

(lumbago) and paid compensation. Appellant has two other employment-related back injuries. Under claim number xxxxxx921, OWCP accepted a lumbosacral strain of January 31, 2000. That claim was doubled into the instant claim. Under claim number xxxxxx604, OWCP accepted a lumbar sprain of May 25, 2006. On November 28, 2011 that claim was doubled into the current claim.

On January 13, 2002 appellant filed a Form CA-7, claim for a schedule award. In an October 3, 2001 report, Dr. David Weiss, an osteopath, cited May 29, 1996 and January 31, 2000 work injuries. He diagnosed additional low back conditions including bulging discs at three levels, aggravation of preexisting degenerative disc disease and lumbar radiculitis. Dr. Weiss opined that appellant reached maximum medical improvement on October 3, 2001 and had 19 percent impairment of the left lower extremity and 3 percent impairment of the right lower extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In an August 14, 2002 report, an OWCP medical adviser reviewed the medical records. He determined that Dr. Weiss' findings on examination supported 11 percent impairment of the left leg and 3 percent to the right leg with maximum medical improvement reached on October 3, 2001. The medical adviser addressed discrepancies in Dr. Weiss' application of the fifth edition of the A.M.A., *Guides*.

On September 9, 2002 OWCP authored, but did not issue, a decision granting compensation for 3 percent impairment to the right lower extremity and 11 percent impairment to the left lower extremity. It set up a payment for the schedule award, but deleted it as there was no issuance of the decision. A claims examiner indicated that the claim required further development as an August 20, 1998 referee examination² established no continuing injury-related residuals or disability with no radiculopathy, intervening injuries and a pending termination of benefits.³

On June 9, 2006 appellant's attorney inquired as to the status of the schedule award claim. OWCP did not respond.

In February 2008, OWCP referred appellant to Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, for a second opinion examination regarding the nature and extent of his continuing employment-related medical residuals and disability. The February 5, 2008 statement of accepted facts noted that the claim file had been combined for appellant's May 29, 1996 and January 31, 2000 work injuries. It did not mention the employment-related back injury of May 25, 2006 or describe the January 31, 2000 work injury. The second opinion specialist was

² In an August 20, 1998 report, Dr. Walter M. Flax, an impartial medical examiner, reviewed the case file, statement of accepted facts and examined appellant. He found that there was no evidence of functional loss, residuals or disability to appellant's back. Dr. Flax further stated that there was no evidence of a herniated disc and opined that treatment was no longer indicated and appellant was capable of working with no restrictions or limitations. His credentials are not of record.

³ The record reflects a notice of proposed termination of compensation on September 9, 1998. OWCP accorded determinative weight to Dr. Flax, an impartial medical examiner, opined that there was no evidence of functional loss, residuals or disability related to appellant's back.

not asked to provide an impairment rating. Dr. Hutter provided a report dated February 29, 2008.

On March 11, 2009 appellant's attorney inquired regarding the status of the schedule award claim. On November 17, 2009 OWCP notified both appellant that permanent impairment determinations were under the sixth edition of the A.M.A., *Guides*. Appellant was advised to obtain a physician's report concerning his lower extremity impairment.

In a December 9, 2009 report, Dr. Ronald E. Gennace, a Board-certified orthopedic surgeon, presented findings on examination. Examination of the lower extremities was essentially normal except for slight decreased pinprick to light touch over the left thigh. In a December 9, 2009 impairment worksheet, Dr. Gennace provided a primary diagnosis of "lumbar disc" and a subsidiary diagnosis of lumbar radiculitis. He opined that appellant had 13 percent impairment of the left lower extremity impairment, due to peripheral nerve impairment. Under the box labeled "sensory," Dr. Gennace noted class 1 and the box labeled "motor" was noted as class 0.

In a January 7, 2010 report, Dr. Henry J. Magliato, an OWCP medical adviser reviewed the case file. He found that Dr. Gennane had not provided sufficient rationale to support his impairment rating. Dr. Magliato failed to explain how the tables and pages of the A.M.A., *Guides* were utilized to determine impairment.

On July 13, 2010 OWCP referred appellant to Dr. P. Leo Varriale, a Board-certified orthopedic specialist, for examination and opinion on any permanent impairment. The February 5, 2008 statement of accepted facts was updated to note Dr. Hutter's second opinion examination.

In an August 10, 2010 report, Dr. Varriale reviewed a history of the May 29, 1996 back injury. He also cited a fall at work in 1980 where appellant injured his lower back resulting in progressive pain. Dr. Varriale reviewed the statement of accepted facts and provided findings on examination. He diagnosed lumbar strain and degenerative disc disease. Dr. Varriale found no objective motor or sensory impairment to the lower extremities and advised that appellant had no impairment.

On August 26, 2010 Dr. Magliato reviewed the case file and Dr. Varriale's report. He concurred that appellant had no lower extremity impairment.

By decision dated March 30, 2011, OWCP denied appellant's schedule award claim. It found that the weight of medical opinion from Dr. Varriale did not establish any employment-related impairment of a scheduled member.

In a letter postmarked April 8, 2011, appellant's attorney requested an oral hearing, which was held on August 10, 2011. On August 8, 2011 OWCP received a report from Dr. Weiss who advised that he was updating the October 3, 2001 examination findings to the sixth edition of the A.M.A., *Guides* and determined that appellant had 11 percent left leg impairment due to sensory loss involving the L3 and L5 nerve roots.

By decision dated October 26, 2011, an OWCP hearing representative set aside the March 30, 2011 decision and remanded the case to OWCP for further development. She determined that Dr. Varriale's second opinion was based on a flawed statement of accepted facts which did not describe the May 25, 2006 employment injury or the medical records relative to that claim. The hearing representative directed OWCP to double claim number xxxxxx604 with the present claim and to prepare an undated statement of accepted facts. Thereafter, appellant was to be referred to a new second opinion examiner to determine whether he sustained any employment-related impairment of the lower extremities.

In November 26, 2011 and February 8, 2012 letters, OWCP requested that appellant provide any relevant information and medical records related to the 1980 employment injury.

In a November 28, 2011 decision, OWCP denied appellant's request to participate in the selection of an impartial referee examination.

On November 28, 2011 OWCP doubled case number xxxxxx604 with the current case, making case number xxxxxx510 the master file. In a December 1, 2011 letter, it advised appellant that all three claims, xxxxxx510, xxxxxx921 and xxxxxx604 were combined.

In a February 22, 2012 letter, appellant stated that he did not file a claim for the 1980 work injury.

OWCP updated the statement of accepted facts on March 27, 2012. It referred appellant together with a list of questions and the case file, to Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, for a second opinion examination.

In an April 13, 2012 report, Dr. Lakin reviewed the history of injury, the medical records and the statement of accepted facts. He diagnosed low back syndrome, lumbosacral sprain, aggravation of lumbar sprain and opined that maximum medical improvement was reached on April 13, 2012. On examination, Dr. Lakin reported that appellant had normal sensation to both lower extremities with no sensory deficit or motor deficit. The May 31, 1996 and March 31, 2000 MRI scans of the lumbar spine showed multilevel degenerative disc disease at L3-4, L4-5 and L5-S1, bulging at L3-4, degenerative disc disease with diffuse bulging at L2-3, L3-4 and L4-5 but no evidence of a herniated nucleus pulposus. Dr. Lakin found that appellant had no (zero percent) impairment to the lower extremities as a result of the work-related injuries of May 29, 1996, January 31, 2000 and May 25, 2006. Under Table 15-14, page 425 of the sixth edition of the A.M.A., *Guides*, he stated that appellant was a Severity O as he had normal sensation to both lower extremities and no sensory deficit or motor deficit. Under Proposed Table 2, page 4 of *The Guides Newsletter*, July/August 2009, Rating Spinal Nerve Extremity Impairment, Dr. Lakin indicated that appellant was a class 0 as there is zero percent impairment to the lower extremities as a result of the work-related accidents. Appellant had no objective sensory or motor deficit and no impairment of the lower extremities as a result of the work injuries from May 29, 1996, which resulted in lumbago, low back syndrome; from the January 31, 2000 accident, which resulted in lumbosacral sprain and as a result of the May 25, 2006 accident, which resulted in an aggravation of the lumbar sprain.

On May 3, 2012 Dr. Magliato concurred with Dr. Lakin's opinion. Dr. Lakin conducted an examination of appellant's low back and found no lower extremity impairment. As there were no sensory or motor deficits, he did not use the Peripheral Nerve Impairment Tables in the sixth edition of the A.M.A., *Guides*. Dr. Magliato noted that, while Dr. Lakin found that maximum medical improvement was reached on April 13, 2012, he believed January 14, 2008 was a more accurate date as Dr. Gennace stated that the condition was static and Dr. Hutter's February 2008 second opinion examination, found no more treatment or testing was necessary.

In response to a June 29, 2012 request for clarification, on July 3, 2012 Dr. Magliato advised that there was no (zero percent) impairment of each lower extremity as no radiculopathy stemmed from the accepted lumbar spine conditions. He further stated no impairment calculations were possible since Dr. Lakin found no sensory or motor deficits.

By decision dated October 22, 2012, OWCP denied appellant's schedule award claim. It found the weight of medical opinion represented by Dr. Lakin.

On October 26, 2012 appellant's counsel requested a hearing, which was held on March 26, 2013. He argued that appellant had permanent impairment of each lower extremity based on the evidence of record in 2002.

By decision dated June 12, 2013, an OWCP hearing representative affirmed the October 22, 2012 decision. He accorded determinative weight to Dr. Lakin's second opinion report.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁵

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.⁶ 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

⁴ 5 U.S.C. § 8107.

⁵ See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ *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.⁷

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.⁸

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 an OWCP medical adviser providing rationale for the percentage of impairment specified.⁹

ANALYSIS

The Board finds that the medical evidence fails to establish that appellant sustained permanent impairment to either lower extremity. OWCP accepted the condition of low back syndrome (lumbago) due to the employment injury of May 29, 1996. Under claim number xxxxxx921, OWCP accepted the condition of lumbosacral sprain due to the injury of January 31, 2000. Under claim number xxxxxx604, it accepted an aggravation of a lumbar sprain on May 25, 2006. OWCP combined each of appellant's claims under the present file number on November 28, 2011.

On December 9, 2009 Dr. Gennace performed a schedule award examination under the sixth edition of the A.M.A., *Guides*. He found that appellant had 13 percent impairment of the left lower extremity and indicated that appellant had class 1 sensory and class 0 motor. Dr. Gennace failed to reference any specific pages or tables from the sixth edition of the A.M.A., *Guides* or otherwise explain how he arrived at his impairment calculation. He did not identify any permanent impairment to the right leg. The Board notes that a 13 percent impairment of a lower extremity under *The Guides Newsletter* would represent a severe impairment. Dr. Gennace however noted essentially normal examination findings. Additionally, there is no evidence that he was aware of appellant's May 25, 2006 work injury. An OWCP medical adviser reviewed Dr. Gennace's report and worksheet and found that there was insufficient information to arrive at an impairment calculation. Thus, Dr. Gennace's report is of diminished probative value.

Dr. Varriale performed a second opinion impairment evaluation on August 10, 2010 and found that appellant had no permanent impairment to the lower extremities. Dr. Magliato concurred with Dr. Varriale's determination. An OWCP hearing representative vacated the March 30, 2011 decision as Dr. Varriale's opinion was not based on an accurate factual and

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

⁸ A.M.A., *Guides* 533.

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

medical background. The statement of accepted facts failed to describe the May 25, 2006 employment injury or include the medical records relative to that claim.

Dr. Weiss provided an “updated” report based on his October 3, 2001 examination. His opinion is of diminished probative value as it did not take into account the May 25, 2006 employment injury and relied on stale examination findings. To be of probative value, a medical report must provide an opinion on the issue presented that is supported by medical rationale. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and employment factors identified by the claimant. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician’s opinion.¹⁰ The rating by Dr. Weiss was not based on an accurate factual and medical background and relied on examination findings from 2001. It is of diminished probative value.

Thereafter, OWCP combined all three claims and prepared an updated statement of accepted facts. It referred appellant to Dr. Lakin for an impairment determination. In an April 13, 2012 report, Dr. Lakin reported that appellant had normal sensation to both lower extremities with no sensory or motor deficits. As appellant had no objective sensory or motor deficits, Dr. Lakin determined that he had no (zero percent) impairment of the lower extremities as a result of the work injuries of May 29, 1996, January 31, 2000 and May 25, 2006. Dr. Magliato reviewed Dr. Lakin’s report on May 3 and July 3, 2012 and agreed that appellant had no impairment of either lower extremity. There was no evidence or documentation to support any radiculopathy or neurologic deficit. Dr. Lakin properly concluded that there was no medical evidence of impairment to the lower extremities resulting from the accepted work-related conditions. Therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

The Board finds that the weight of the medical evidence, as represented by Dr. Lakin’s report, does not establish a ratable impairment of the bilateral lower extremities as there is no medical evidence establishing impairment of the lower extremities, scheduled members, as a result of appellant’s accepted lumbar spine conditions.

On appeal and before OWCP, counsel argued that a schedule award should be issued for impairment to appellant’s lower extremities based on evidence from 2002. Counsel also argued that OWCP erred in failing to adjudicate the claim in a timely manner. Review of the file reflects an August 20, 1998 impartial examination from Dr. Flax who found that appellant had no continuing injury-related residuals or disability with no radiculopathy. Dr. Flax was not asked to address permanent impairment. As to the length of time OWCP took in adjudicating the claim, the record reflects that appellant sustained a lumbar sprain on May 25, 2006. This necessitated additional development of the medical evidence beyond the 2002 impairment calculation.

¹⁰ Jennifer Atkerson, 55 ECAB 317 (2004).

Counsel further contends that the opinions of Dr. Lakin and Dr. Magliato do not carry the weight of the medical evidence as a conflict was created with Dr. Weiss, who identified impairment to both lower extremities under the fifth and sixth editions of the A.M.A., *Guides*. Dr. Weiss' October 3, 2001 report was based on the fifth edition of the A.M.A., *Guides*. It is not relevant as the sixth edition of the A.M.A., *Guides* was adopted. While Dr. Weiss provided an "updated" impairment rating utilizing the sixth edition of the A.M.A., *Guides*, his findings were based on the October 3, 2001 examination and did not include appellant's subsequent work injury of May 25, 2006. Dr. Weiss' opinion is not based on an accurate factual and medical background or recent examination. Accordingly, it is not sufficient to create a conflict in medical opinion with Dr. Lakin.

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 has not established entitlement to a schedule award to his left or right lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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