

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

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**W.M., Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 13-2075  
Issued: March 5, 2014**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 11, 2013 appellant, through his attorney, filed a timely appeal from a June 26, 2013 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' 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 the decision.

**ISSUE**

The issue is whether appellant met his burden of proof to establish that he has a permanent impairment of the left lower extremity due to the accepted low back conditions.

On appeal, appellant's attorney asserts that, at the very least, a conflict in medical evidence has been created and referral for an impartial evaluation is warranted.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On May 17, 2011 appellant, then a 50-year-old city carrier, filed a traumatic injury claim alleging that he injured his middle back when exiting his postal vehicle on May 12, 2011. He stopped work on May 16, 2011. A May 30, 2011 magnetic resonance imaging (MRI) scan study of the lumbar spine demonstrated disc bulging and facet arthritis at L4-5 and L5-S1. Appellant returned to full duty on August 24, 2011.

In a September 21, 2011 decision, an OWCP hearing representative reversed a July 1, 2011 decision that denied appellant's claim and directed OWCP to accept left sciatica and left L5 radiculopathy. OWCP accepted these conditions on November 10, 2011. An August 29, 2012 lower extremity electrodiagnostic study was abnormal, demonstrating left L5-S1 radiculopathy. In an October 10, 2012 progress note, Dr. Jeremy I. Simon, a Board-certified physiatrist, who is also Board-certified in pain medicine, noted seeing appellant in follow up for his employment injury. Physical examination demonstrated 5/5 lower limb strength and intact sensation in the lower extremity dermatomes.

On November 30, 2012 appellant claimed a schedule award and submitted an August 21, 2012 report, updated on October 15, 2012, in which Dr. David Weiss, an osteopath, reported his review of the medical record including MRI scan and electrodiagnostic studies, appellant's history, and his complaint of daily lumbar pain radiating to the left leg with numbness and tingling. Dr. Weiss noted that appellant was a letter carrier who had modified his daily living activities due to the work injury. An August 21, 2012 examination showed a slightly antalgic gait and no tenderness to palpation of the lumbar spine. Sitting root sign and straight leg raising were negative. Leg strength was 5/5, and sensory examination revealed diminished light touch at L4, L5 and S1. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain, bulging lumbar disc at L4-5, aggravation of preexisting age-related lumbar degenerative disc disease, left lumbar radiculopathy, and status post interventional pain management with lumbar epidural blocks. He rated impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>2</sup> stating that it was based on the history provided by appellant, his examination, his employment duties and a medical records review. Under Proposed Table 2, found in the July/August A.M.A., *Guides Newsletter*, appellant had a class 1 moderate sensory impairment of the left L4 nerve root for three percent impairment. Dr. Weiss found net adjustment scores of two for functional history and one for clinical studies which, after applying the net adjustment formula, yielded a net adjustment of one for a final left lower extremity impairment of four percent due to a moderate sensory impairment of the L4 nerve root. He repeated his impairment evaluation for the left L5 nerve root, finding a class 1 impairment of three percent with modifiers of two each for functional history and clinical studies, which yielded a net adjustment of two, for a total five percent left lower extremity impairment due to an L5 moderate sensory impairment. Dr. Weiss then evaluated the S1 nerve root, finding a severe sensory deficit for a four percent impairment with modifiers of two each for functional history and clinical studies with a net adjustment of two, for a total four percent impairment for an S1 severe sensory impairment. He combined the impairment values for L4, L5 and S1, finding a total left leg impairment of 13 percent.

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

By report dated November 29, 2012, Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, noted his review of the record including Dr. Weiss' report. He advised that there was no basis for a lower extremity rating related to the accepted lumbar condition, indicating that Dr. Simon found intact lower extremity sensation and strength on October 10, 2012. Dr. Slutsky observed that Dr. Weiss, who found moderate sensory deficits at L4 and L5 dermatomes and a severe sensory deficit in the left S1 dermatome, only tested for light touch. He advised that, in accordance with Table 16-11 of the A.M.A., *Guides*, sensory loss testing must include light touch testing, sharp/dull discrimination testing, and protective sensation, and, thus, Dr. Weiss' examination did not comport with the A.M.A., *Guides*. Dr. Slutsky concluded that, as there was no impairment rating that properly evaluated appellant's left lower extremity in accordance with the A.M.A., *Guides*, appellant had not established entitlement to a schedule award.

By decision dated December 26, 2012, OWCP denied appellant's claim for a schedule award on the grounds that the medical evidence did not demonstrate a measurable impairment. Appellant, through his attorney, timely requested a hearing, that was held on April 11, 2013. He described the May 12, 2011 work injury and his symptoms of radiating left lower extremity pain with numbness, sharp tingling and some weakness. Appellant testified that he was working modified duty at the time of the injury and, after his return to work on August 24, 2011, has continued to work modified duty. His attorney argued that he should be referred for a second-opinion evaluation or that a conflict in medical evidence had been created.

In a decision dated June 26, 2013, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Slutsky finding that Dr. Weiss did not support his sensory findings in accordance with the methodology found in the A.M.A., *Guides*.

### **LEGAL PRECEDENT**

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, 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 after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.<sup>6</sup> For decisions issued after May 1, 2009, the sixth edition is to be used.<sup>7</sup>

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Id.* at 10.404(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>7</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).<sup>8</sup> Under the sixth edition, for lower extremity impairments the evaluator identifies 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).<sup>9</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>10</sup> Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>11</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.<sup>12</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>13</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>14</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 a July-August 2009 *The Guides Newsletter*.<sup>15</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he has a ratable impairment of the left lower extremity. OWCP accepted that he sustained left sciatica and left L5 radiculopathy and appellant filed a schedule award claim. The Board finds that the weight of the medical evidence rests with the opinion of Dr. Slutsky, an OWCP medical adviser,

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<sup>8</sup> A.M.A., *Guides*, *supra* note 2 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

<sup>9</sup> *Id.* at 494-531.

<sup>10</sup> *Id.* at 521.

<sup>11</sup> *Id.* at 23-28.

<sup>12</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>13</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>14</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>15</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); *supra* note 6 at Chapter 3.700, Exhibit 1, n.5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

who explained why Dr. Weiss' impairment evaluation did not comport with the sixth edition of the A.M.A., *Guides*.

In his November 29, 2012 report, Dr. Slutsky described an October 10, 2012 report in which Dr. Simon, an attending physiatrist, advised that appellant had intact sensation in the lower extremity dermatomes. He indicated that the impairment evaluation done by Dr. Weiss, an attending osteopath, did not comport with the A.M.A., *Guides* because the A.M.A., *Guides* provided that sensory loss testing must include light touch testing, sharp/dull discrimination testing and protective sensation.

In his October 15, 2012 report, based on physical examination done on August 21, 2012, Dr. Weiss advised that appellant had diminished light touch sensation on the left at L4, L5 and S1 which demonstrated sensory impairments of 4 percent, 5 percent and 4 percent respectively, for a total 13 percent left lower extremity.

Section 16.4a of the sixth edition of the A.M.A., *Guides*, provides that sensory deficit testing must include light touch testing, sharp/dull discrimination testing and describes the methodology to be used in interpreting sensory deficits.<sup>16</sup> The burden is upon the employee to establish that he or she is entitled to schedule award compensation.<sup>17</sup> When the examining physician does not provide an estimate of impairment that conforms to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by an OWCP medical adviser.<sup>18</sup> As Dr. Weiss did not indicate that he tested sharp/dull discrimination, his evaluation does not comport with the A.M.A., *Guides* and is insufficient to establish entitlement to a schedule award. Therefore, appellant's arguments on appeal are without merit.

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 a permanent impairment of the left lower extremity due to the accepted low back conditions.

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<sup>16</sup> A.M.A., *Guides*, *supra* note 2 at 532.

<sup>17</sup> *D.H.*, 58 ECAB 358 (2007).

<sup>18</sup> *J.Q.*, 59 ECAB 366 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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