United States Department of Labor
Employees' Compensation Appeals Board

F.W., Appellant **and** **DEPARTMENT OF THE ARMY, WHITE SANDS MISSILE RANGE, NM, Employer**	))))))))	**Docket No. 14-344** **Issued: July 23, 2014**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Miriann D. Ozur, Esq., for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 2, 2013 appellant, through his attorney, filed a timely appeal from a September 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether appellant has more than a two percent impairment to each lower extremity for which he received schedule awards.

On appeal, appellant's counsel argues that the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guide*s) and in particular, the use of *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) is inappropriate as junk science. He argued that appropriate scientific methodology, including peer review, was not utilized in

[1] 5 U.S.C. §§ 8101-8193.

developing these standards. The Director of OWCP responded and noted that *The Guides Newsletter* has been consistently upheld by the Board as an appropriate method for calculating permanent impairment due to spinal injuries under FECA. Further, appellant's attorney did not establish that OWCP abused its discretion in applying *The Guides Newsletter* in determining permanent impairment in this case.

FACTUAL HISTORY

OWCP accepted that appellant, a 52-year-old toxic materials handler, sustained a sprain of the back, lumbar region and lumbosacral radiculopathy, aggravation of degenerative lumbar/lumbosacral spine and lumbar spondylolisthesis while moving a basket in the performance of duty on April 20, 2007. In an October 17, 2011 decision, the Board found that he had no employment-related permanent impairment to a scheduled member or function of the body. The facts as set forth in the Board's prior decision are hereby incorporated by reference.[2]

On August 29, 2012 appellant filed claim for a schedule award. In a September 6, 2012 report, Dr. Charles Zaltz, a Board-certified orthopedic surgeon, stated that appellant had a spinal impairment, pursuant to the A.M.A., *Guides*, of 19 percent based on Table 17-4 on page 571 of the A.M.A., *Guides.* He noted that appellant's impairment fell into class 3 related to stenosis at L4-5 and L5-S1 along with an alteration of motion segment integrity. Dr. Zaltz noted that appellant had persistent radiculopathy and a single appropriate level as indicated by the weakness of dorsiflexion of the extensor halluces longus on the right side and an electromyogram, which is demonstrated as acute radiculopathy bilaterally at L5. He also noted a documented history and an observed history of walking for less than five minutes related to spinal stenosis and scarring at the operative site. Dr. Zaltz noted no vascular reasons for the claudication and no evidence of a cauda equine syndrome.

On September 25, 2012 Dr. Michael M. Katz, a medical adviser, reviewed the medical report of Dr. Zaltz, which he found not probative as FECA does not allow a schedule award for the spine nor recognize whole person impairment. He noted that spinal nerve injury was best determined using the method described in *The Guides Newsletter* and recommended that a second opinion specialist evaluate appellant.

OWCP referred appellant to Dr. Zvi Kalisky, a Board-certified physiatrist, for a second opinion. In a December 19, 2012 report, Dr. Kalisky noted that appellant's clinical diagnosis was bilateral L5 radiculopathy which was confirmed by electrodiagnosis. He used the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* of July/August 2009. Dr. Kalisky opined that appellant had a two percent impairment of his left and right lower extremities. Appellant presented with mild sensory findings in the left lower extremity in the L5 root distribution. Dr. Kalisky diagnosed left L5 radiculopathy which was confirmed by an electrodiagnostic study. Under Table 16-11, page 533, of the A.M.A., *Guides* appellant's sensory deficit was consistent with severity I (mild). Dr. Kalisky noted that motor examination of the left lower extremity was intact and there was no motor radiculopathy to be rated. Table 2

[2] Docket No. 11-191 (issued October 17, 2011). On April 20, 2007 appellant, then a 52-years-old toxic material handler, filed a traumatic injury claim alleging that, on that date, while moving a basket, he felt a sharp pain in his lower back.

of *The Guides Newsletter*, July/August 2009 specified that L5 mild sensory deficit is class 1 impairment with a default value of one to the percent lower extremity. As for adjustment, Dr. Kalisky noted that, as GRIDS physical examination was used to define the class impairment, it did not serve as an adjustment. For functional history adjustment, the American Association of Orthopedic Surgeons (AAOS) lower limb score was 57 which is consistent with grade modifier 2. With regard to clinical studies (electrodiagnosis), Dr. Kalisky used a grade modifier 1 for mild pathology. The net adjustment was calculated to be +1, moving to the right of the default value to grade D, which resulted in two percent lower extremity impairment for L5 radiculopathy. Since there were no valid motor findings on examination, the impairment rating was limited to sensory radiculopathy. Appellant had no (zero percent) lower extremity impairment or motor radiculopathy, thus the total left lower extremity impairment was two percent.

With regard to the right lower extremity, Dr. Kalisky noted that appellant also presented with mild sensory findings in the right in L5 root distribution that was confirmed by electrodiagnostic study. Under Table 16-11 of the A.M.A., *Guides*, appellant's sensory deficit was consistent with severity I (mild). Motor examination of the right lower extremity was intact and there was no motor radiculopathy to be rated. Table 2 of *The Guides Newsletter,* July/August 2009 specified that L5 mild sensory deficit is class 1 impairment with default value of one percent lower extremity impairment. Dr. Kalisky again noted that GRIDS physical examination was used to define the class impairment, therefore, did not serve as an adjustment under functional history adjustment, appellant's AAOS lower limb score was 57, which was consistent with grade modifier 2. For clinical studies (electrodiagnosis) he had grade modifier 1 for mild pathology. The net adjustment is +1, moving to the right of the default value to grade D which results in two percent lower extremity impairment for L5 radiculopathy. Since there were no valid motor findings on examination, the impairment rating was limited to sensory radiculopathy. Dr. Kalisky noted no (zero percent) lower extremity impairment for motor radiculopathy and concluded that the total right lower extremity impairment is two percent.

On February 1, 2013 Dr. H. Mobley, a medical adviser, agreed with Dr. Kalisky's ratings.

On March 19, 2013 OWCP granted schedule awards for two percent loss of use of the right and left lower extremities.

On April 1, 2013 appellant, through counsel, requested a hearing before an OWCP hearing representative. At the July 16, 2013 hearing, he testified that he had failed back syndrome as his surgery did not work. Appellant noted that he could not bend over and often lost his balance. He noted constant pain in both legs.

In a decision dated September 9, 2013, the hearing representative affirmed the March 19, 2013 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] 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 stands 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] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[7] Neither FECA nor the implementing federal regulations provide for payment of a schedule sward for the permanent loss of use of the back, the spine or the body as a whole; a claimant is not entitled to such a schedule award.[8] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[9] A claimant may receive a schedule award for any permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.[10]

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment, set forth in the July/August 2009 *The Guides Newsletter*.[11] It was designed for situations in which 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 Federal (FECA) Procedure Manual.[12] The Board has recognized the adoption of this methodology as proper in order to provide a

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6.a (January 2010).

[6] *See id.; Jacqueline S. Harris,* 54 ECAB 139 (2002).

[7] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[8] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] 5 U.S.C. § 8101(19).

[10] *Thomas J. Engelhart, supra* note 7.

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

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[13]

ANALYSIS

OWCP accepted appellant's claim for sprain of the back, lumbar region; lumbosacral radiculopathy; aggravation of degeneration of lumbar/lumbosacral spine; and lumbar spondylolisthesis. It granted schedule awards for two percent impairment of each lower extremity.

Dr. Zaltz stated that appellant had a 19 percent impairment of the spine based on Table 17-4 on page 571 of the A.M.A., *Guides.* However, neither FECA nor the implementing federal regulations provide for a schedule award based on impairment to the back or spine. A schedule award is permissible, however, when the employment-related spinal condition affects the upper or lower extremities.[14] The Board notes that FECA does not authorize schedule awards for loss of use of the body as a whole.[15] The impairment rating of Dr. Zaltz is of little probative value.[16] OWCP properly forwarded the report of Dr. Zaltz to the medical adviser, who determined that a second opinion evaluation was necessary. Accordingly, OWCP referred appellant to Dr. Kalisky for a second opinion and to apply the sixth edition of the A.M.A., *Guides*.

The Board finds that Dr. Kalisky properly applied the A.M.A., *Guides*. Dr. Kalisky noted that appellant's clinical diagnosis was bilateral L5 radiculopathy that was confirmed by electrodiagnosis. Pursuant to Table 16-11 of the A.M.A., *Guides*, appellant's bilateral sensory deficit was mild with severity I.[17] Dr. Kalisky made identical findings for each extremity with regard to the adjustments. He noted that there was no motor radiculopathy. Applying Table 2 of *The Guides Newsletter*, Dr. Kalisky noted that a class 1 impairment had a default value of one percent of the lower extremity. He found no adjustment for physical examination but found a grade modifier 2 for functional history and a grade modifier 1 for mild pathology evinced by clinical studies. Based on the adjustments, Dr. Kalisky moved the default value to the right to grade D, which represented two percent lower extremity impairment for L5 radiculopathy to each extremity. Dr. Mobley agreed with the impairment ratings. There is no medical evidence establishing greater impairment.[18] Accordingly, OWCP properly determined that appellant had a two percent impairment of each lower extremity and issued a schedule award in that amount.

On appeal, counsel asserts that OWCP's rating methodology for extremity impairment originating in the spine amounts to junk science. He also further maintained that *The Guides Newsletter* was not an official publication of the American Medical Association. As noted,

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[13] *D.S.*, Docket No. 14-12 (issued March 18, 2014).

[14] *Id.*

[15] *M.E.*, Docket No. 13-159 (issued May 14, 2013).

[16] *J.S.*, Docket No. 13-381 (issued April 26, 2013).

[17] A.M.A., *Guides* 533.

[18] *T.R.*, Docket No. 12-988 (issued February 22, 2013).

however, OWCP's reliance on the July/August 2009 *The Guides Newsletter* as incorporated into the Federal (FECA) Procedure Manual is a proper exercise of the Director's discretion.[19] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[20] OWCP adopted the sixth edition of the A.M.A., *Guides* for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which incorporates the proposed tables outlined in the July to August 2009 *The Guides Newsletter*.[21] The Board has recognized this adoption as proper in order to provide a uniform standard applicable to each claimant for a schedule award.[22]

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 did not have greater than two percent impairment to each lower extremity for which he received a schedule award.

[19] *E.D.*, Docket No. 13-2024 (issued April 24, 2014).

[20] *D.S., supra* note 13.

[21] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700, Exhibit 4 (January 2010).

[22] *D.S.*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2013 is affirmed.

Issued: July 23, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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