

FACTUAL HISTORY

This case has previously been before the Board. By decision dated September 5, 2012, the Board set aside a September 14, 2011 decision denying modification of a July 30, 2009 loss of wage-earning capacity determination.³ The Board remanded the case for OWCP to apply FECA Bulletin No. 09-05. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

On July 5, 2011 appellant, through his attorney, requested a schedule award. In an impairment evaluation dated July 2, 2011, Dr. William N. Grant, an attending Board-certified internist, diagnosed left cervical disc displacement, a cervical root lesion, lumbar disc displacement with myelopathy and a lumbar sprain. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), he found that appellant had a 36 percent impairment of the left upper extremity and a 25 percent impairment of each lower extremity.

On July 14, 2011 an OWCP medical adviser, Neil Ghodadra, M.D., reviewed Dr. Grant's report and disagreed with his impairment rating. He noted that Dr. Grant used rating of motion in conjunction with rating motor and density loss. Dr. Ghodadra found that appellant had a nine percent impairment of the left upper extremity and a nine percent impairment of each lower extremity.

OWCP determined that a conflict existed between Dr. Grant and OWCP's medical adviser. It referred appellant to Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated October 27, 2011, Dr. Weiss reviewed appellant's history of work injuries. He noted that he was status post a "L5-S1 laminectomy and disc excision for [a] right-sided L5-S1 herniated disc." Dr. Weiss discussed appellant's history of back pain and infrequent "pain running down his right lower extremity to the medial aspect of his foot." On examination, he found lumbar spasm, a pain free straight leg raise bilaterally and mild EHL (extensor hallucis longus) weakness on the left side. Dr. Weiss diagnosed an L5-S1 laminectomy, C3 through C6 laminectomies, a C4-6 anterior fusion and residual radiculopathy at C6 on the left. Applying Chapter 17 of the A.M.A., *Guides*, relevant to determining impairments of the spine and pelvis, he concluded that appellant had a 7 percent whole person impairment due to his back injury and a 17 percent whole person impairment due to his neck injury, for a total of a 23 percent whole person impairment. Dr. Weiss stated that appellant had "no residuals of the right-sided herniated disc on examination. There is mild left EHL weakness, but this is on the opposite side and therefore not related to the injury in question."

On January 8, 2012 an OWCP medical adviser noted that FECA did not provide schedule awards for whole person impairment ratings. He found that Dr. Weiss did not find any evidence of an impairment of the right lower extremity. The medical adviser further found that Dr. Weiss

³ On February 23, 2006 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim alleging that on February 16, 2006 he sustained left shoulder pain while casing mail. OWCP accepted the claim, assigned file number xxxxxx054, for a left displaced cervical intervertebral disc. It further accepted that on January 18, 2006 appellant sustained lumbar strain and herniated discs at L1-2 and L5-S1. OWCP assigned the claim file number xxxxxx218. It combined both file numbers into xxxxxx054. On July 28, 2008 appellant underwent a right laminectomy and discectomy at L5-S1. He also underwent cervical surgeries on October 8 and 27, 2008.

determined that the EHL weakness was not related to the work injury. He concluded that appellant had no impairment of the lower extremities but had a 13 percent permanent impairment of the left upper extremity.

By decision dated January 20, 2012, OWCP granted appellant a schedule award for a 13 percent permanent impairment of the left.

On January 30, 2012 counsel requested a telephone hearing before an OWCP hearing representative. At the April 16, 2012 telephone hearing, counsel indicated that he was appealing only the issue of the extent of impairment of the lower extremities, which was not addressed in the January 8, 2012 decision. On April 27, 2012 the hearing representative granted appellant's petition to withdraw his hearing request.

In a decision dated July 24, 2012, OWCP denied appellant's claim for schedule awards for the lower extremities.

On August 1, 2012 counsel requested a telephone hearing. On September 20, 2012 following a preliminary review, an OWCP hearing representative determined that the case was not in posture for a hearing. She set aside the July 24, 2012 decision and remanded the case for Dr. Weiss to clarify whether the weakness in appellant's left lower extremity was due to the herniated disc at L1-2 and to properly apply *The Guides Newsletter* (July/August 2009) in determining whether there was any impairment to either lower extremity. The hearing representative further found that Dr. Weiss should review OWCP's medical adviser's January 8, 2012 report.

By letter dated October 5, 2012, OWCP requested that Dr. Weiss address whether appellant had any impairment for weakness of the left lower extremity due to her work injury. It further asked that he review the January 8, 2012 report from OWCP's medical adviser and provide a rationalized opinion regarding whether he agreed with the right lower extremity rating.

In a supplemental report dated October 16, 2012, Dr. Weiss advised that the EHL left-sided weakness was "typically associated with a herniated disc at the L4-5 level. Therefore, it would not be related to a herniated disc at L1-2. It would also not be related to an (opposite-side) right-sided disc herniation at L5-S1." He found that there was no impairment of the left lower extremity due to the accepted work injury. Dr. Weiss agreed with OWCP's medical adviser that appellant had no impairment of the right lower extremity.

By decision dated October 23, 2012, OWCP denied appellant's claim for schedule awards for the lower extremities.

On October 29, 2012 counsel requested a telephone hearing, which was held on February 13, 2013. He argued that there was a conflict in opinion between OWCP's medical adviser and Dr. Grant. Counsel also maintained that Dr. Weiss did not properly provide an impairment rating using the A.M.A., *Guides*.

In a decision dated April 30, 2013, an OWCP hearing representative affirmed the October 23, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal 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 As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

Appellant has the burden under FECA to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.⁸ A schedule award is not payable for a member, function or organ of the body not specified under FECA or in the implementing regulations.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

ANALYSIS

OWCP accepted that appellant sustained a left displaced cervical disc due to a February 16, 2006 work injury and lumbar strain and herniated discs at L1-2 and L5-S1 due to a January 18, 2006 work injury. Appellant filed a claim for a schedule award. OWCP determined that a conflict existed between Dr. Grant, who found a 25 percent impairment of each lower extremity and the OWCP medical adviser, who found a 9 percent impairment of each lower extremity.¹⁰ OWCP referred him to Dr. Weiss for an impartial medical examination.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹ On October 27, 2011 Dr. Weiss found a normal

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 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *See Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

⁹ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁰ The record also contained a conflict regarding the extent of appellant's upper extremity impairment; however, the only issue before the Board is the extent of any lower extremity impairment.

¹¹ *See Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

straight leg raise bilaterally and mild weakness of the extensor hallucis longus on the left side. He determined that appellant had no residuals from his right-sided herniated disc. Dr. Weiss advised that appellant had a seven percent whole person impairment due to his spine using Chapter 17 of the A.M.A., *Guides*. FECA, however, specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.¹² FECA further does not provide for an impairment of the whole person.¹³

On January 8, 2012 an OWCP medical adviser found that appellant had no impairment of either lower extremity based on Dr. Weiss' examination. In a supplemental report dated October 16, 2012, Dr. Weiss explained that weakness of the left extensor hallucis longus was not related to an L1-2 herniated disc as it usually resulted from an L4-5 disc herniation. He also opined that it was not due to an L5-S1 herniated disc on the right. Dr. Weiss agreed with OWCP's medical adviser's finding that appellant had no right lower extremity impairment. It is the impartial medical specialist who must provide an independent opinion resolving the conflict on the degree of permanent impairment in accordance with the A.M.A., *Guides*.¹⁴ As noted, Dr. Weiss previously explained in his October 27, 2011 report that appellant had no residuals of his right disc herniation. The Board finds that Dr. Weiss' opinion, which is based on a complete and accurate medical history, is sufficiently well rationalized and based upon a proper factual background and thus represents the special weight of the evidence and establishes that appellant has no lower extremity impairment due to his work injury.¹⁵

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 is not entitled to a schedule award for a permanent impairment of the lower extremities.

¹² *Francesco C. Veneziani*, 48 ECAB 572 (1997). A schedule award is payable for a permanent impairment of the extremities that is due to a work-related back condition; see *Denise D. Cason*, 48 ECAB 530 (1997).

¹³ *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁴ See *Richard R. LeMay*, 56 ECAB 341 (2005).

¹⁵ See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2013
Washington, DC

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

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

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