



On appeal appellant asserts that the opinion of his attending physician is entitled to greater weight because he will need life-long care due to the accepted conditions.

### **FACTUAL HISTORY**

On July 26, 2011 appellant, then a 38-year-old special agent, fell from a ladder while moving equipment, injuring his jaw and back. He stopped work that day. OWCP accepted that he sustained a closed fracture of the mandible, orbital floor and L3 vertebra. It subsequently accepted other complications of internal structures of the mouth. Appellant underwent mandibular fracture repair and dental surgery. He returned to work on September 29, 2011 and to full duty with no restrictions on October 13, 2011.

On August 1, 2012 appellant filed a schedule award claim. In an August 22, 2012 letter, OWCP informed him to submit a report from his physician that was in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>2</sup>

In a February 9, 2013 report, Dr. Mark Bernhard, a Board-certified physiatrist, reviewed the history of injury and noted self-reported activities of daily living and a pain questionnaire, and a range of motion study. A functional capacity evaluation noted that appellant could perform all activities of the special agent position. Dr. Bernhard reported that appellant had a pain level of zero to three and that visual inspection of the jaw and facial structure revealed a dental retainer, and a three-centimeter long scar at the right mandibular area, and an audible and palpable click on the right mandible on opening and closing. On physical examination there was decreased sensation of the right leg anteriorly. Lower extremity muscle strength was normal bilaterally. Dr. Bernhard advised that lower extremity electrodiagnostic studies showed no evidence of abnormality. He diagnosed right mandibular fracture, status post open reduction and internal fixation; palatal fracture, right medial and lateral pterygoid plates; right orbital fracture, status post open reduction and internal fixation; mild eye proptosis; compression fracture with greater than 50 percent loss of height of the vertebral body and hypertension with exacerbation. Dr. Bernhard advised that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had a class 2 impairment under Table 17-4, Lumbar Spine Regional Grid for a 12 percent whole person impairment. Based on the pain questionnaire, he had a grade modifier of 1, for a total 13 percent whole person impairment. Under Table 11-5, Facial Disorders/Disfigurement, appellant had a grade 2 impairment for an additional six percent impairment. Dr. Bernhard concluded that under the Combined Values Chart, appellant had 18 percent whole body impairment.

By report dated June 26, 2013, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the record, including Dr. Bernhard's report. He noted that a schedule award was not payable under FECA for injury to the spine but was payable for the loss of use to the extremities. Dr. Harris diagnosed a fracture of the L3 vertebral body with right lumbar radiculopathy. He advised that, under the sixth edition of the A.M.A., *Guides*, and *The Guides Newsletter*, appellant had one percent impairment of the right leg for residual problems with mild pain and impaired sensation with right L3 lumbar radiculopathy and an additional one

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

percent impairment for residual problems with mild pain and impaired sensation with right L4 lumbar radiculopathy, for a total two percent right leg impairment. Dr. Harris found that appellant had zero percent (no) impairment of the left leg. He advised that the date of maximum improvement was January 17, 2013, when appellant was evaluated by Dr. Bernhard.

Appellant submitted an application for a disfigurement award on August 7, 2013. He noted that he had scars on the right jawline and neck with loss of muscle control on the right side, twitching, a lop-sided smile and an open mouth that exposed gums and missing teeth. Two photographs were submitted on August 12, 2013. On August 21, 2013 OWCP informed appellant that he needed to provide a physician's report regarding his disfigurement.

In an August 10, 2013 report, Dr. Bernhard noted that because FECA did not grant a schedule award for a spinal impairment, as there was no spinal nerve involvement in the lower or upper extremities, appellant was not entitled to a schedule award for his spinal injury. He advised that maximum medical improvement was reached on November 1, 2011. Dr. Bernhard noted no scars or disfigurement in relation to appellant's claim.

On September 6, 2013 appellant was granted a schedule award for two percent impairment of the right lower extremity, for a total of 5.76 weeks, to run from January 17 to February 26, 2013. OWCP also found that appellant had no ratable left leg impairment. It stated that the impairment was based on the findings of Dr. Harris, an OWCP medical adviser.

By report dated November 12, 2013, Dr. Ellen Pichey, Board-certified in family and occupational medicine and an OWCP medical adviser, reviewed Dr. Bernhard's February 9, 2013 report in which he described a three centimeter scar in the right mandibular area. She advised that two photographs demonstrated a linear horizontal scar about three centimeters in length which approximately paralleled the lips, lying about two centimeters below the lower lip, and that there could be an additional linear scar approximately one centimeter in length, that was one centimeter distal and parallel to the longer scar. Dr. Pichey found that the date of maximum medical improvement was February 9, 2013.

In a November 13, 2013 memorandum, an OWCP District Director advised that appellant's visible facial disfigurement, as reviewed by Dr. Pichey, could impair his ability to obtain employment. He found that \$2,750.00 was the proper disfigurement award in this case.

In a November 13, 2013 decision, OWCP awarded appellant \$2,750.00 for facial disfigurement.

### **LEGAL PRECEDENT -- ISSUE 1&2**

The schedule award provision of FECA,<sup>3</sup> and its implementing federal regulations,<sup>4</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,

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

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.<sup>5</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>6</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>7</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>8</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.<sup>9</sup> OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in the July/August 2009 *The Guides Newsletter*.<sup>10</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>11</sup> In determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.<sup>12</sup>

### **ANALYSIS -- ISSUE 1 & 2**

The Board finds that appellant has no more than a two percent impairment of the right leg. OWCP accepted that he sustained a closed fracture of the L3 vertebra. The Board finds that the weight of the medical evidence rests with the opinion of Dr. Harris, OWCP's medical

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<sup>5</sup> 20 C.F.R. § 10.404(a).

<sup>6</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>7</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>8</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>9</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>10</sup> 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).

<sup>11</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

<sup>12</sup> *Peter C. Belkind*, 56 ECAB 580 (2005).

adviser, who provided the only impairment evaluation of record that properly applied the sixth edition of the A.M.A., *Guides*.

In a February 9, 2013 report, Dr. Bernhard, the attending physiatrist, stated that he rated appellant's lower extremity impairment in accordance with Chapter 17, "The Spine and Pelvis." As noted, lower extremity impairments are to be rated as provided in Exhibit 4 of section 3.700 of OWCP's procedures based on *The Guides Newsletter*. Proposed Table 2 is to be used in rating lower extremity impairments caused by spinal nerve injury.<sup>13</sup> In a February 9, 2013 report, Dr. Bernhard provided a whole person impairment. FECA does not authorize schedule awards for permanent impairment of the whole person.<sup>14</sup> On August 10, 2013 Dr. Bernhard advised that appellant had no spinal nerve involvement in the lower or upper extremities. Therefore, he was not entitled to a schedule award for his spinal injury.

In a June 26, 2013 report, Dr. Harris reviewed the medical record, including the reports of Dr. Bernhard. He found that maximum medical improvement was reached on January 17, 2013, the date of Dr. Bernhard's evaluation. Dr. Harris utilized proposed Table 2 in *The Guides Newsletter* and found class 1 impairments of one percent each for sensory loss at L3 and L4, for a total right lower extremity impairment of two percent. He also found that appellant had no impairment of the left leg.

The Board finds that Dr. Harris properly reviewed the medical record and evaluated appellant's right lower extremity impairment in accordance with *The Guides Newsletter* and OWCP procedures found at Exhibit 4 of section 3.700. There is no medical evidence in conformance with the A.M.A., *Guides* showing a greater impairment. Appellant has not met his burden of proof to establish greater than two percent right leg impairment or a ratable impairment of his left leg.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8107(c)(21) of FECA provides that payment of compensation not to exceed \$3,500.00 may be made for disfigurement of the face, head or neck which is likely to handicap the claimant in securing or maintaining employment.<sup>15</sup> OWCP procedures further provide that an OWCP medical adviser will be asked to review such claims and to evaluate the employee's disfigurement. If the medical adviser finds that maximum medical improvement has occurred, the medical adviser shall review the photographs submitted with the medical evidence of record. The concurrence of the District Director or the Assistant District Director must be obtained. Following the file review, the medical adviser and District Director or the Assistant District Director will write a memorandum which contains a description of the disfigurement. If the medical adviser does not find that maximum medical improvement has occurred, but has submitted a statement as to whether plastic surgery may improve the appearance and decrease

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<sup>13</sup> *Supra* note 10.

<sup>14</sup> *N.D.*, 59 ECAB 344 (2008).

<sup>15</sup> 5 U.S.C. § 8107(c)(21).

the degree of disfigurement and the claimant is amenable, the medical adviser should include in his or her statement information concerning arrangements for treatment.<sup>16</sup>

In an appeal involving disfigurement, the question before the Board is whether the amount awarded by OWCP was based upon sound and considered judgment and was proper and equitable under the circumstances as provided by section 8107(c)(21) of FECA.<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

Section 8107(c)(21) of FECA provides that payment of compensation not to exceed \$3,500.00 may be made for disfigurement of the face, head or neck which is likely to handicap the claimant in securing or maintaining employment.<sup>18</sup> The Board finds that OWCP properly followed its procedures in determining that appellant was entitled to \$2,750.00 for facial disfigurement.<sup>19</sup>

Dr. Pichey, an OWCP medical adviser, reviewed the record, including Dr. Bernhard's February 9, 2013 report. She noted that Dr. Bernhard described a three centimeter scar in the right mandibular area and that two photographs demonstrated a linear horizontal scar about three centimeters in length and an additional linear scar approximately one centimeter in length. Dr. Pichey found that the date of maximum medical improvement was February 9, 2013. In a November 13, 2013 memorandum, a District Director advised that appellant's visible facial disfigurement, as reviewed by Dr. Pichey, could impair his ability to obtain employment. He found that \$2,750.00 was the proper disfigurement award in this case.

The Board finds that OWCP did not abuse its discretion in awarding \$2,750.00 for permanent disfigurement. Although appellant believes \$2,750.00 is insufficient compensation for his disfigurement, he has not demonstrated that he is entitled to a greater award for permanent facial disfigurement.<sup>20</sup>

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 establish that he has greater right leg impairment than that for which he has already received a schedule award, that he did not establish ratable left

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<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disfigurement*, Chapter 2.808.10 (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Disfigurement*, Chapter 3.700.5 (January 2010); *see D.H.*, Docket No. 10-2095 (issued June 6, 2011).

<sup>17</sup> *W.P.*, Docket No. 12-1677 (issued March 12, 2013).

<sup>18</sup> 5 U.S.C. § 8107(c)(21).

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *See D.H.*, *supra* note 16.

leg impairment, and that OWCP did not abuse its discretion in awarding \$2,750.00 for facial disfigurement.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13 and September 6, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 15, 2014  
Washington, DC

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

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

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