1 nerve root equaled three percent lower extremity impairment and mild-to-moderate deficit of left S1 nerve root equaled five percent impairment, for a total left lower extremity impairment of eight percent.

In a March 3, 2011 amended report, OWCP's medical adviser noted the claim was accepted only for lumbar sprain and hip contusion. The other conditions of lumbar degenerative disc disease of the lumbar spine with foraminal stenosis, spondylosis and chronic pain syndrome with left leg pain/weakness and sciatica were not part of the accepted conditions and thus could not be rated for impairment. Therefore, the medical adviser stated that the final impairment of

the left lower extremity was zero percent for the accepted lumbar sprain and left hip contusion conditions.

By decision dated March 7, 2011, OWCP denied appellant's claim for a schedule award on the grounds that the medical evidence was insufficient to support an impairment arising from the June 2, 1986 work incident.

On March 15, 2011 appellant requested a telephonic hearing, which was held on June 10, 2011. Counsel argued that appellant's preexisting medical conditions should be included in calculating the schedule award.

In a May 5, 2011 report, Dr. Fritzhand noted the history of injury and presented examination findings. He opined that appellant reached maximum medical impairment by 1990. Under the sixth edition of the A.M.A., *Guides*, Dr. Fritzhand opined that appellant has seven percent left lower extremity impairment consisting of three percent motor impairment and four percent sensory impairment. Citations to tables within the A.M.A., *Guides* was provided.

By decision dated September 7, 2011, OWCP's hearing representative set aside its decision and remanded the case file. OWCP was directed to expand the accepted condition to include aggravation of appellant's underlying degenerative disc disease and refer him for a second opinion examination to determine whether the aggravation of degenerative disc disease continued and whether he sustained a permanent impairment as a result of the work incident.

OWCP subsequently expanded the claim to include aggravation of degenerative lumbar disc disease. In an October 11, 2011 report, Dr. Deborah St. Clair, a Board-certified orthopedic surgeon and OWCP referral physician, noted the history of injury, reviewed appellant's medical file, including an updated statement of accepted facts and set forth examination findings. She concluded that the aggravation returned to baseline after he ceased work and noted it was normal to expect progression of his spinal deterioration that was present at the time of injury. Dr. St. Clair further opined that the work injury had a permanent effect on appellant's total functioning but little effect anatomically upon the spine itself. She indicated that his spinal changes reflect aging. Dr. St. Clair opined that there was no ratable impairment to the lower extremity resulting from appellant's spinal condition, but gave him a three percent whole person impairment for pain under Chapter 3 of the A.M.A., *Guides*.

On November 16, 2011 OWCP's medical adviser reviewed Dr. St. Clair's October 11, 2011 report and found it to be thorough and objective. He stated that OWCP cannot recognize whole person impairment and thus the three percent whole person impairment for pain was not applicable. The medical adviser opined that Dr. St. Clair's report did not supply a basis for an impairment rating and thus appellant had zero percent permanent impairment of the left lower extremity.

By decision dated November 17, 2011, OWCP denied appellant's claim for a schedule award.

On November 22, 2011 appellant requested a telephonic hearing. By decision dated January 24, 2012, OWCP's hearing representative found the case not in posture for a hearing. The hearing representative found that Dr. St. Clair found that appellant's degenerative disc

disease was permanently aggravated and concluded that a conflict in medical opinion existed between Dr. St. Clair and Dr. Fritzhand as to whether there was a permanent partial impairment to a scheduled member. OWCP's November 17, 2011 decision was set aside and the case remanded to resolve this conflict.

In a February 3, 2012 statement of accepted facts, OWCP noted that a permanent aggravation of degenerative disc disease had been accepted. To resolve the conflict of medical opinion, it referred appellant to Dr. John Stanton, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 12, 2012 report, Dr. Stanton noted the history of injury, his review of the medical records and discussed his findings on examination. He advised that there was no impairment based on appellant's work-related condition with regards to the left lower extremity. Dr. Stanton noted that appellant did not have significant numbness, only slight loss of reflexes of the Achilles on left side compared to the right. No muscle atrophy, negative straight leg raise testing and equal mobility of the lower extremity and almost equal strength on both sides. Dr. Stanton concluded that appellant has progressive arthritic changes throughout his body and, with regards to lumbar spine, has developed some bilateral, more left than right, foraminal narrowing due to facet hypertrophy, which has caused complaints of pain down the left lower extremity. The progression of this lumbar arthritis has made it impossible for appellant to work, but this was not related to the work incident. Dr. Stanton opined that work-related injury was nothing more than a contusion to the right hip and a strain of the lumbar spine, which resolved no later than May 1989 when he reached maximum medical improvement. Accordingly, he opined that appellant had no ratable impairment due to his work-related injury.

In a May 29, 2012 report, OWCP's medical adviser reviewed Dr. Stanton's impartial report and concluded that appellant reached maximum medical improvement in May 1989 and that Dr. Stanton appropriately applied the sixth edition of the A.M.A., *Guides*. He advised that Dr. Stanton's report did not support an impairment to a scheduled member as a result of the June 2, 1986 work injury.

By decision dated May 29, 2012, OWCP denied appellant's claim for a schedule award based on the opinion of Dr. Stanton, the impartial medical specialist, and its medical adviser.

On June 4, 2012 appellant requested a telephonic hearing, which was held on October 10, 2012. In a November 10, 2012 report, Dr. Fritzhand stated that his reports establish that appellant sustained permanent impairment to the left lower extremity due to the allowed work injury. He indicated that his findings were also corroborated by Dr. Stanton's impartial medical examination.

By decision dated November 28, 2012, OWCP's hearing representative affirmed the May 29, 2012 decision.

In a December 12, 2012 letter, appellant requested reconsideration based on Dr. Fritzhand's November 10, 2012 report not previously considered. A copy of Dr. Fritzhand's narrative November 10, 2012 report was resubmitted.

By decision dated February 8, 2013, OWCP denied modification of its November 28, 2012 decision. It reviewed Dr. Fritzhand's new report but affirmed that the medical evidence did

not establish a permanent impairment to a scheduled member of the body causally related to the accepted injury and that appellant had not established entitlement to a schedule award.

LEGAL PRECEDENT

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.² 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.³ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.⁴

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.⁵ Neither, FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁶ However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.⁷

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment.⁸ It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.⁹ The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹⁰

When there exist opposing medical opinions of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

² For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks compensation. 5 U.S.C. § 8107(c)(2).

³ 20 C.F.R. § 10.404.

⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

⁵ *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

⁶ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

⁷ Federal (FECA) Procedure Manual, Part 2, *supra* note 4 at Chapter 2.808.6a(3).

⁸ Federal (FECA) Procedure Manual, Part 3, *supra* note 4 at Chapter 3.700, Exhibit 4.

⁹ *Id.*

¹⁰ *Id.*

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, will be given special weight.¹¹

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain sprain and left hip contusion as a result of the June 2, 1986 work incident and subsequently expanded the claim to include permanent aggravation of degenerative lumbar disc disease. Appellant claimed a schedule award. OWCP found a conflict in medical opinion between Dr. St. Clair, who opined that appellant had no ratable impairment to the lower extremity, but three percent whole person impairment for pain and Dr. Fritzhand, who opined that appellant had permanent impairment to the left lower extremity as a result of the work injuries. It properly referred appellant to Dr. Stanton for an impartial evaluation to resolve the conflict.¹²

In an April 12, 2012 report, Dr. Stanton reviewed the medical record and the statement of accepted facts. He also presented findings on examination. Dr. Stanton noted that appellant did not have significant numbness, only slight loss of reflexes of the Achilles on left side compared to the right. Also there was no muscle atrophy, negative straight leg raise testing and equal mobility of the lower extremity with almost equal strength on both sides. Dr. Stanton found that the accepted conditions resolved by May 1989 and that maximum medical improvement was reached at that time. He opined that there was no impairment based on appellant's work-related condition with regards to the left lower extremity and concluded that the progressive arthritic changes appellant has with regards to lumbar spine were nonwork-related foraminal narrowing due to facet hypertrophy, which has caused complaints of pain down the left lower extremity. The progression of this lumbar arthritis has made it impossible for appellant to work, but this was not related to the work incident.

On May 29, 2012 a second OWCP medical adviser reviewed Dr. Stanton's April 12, 2012 report and concluded that Dr. Stanton appropriately applied the sixth edition of the A.M.A., *Guides* and concurred that there was no basis for an impairment rating to a scheduled member as a result of the June 2, 1986 work injury.

Dr. Stanton provided examination findings and provided a well-rationalized opinion that there was no continuing symptoms of appellant's accepted conditions on which permanent impairment could be based. Although he noted the progressive arthritic changes appellant has with regards to lumbar spine has caused complaints of pain down the left lower extremity, he specifically stated that this was due to foraminal narrowing due to facet hypertrophy, which was nonwork related.

The Board finds that Dr. Stanton had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Stanton is a specialist in the appropriate field. His opinion is sufficiently well rationalized and based upon a proper factual and medical background

¹¹ *R.C.*, 58 ECAB 238 (2006); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

¹² *Manuel Gill*, 52 ECAB 282 (2001).

such that it is entitled to special weight and establishes no basis for permanent impairment of the left leg causally related to appellant's accepted conditions.

After Dr. Stanton's evaluation, appellant submitted a November 10, 2012 report from Dr. Fritzhand, who continued to opine that appellant sustained a permanent impairment to his left lower extremity due to the work injury. He further states that Dr. Stanton's findings are consistent with his physical examination findings of May 5, 2011 and those findings form the basis of the left lower extremity impairment. The Board notes that while Dr. Stanton found that the progressive arthritic changes in appellant's lumbar spine resulted in left leg pain, he specifically opined that this was not a consequence of the work accident. Dr. Stanton provided a well-rationalized opinion that the accepted aggravation of lumbar degenerative disc disease, lumbar sprain and left hip contusion had resolved without any permanent impairment. Therefore, it is not established that the impairment to the left lower extremity which Dr. Fritzhand provided is causally related to the accepted work injury. Additionally, he was on one side of a conflict resolved by Dr. Stanton and his November 10, 2012 report does not otherwise provide new findings or medical rationale sufficient to establish that any left lower extremity impairment was causally related to the June 2, 1986 work injury.¹³ Therefore, Dr. Fritzhand's report is insufficient to overcome Dr. Stanton's opinion that the accepted conditions had resolved without permanent impairment to a scheduled member causally related to the June 2, 1986 work injury or to create a new medical conflict.¹⁴

The Board finds that OWCP properly denied appellant's claim for a schedule award. On appeal, counsel argues the decision is contrary to fact and law. However, the medical evidence does not establish that appellant has permanent impairment to a scheduled member of the body causally related to his accepted injury. Consequently, appellant has not established entitlement to a schedule award.

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹³ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁴ See *S.J.*, Docket No. 09-1794 (issued September 20, 2010) (submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict). See also *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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