

permanent impairment of the right upper extremity.² On August 1, 2003 the Board reversed a January 17, 2002 loss of wage-earning capacity determination.³ By decision dated November 22, 2005, the Board set aside February 4 and November 5, 2004 decisions granting appellant a schedule award for a nine percent right upper extremity impairment.⁴ The Board determined that OWCP failed to follow its medical adviser's request for a supplemental medical report addressing the extent of appellant's permanent impairment. In a decision dated October 19, 2006, the Board affirmed in part and set aside in part a February 1, 2006 decision finding that appellant had a 13 percent permanent impairment of the right upper extremity.⁵ The Board noted that the medical evidence addressed the left rather than right upper extremity impairment. The Board found that appellant had a 13 percent left upper extremity impairment but remanded the case for further development to determine the extent of any permanent impairment of the right upper extremity. By order dated December 31, 2007, the Board affirmed in part and set aside in part January 12 and May 23, 2007 decisions granting appellant a schedule award for a 13 percent left upper extremity and offsetting compensation from the schedule award to recover an amount paid to him in error for his right upper extremity.⁶ The Board found that OWCP had not adequately explained why appellant received an overpayment which should be recovered by withholding a portion of his schedule award. In a decision dated December 12, 2008, the Board set aside June 25, 2007 and March 14, 2008 decisions finding that appellant received an overpayment of compensation because it erroneously paid him a schedule award for more than a nine percent permanent impairment of the right upper extremity.⁷ The Board determined that OWCP failed to properly adjudicate the extent of his permanent impairment of the right upper extremity and remanded the case for further development of the medical evidence. By decision dated April 4, 2011, the Board set aside an April 19, 2010 decision finding that appellant had no more than a nine percent permanent impairment of the right upper extremity.⁸ The Board determined that neither the second opinion physician nor the medical adviser appropriately rated his impairment of the extremity resulting from a spinal nerve impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). The Board remanded the case for OWCP to obtain a medical opinion regarding the extent of appellant's right upper extremity impairment consistent with the July/August 2009 edition of *The Guides Newsletter*. In

² *Order Granting Remand and Cancelling Oral Argument*, Docket No. 02-1225 (issued June 2, 2003). On March 19, 1999 appellant, then a 48-year-old mail handler, filed an occupational disease claim alleging that he sustained a back condition due to factors of his federal employment. OWCP accepted the claim for an acceleration of cervical spine disease. Appellant underwent bilateral posterior foraminotomies at C3-4 and C4-5 on January 27, 1999 and an anterior discectomy and fusion at C6-7 on July 2, 1999. He further underwent bilateral foraminotomies and fusion at C4-5, C5-6 and C6-7 on December 10, 2004.

³ Docket No. 02-1072 (issued August 1, 2003).

⁴ Docket No. 05-1726 (issued November 22, 2005).

⁵ Docket No. 06-122 (issued October 19, 2006).

⁶ *Order Remanding Case*, Docket No. 07-1753 (issued December 31, 2007).

⁷ Docket No. 08-1247 (issued December 12, 2008).

⁸ Docket No. 10-1562 (issued April 4, 2011).

an order remanding case dated August 24, 2012, the Board set aside a November 30, 2011 decision granting him an increased schedule award.⁹ The Board noted that OWCP had referred appellant to Dr. Michael D. Plooster, a Board-certified orthopedic surgeon, for a second opinion examination. The Board found, however, that Dr. Plooster and the medical adviser did not apply *The Guides Newsletter* in determining the extent of appellant's impairment caused by the injury to his cervical spine. The facts and the circumstances as set forth in the prior decisions and orders are hereby incorporated by reference.

On April 8, 2013 an OWCP medical adviser reviewed appellant's history of a herniated cervical disc. He stated:

“[Appellant] continues to have subjective complaints of neck and bilateral shoulder pain as well as numbness in the entire left upper extremity as well as numbness in the index finger and thumb of the right hand. The neurological examination demonstrated diminished sensation to pinprick in all four extremities in a nonanatomic distribution consistent with a nonphysiologic cause for the condition. There was weakness in the small muscles of the right hand. Deep tendon reflexes were described as symmetric at 1+. No focal muscular weakness was described. X-rays have demonstrated the fusion to be stable without evidence for pseudoarthrosis.”

The medical adviser identified the diagnosis as a class 3 disc herniation with multiple levels of radiculopathy using Table 17-2 on page 564 of the A.M.A., *Guides*, relevant to determining impairments of the cervical spine. He found that appellant had a whole person impairment of 13 percent, which he converted to a 21 percent impairment of each upper extremity using Table 15-11 on page 420. The medical adviser stated, “This award would replace previous awards as it was based on [*The Guides*] *Newsletter* describing the appropriate manner in which to rate PPI [permanent partial impairments] for spinal conditions.”

By decision dated April 24, 2013, OWCP granted appellant a schedule award for a total of 21 percent impairment of each upper extremity, less the previous award of 13 percent for the right upper extremity and 20 percent for the left upper extremity.

On appeal appellant asserts that he experiences constant shoulder pain, difficulty reaching and loss of sleep. He maintains that the employing establishment did not provide light duty and that he has to pay for snow shoveling.

LEGAL PRECEDENT

The schedule award provision of FECA,¹⁰ and its implementing federal regulations,¹¹ 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,

⁹ *Order Remanding Case*, Docket No. 12-661 (issued August 24, 2012).

¹⁰ 5 U.S.C. § 8107.

¹¹ 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.¹² As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹³

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹⁴ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

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.¹⁵

ANALYSIS

In an order dated August 24, 2012, the Board determined that neither Dr. Plooster, who provided a second opinion, nor the medical adviser applied the provisions of *The Guides Newsletter* in determining the extent of appellant's impairment of the upper extremities resulting from his cervical spine injury. The Board remanded the case for OWCP to obtain an opinion regarding the extent of any upper extremity impairment consistent with *The Guides Newsletter*.

On remand, OWCP's medical adviser reviewed the evidence of record and indicated that he was applying the provisions of *The Guides Newsletter*. Utilizing the cervical spine regional grid set forth at Table 17-2 on page 564, he identified the diagnosis as a herniated disc at multiple levels with radiculopathy, which yielded a whole person impairment of 13 percent. The medical adviser converted the 13 percent whole person impairment to a 21 percent right and left upper extremity impairment. *The Guides Newsletter*, however, provides a specific method for determining impairments such as radiculopathy from a spinal nerve injury. It explains that, in the sixth edition, impairment for radiculopathy is reflected in the diagnosis-based impairment for the spinal region. Consequently, OWCP's medical adviser improperly used Chapter 17 to determine appellant's impairment.¹⁶ In rating a spinal nerve impairment of the upper extremity, the proper table to use is Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments, which is set forth in *The Guides Newsletter*. As the record does not contain an

¹² *Id.* at § 10.404(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, 2.808.5(a) (February 2013); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁴ A.M.A., *Guides* 494-531.

¹⁵ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁶ *See T.R.*, Docket No. 12-988 (issued February 22, 2013).

opinion consistent with the sixth edition methodology rating appellant's upper extremity impairment, the case requires further clarification. The case is remanded to OWCP for this purpose. After such further development as it deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 5, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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