

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

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**C.J., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**CUSTOMS & BORDER PROTECTION,** )  
**San Ysidro, CA, Employer** )

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**Docket No. 14-1308**  
**Issued: October 7, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 20, 2014 appellant filed a timely appeal from the December 6, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied an additional schedule award. 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 this case.

**ISSUE**

The issue is whether appellant has more than a 13 percent impairment of his left lower extremity, for which he received schedule awards.

**FACTUAL HISTORY**

On December 20, 2010 appellant, a 44-year-old border patrol agent, sustained a traumatic injury in the performance of duty while attempting to jump a fence in response to a sensor

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

activation. OWCP accepted his claim for lumbar sprain and lumbosacral (joint) sprain. It later accepted displacement of lumbar intervertebral disc without myelopathy.

OWCP issued a schedule award on September 24, 2012 for a four percent additional impairment of the left lower extremity. It indicated that appellant had already received a schedule award in 2003 for a nine percent impairment of the left lower extremity under another claim number,<sup>2</sup> accepted for an accepted left knee sprain. With the additional four percent impairment due to mild sensory and motor deficits of the S1 spinal nerve root, appellant's combined left lower extremity impairments totaled 13 percent.

On January 7, 2013 an OWCP hearing representative affirmed appellant's additional schedule award.

Dr. Thomas W. Harris, the attending orthopedic surgeon, examined appellant on March 26, 2013 and found a 10 percent impairment of the left lower extremity due to the combination of L5 moderate sensory deficit (3 percent), S1 moderate sensory deficit (2 percent), and an L5 mild motor deficit involving the extensor halluc longus (5 percent).

In a decision dated December 6, 2013, OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It reasoned that, while Dr. Harris found a 10 percent impairment of the left lower extremity, appellant had already received schedule awards for a 13 percent impairment. Accordingly, the evidence failed to establish that appellant was entitled to greater impairment.

Appellant argues on appeal that his initial schedule award was for his left knee, and now he has nerve damage, which is unrelated.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>3</sup> and the implementing regulations<sup>4</sup> set forth the number of weeks of compensation payable for 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 of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.<sup>5</sup>

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 standards applicable to all claimants. OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating

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<sup>2</sup> OWCP File No. xxxxxx564.

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

schedule losses.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

### ANALYSIS

Appellant submitted an impairment evaluation performed by his orthopedic surgeon, Dr. Harris, who found a 10 percent impairment of the left lower extremity due to several spinal nerve root deficits. OWCP found the percentage alone to be insufficient to establish that appellant was entitled to an additional award because he had previously received schedule awards totaling 13 percent impairment.

However, appellant received a schedule award under another claim for a nine percent impairment of his left lower extremity due to an accepted left knee strain. The record does not disclose how this impairment was calculated. When it was later determined that he had an additional four percent impairment due to mild sensory and motor deficits of the S1 spinal nerve root, OWCP combined the impairments due to left knee strain and spinal nerve root deficits to determine that appellant had a total left lower extremity impairment of 13 percent.

Appellant submitted evidence of a greater impairment due to spinal nerve root deficits. If this 10 percent impairment were combined with his previously determined 9 percent impairment for left knee sprain, his total left lower extremity impairment would total 18 percent, according to the Combined Values Chart on page 604 of the A.M.A., *Guides*.

OWCP did not refer this matter to its medical adviser for review. FECA procedures relating to the evaluation of schedule awards state that the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percent of impairment.<sup>8</sup>

As OWCP did not follow its procedures, the Board finds that this case is not in posture for decision. The Board will set aside OWCP's December 6, 2013 decision denying an additional schedule award and will remand the case for further development of the medical evidence. OWCP shall route the file to its medical adviser for review of Dr. Harris' most recent impairment evaluation and for an opinion on the nature and percentage of the entire impairment to the left lower extremity under the sixth edition of the A.M.A., *Guides*. Following such further development of the evidence as may become necessary, OWCP shall issue a *de novo* decision on appellant's entitlement to an additional schedule award.

### CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

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<sup>6</sup> 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

<sup>8</sup> *Id.* at Chapter 2.808.6.d.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 6, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: October 7, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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