

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

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**B.M., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Beckley, WV, Employer**

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**Docket No. 14-345  
Issued: December 24, 2014**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 2, 2013 appellant, through her attorney, filed a timely appeal from a November 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award decision.

**ISSUE**

The issue is whether appellant has more than a four percent permanent impairment to her left lower extremity and a four percent permanent impairment to her right lower extremity.

**FACTUAL HISTORY**

This is the second appeal before the Board. Appellant, then a 48-year-old medical technician, injured her lower back on May 15, 2001. She filed a claim for benefits on May 16,

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

2001, which OWCP accepted for lumbosacral strain. On May 18, 2001 appellant underwent x-ray testing of the lumbar spine which showed degenerative changes in the facet joint between L4-5 and L5-S1. She underwent electromyographic tests and nerve conduction studies of the lower extremities on March 21, 2002 which were found to be normal.

Appellant underwent a January 21, 2007 magnetic resonance imaging (MRI) scan of the lumbar spine, which demonstrated mild encroachment on the neural foramina at L3-4, concentric bulging of the L4-5 disc with possible nerve root impingement and mild concentric bulging at L5-S1 with possible nerve root impingement. An MRI scan she underwent on December 10, 2008 noted no interval change.

On February 1, 2009 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her lower extremities.

By decision dated March 12, 2009, OWCP found that appellant had no ratable impairment causally related to her accepted lower back conditions and therefore was not entitled to a schedule award.

Appellant's attorney requested a hearing on March 18, 2009. He submitted March 2 and June 25, 2009 reports from Dr. Robert P. Kropac, her treating physician and a specialist in orthopedic surgery, who rated a two percent whole person impairment. Dr. Kropac provided findings on physical examination, which showed decreased sensation in the left lower extremity radiating to both extremities and diagnosed chronic lumbosacral musculoligamentous strain secondary to the May 15, 2001 injury with subjective complaints, clinical findings and MRI scan findings consistent with this diagnosis.

At the June 24, 2009 hearing, appellant's attorney requested that Dr. Kropac's impairment evaluation be forwarded to an OWCP medical adviser. OWCP did not respond to this request.

By decision dated August 20, 2009, an OWCP hearing representative affirmed the March 12, 2009 decision. She found that the evidence failed to establish that appellant's work-related conditions caused any permanent impairment.

In a decision dated May 14, 2010,<sup>2</sup> the Board set aside the March 12 and August 20, 2009 decisions finding that, although Dr. Kropac rated impairment under the whole person section of the A.M.A., *Guides*, which is not allowed under FECA, he did submit physical examination findings of decreased sensation of the lower extremities, which warranted review by an OWCP medical adviser. The Board therefore remanded the case to OWCP for review of the medical record by an OWCP medical adviser. The complete facts of this case are set forth in the Board's May 14, 2010 decision and are herein incorporated by reference.

In a May 21, 2010 report, an OWCP medical adviser reviewed Dr. Kropac's reports and impairment evaluation and found that appellant had no lower extremity impairment related to her accepted lower back conditions. He stated that Dr. Kropac found no motor or sensory deficits in

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<sup>2</sup> Docket No. 09-2231 (issued May 14, 2010).

the lower extremities related to her low back and rated her using Chapter 17 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), which OWCP does not accept as the standard for rating spinal impairments.<sup>3</sup>

By decision dated June 8, 2010, OWCP found that appellant had no ratable impairment causally related to her accepted lower back conditions and therefore was not entitled to a schedule award.

Appellant's attorney requested an oral hearing, which was held on September 20, 2010.

In an August 20, 2010 report, Dr. William N. Grant, a specialist in internal medicine, found that appellant had a 25 percent impairment of her left and right lower extremities, pursuant to the sixth edition of the A.M.A., *Guides*.

By decision dated November 16, 2010, an OWCP hearing representative set aside the June 8, 2010 decision and remanded to the district office for consideration of a schedule award based on Dr. Grant's August 20, 2010 report.

By decision dated April 20, 2011, OWCP found that appellant had no ratable impairment causally related to her accepted lower back conditions and therefore was not entitled to a schedule award.

By letter dated April 27, 2011, appellant's attorney again requested a hearing, and submitted an additional medical report.

In a July 22, 2011 report, Dr. Martin Fritzhand, a specialist in occupational medicine, found that appellant had a nine percent impairment of the right and left extremity pursuant to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment using the sixth edition" (July/August 2009). On examination he stated that appellant had a sensory loss involving the lower extremities based on evidence of nerve root damage, as the Achilles tendon reflexes were absent and muscle strength was diminished over both lower limbs. Dr. Fritzhand therefore found that she had sustained an impairment to the S1 nerve root and relied on proposed Table 2 of *The Guides Newsletter*, spinal nerve impairments, lower extremity impairments, to rate a class 1 impairment.

Dr. Fritzhand further found that, under Table 16-11, page 533<sup>4</sup> of the A.M.A., *Guides*, the table used to rate sensory and motor severity, appellant had a sensory deficit with severity level 3, severe, for impaired sharp/dull recognition, but retained protective sensibility; and a motor deficit, severity level 1, mild. Using Table 16-6 at page 516,<sup>5</sup> he rated a Functional History grade modifier 2, for a moderate problem; he did not utilize the Physical Examination grade modifier; and he rated a Clinical Studies grade modifier 2 for a moderate problem, at Table 16-8,

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<sup>3</sup> Dr. Kropac continued to submit progress reports, which contained examination findings pertaining to appellant's lumbar spine through 2013.

<sup>4</sup> A.M.A., *Guides* 533

<sup>5</sup> *Id.* at 516

page 520.<sup>6</sup> Based on the above findings Dr. Fritzhand compared the net adjustments from functional history and clinical studies to the net adjustment formula at page 521 of the A.M.A., *Guides*. He calculated a total net adjustment of two, moving the initial grade C to grade E, which yielded a sensory impairment of four percent to each lower extremity and a motor impairment of five percent to each lower extremity, for a total nine percent impairment for each lower extremity.

By decision dated September 30, 2011, an OWCP hearing representative set aside the June 8, 2010 decision and remanded to the district office for consideration of a schedule award by an OWCP medical adviser based on Dr. Fritzhand's July 22, 2011 report.

In an October 19, 2011 report, an OWCP medical adviser found that, as the only accepted condition was a lumbosacral sprain, with no additional accepted conditions of lumbar degenerative disc disease, herniations or radiculopathy, there was no basis for a lower extremity impairment rating.

By decision dated October 21, 2011, OWCP found that appellant had no ratable impairment causally related to her accepted lower back conditions and therefore was not entitled to a schedule award.

By letter dated October 31, 2011, appellant's attorney requested an oral hearing, which was held on February 17, 2012.

By decision dated May 8, 2012, an OWCP hearing representative set aside the October 21, 2011 decision. She stated that the accepted conditions had been expanded to include aggravation of spinal stenosis and aggravation of degenerative disc disease and indicated that the medical adviser had erred by failing to consider whether appellant had sustained a permanent impairment stemming from these conditions. The hearing representative therefore remanded for referral of the impairment reports to the medical adviser, along with an accurate list of the accepted conditions, to be reviewed for determination as to whether she had a lower extremity impairment from her accepted conditions.

OWCP accepted the additional condition of temporary aggravation of degeneration of lumbar or lumbosacral intervertebral disc. It updated the statement of accepted facts (SOAF) and forwarded the file to a district medical adviser for review. In a June 29, 2012 report, Dr. Morley Slutsky, a Board-certified orthopedic surgeon and an OWCP medical adviser, again reviewed the record and found that there was no basis for a schedule award to either lower extremity based on Dr. Fritzhand's July 22, 2011 report.

By decision dated July 9, 2012, OWCP found that appellant had no ratable impairment causally related to her accepted lower back conditions and therefore was not entitled to a schedule award.

By letter dated July 16, 2012, appellant's attorney requested an oral hearing, which was held on November 9, 2012.

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<sup>6</sup> *Id.* at 518

Although there is nothing in the record to explain this referral, on July 17, 2012, Dr. Arnold Berman, Board-certified in orthopedic surgery and an OWCP medical adviser, reported reviewing Dr. Fritzhand's July 22, 2011 report and found that appellant had a four percent permanent impairment of her left and right lower extremities. He stated that his agreement with Dr. Fritzhand's opinion that her S1 nerve root deficit was a sufficient basis for rating impairment pursuant to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* (July/August 2009). Dr. Berman found, however, that appellant had a mild sensory deficit under Table 16-11, which yielded a one percent impairment, as opposed to Dr. Fritzhand's finding of a five percent sensory impairment based on a severe sensory deficit. He stated that Dr. Fritzhand's rating was not consistent with his examination findings, since she did have protective sensation.

Dr. Berman further found that Dr. Fritzhand's calculation of the grade modifiers were not correct and were not consistent with his examination findings or appellant's prior medical records. He determined that appellant had a grade modifier 1 as opposed to 2 for both functional history and clinical studies. Based on these findings Dr. Berman recommended a schedule award for mild sensory deficit, S1, for one percent impairment; and a mild motor deficit of three percent, for grade C, for a four percent total impairment for the right and left lower extremities, with a July 22, 2011 date of maximum medical improvement based on the date of Dr. Fritzhand's examination.

By decision dated January 25, 2013, an OWCP hearing representative set aside the July 9, 2012 decision in light of the fact that appellant's impairment claim had been evaluated by two OWCP medical advisers. He noted that, in accordance with the May 8, 2012 decision of OWCP's hearing representative, the case had been referred on June 12, 2012 to an OWCP medical adviser to review Dr. Fritzhand's July 22, 2011 impairment report with a correct listing of appellant's accepted work-related medical conditions. However, prior to receipt of the report OWCP had initiated a referral on June 29, 2012 to Dr. Slutsky. This report, which found that appellant had no ratable impairment based on her accepted lower back conditions, was received into the case file on July 2, 2012 and provided the basis of OWCP's decision denying a schedule award. Dr. Berman's report was received on July 16, 2012. Accordingly, the hearing representative remanded to the district office for consideration of whether the weight of medical evidence in this case, with regard to appellant's schedule award claim, was represented by Dr. Berman or Dr. Slutsky.

By decision dated March 6, 2013, OWCP, relying on Dr. Berman's July 16, 2012 report, granted appellant a schedule award for a four percent permanent impairment of the left lower extremity and a four percent permanent impairment of the left lower extremity for the period July 22 to December 30, 2011, for a total of 23.04 weeks of compensation.

By letter dated March 25, 2013, appellant's attorney requested an oral hearing, which was held on July 19, 2013.

By decision dated November 5, 2013, an OWCP hearing representative affirmed the March 6, 2013 decision.

## LEGAL PRECEDENT

The schedule award provision of FECA<sup>7</sup> and its implementing regulations<sup>8</sup> 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>9</sup> 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>10</sup>

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.<sup>11</sup> A schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>12</sup> The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.<sup>13</sup> It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the FECA Procedure Manual.<sup>14</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>15</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

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Veronica Williams*, 56 ECAB 367, 370 (2005).

<sup>11</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3).

<sup>13</sup> The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

<sup>14</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

<sup>15</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>16</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment using the sixth edition" (July/August 2009) is to be applied.<sup>17</sup>

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH and if electrodiagnostic testing were done, GMCS.<sup>18</sup> The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).<sup>19</sup>

### ANALYSIS

The Board finds that a conflict in medical opinion exists between Dr. Fritzhand and Dr. Berman concerning the degree of permanent impairment to appellant's lower extremities caused by her accepted lower back conditions.

Dr. Fritzhand rated a nine percent impairment of the right and left extremity pursuant to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* (July/August 2009). He found that appellant had S1 nerve root deficit which yielded a class 1 impairment under Proposed Table 2 of *The Guides Newsletter*, Spinal Nerve Impairments, Lower Extremity Impairments. Relying on Table 16-11 of the A.M.A., *Guides*, Dr. Fritzhand found that she had a sensory deficit with severity level 3, severe, for impaired sharp/dull recognition, but retained protective sensibility; and a motor deficit, severity level 1, mild. He rated a functional history grade modifier 2, for a moderate problem and a clinical studies grade modifier 2 for a moderate problem, for a total net adjusted default impairment a grade E impairment, which produced a sensory impairment of four percent to each lower extremity and a motor impairment of five percent to each lower extremity, for a total nine percent impairment for each lower extremity.

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<sup>16</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>17</sup> See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>18</sup> A.M.A., *Guides* 533.

<sup>19</sup> *Id.* at 521.

This contrasted with the opinion of Dr. Berman, who utilized the same tables as Dr. Fritzhand but found that in his July 16, 2012 report that appellant had a four percent impairment to the right and left upper extremities under the A.M.A., *Guides* and *The Guides Newsletter* (July/August 2009).<sup>20</sup> Dr. Berman found that she had a mild, not a severe, sensory deficit under Table 16-11 which yielded a one percent impairment. He further found that appellant had a grade modifier 1 instead 2 for both functional history and clinical studies and a mild motor deficit of three percent, which yielded a grade C net adjusted impairment, for a four percent total impairment for the right and left lower extremities. As appellant's treating physician, Dr. Fritzhand, and Dr. Berman, an OWCP medical adviser, clearly disagreed regarding the severity of appellant's deficits, a conflict exists in the medical opinion evidence.

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>21</sup>

Accordingly, the Board sets aside the November 5, 2013 decision of the hearing representative and remands for referral of appellant, the case record and a SOAF to an independent medical specialist to determine the appropriate degree of her permanent impairment to her right and left lower extremities stemming from her accepted lower back conditions. After such further development of the record as it deems necessary, it shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision. The case is remanded for further development of the medical evidence.

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<sup>20</sup> On appeal, appellant's attorney argued that OWCP's methodology amounts to "junk science." The Board notes, however, that the A.M.A., *Guides* have been adopted as the uniform standard applicable to all claimants for the determination of permanent impairment under FECA. As indicated above, the methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

<sup>21</sup> 5 U.S.C. § 8123(a); *see also* B.C., 59 ECAB 111 (2006).



**ORDER**

**IT IS HEREBY ORDERED THAT** the November 5, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: December 24, 2014  
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