

claim due to employment injuries of December 27, 2002 and April 9, 2003.² The facts and history contained in the prior appeal are incorporated by reference.³

On August 29, 2008 appellant filed a Form CA-7 claim for a schedule award. On February 1, 2010 he underwent L5-S1 laminectomy and fusion surgery. OWCP subsequently referred appellant to Dr. Bienvenido D. Ortega, a Board-certified neurologist, for a second opinion regarding his schedule award claim. In a March 20, 2010 report, Dr. Ortega reported his review of the medical record, including the statement of accepted facts and objective studies and noted that appellant reported complete resolution of left elbow shortly after the accident and that he had so far recovered fully following the February 1, 2010 surgery with no pain whatsoever. He opined that there was no medical evidence that appellant had any permanent impairment due to any current objective findings as a result of the work-related injury.

On April 11, 2012 an OWCP medical adviser reviewed Dr. Ortega's March 20, 2010 impairment evaluation as well as an August 25, 2010 report from Dr. Bruce T. Cohn, a Board-certified orthopedic surgeon, who released appellant to full-duty work. The medical adviser found no motor or sensory deficits of the bilateral lower extremities under the sixth edition of the American Medical Association's supplemental publication (*The Guides Newsletter*) (hereinafter). He agreed with Dr. Ortega that there was no residual lower extremity impairment. In an April 20, 2012 decision, OWCP denied appellant's schedule award claim.

Appellant requested an oral hearing, which was held on July 18, 2012. A June 19, 2012 report from Dr. John L. Dunne, an osteopath, noted the history of injury, a review of medical records and examination findings. He opined that appellant had zero percent impairment for a fully resolved contusion of the left elbow. Dr. Dunne also opined that there was 12 percent impairment of the whole person for the lumbar spine. He explained that there had been an alteration of motion segment integrity at a single level and explained the methodologies used to compute the impairment rating under Chapter 17 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (hereinafter).

By decision dated August 20, 2012, an OWCP hearing representative affirmed the prior decision of April 20, 2012. She noted that Dr. Dunne's report "neither utilizes the guidelines in *The Guides Newsletter* nor addresses Dr. Ortiz' lack of any objective findings of ongoing herniation or radiculopathy."⁴

Following the Board's order on remand, OWCP referred the case record to its medical adviser to review Dr. Dunne's June 19, 2012 report. In an April 29, 2013 report, Dr. Morton Slutsky, an OWCP medical adviser Board-certified in occupational medicine, noted his review of the record and opined that appellant had reached maximum medical improvement as of

² Docket No. 12-1932 (issued March 25, 2013).

³ This claim involves master case file number xxxxxx520, which was accepted for contusion of the back, contusion of the left elbow, lumbar sprain, lumbosacral neuritis or radiculitis and herniated disc as a result of the December 27, 2002 fall and subsidiary case file number xxxxxx026, which involved an April 9, 2003 temporary aggravation of lumbar sprain and lumbar disc herniation, resolved as of August 2, 2004.

⁴ While the hearing representative refers to the second opinion examiner as Dr. Ortiz, this should be Dr. Ortega.

August 25, 2010. He advised that there was no basis for a left upper extremity rating related to the accepted left elbow condition, as this was the same rating Dr. Dunne had rated for the left elbow. Dr. Slutsky further advised that there was no basis for a lower extremity impairment rating in either extremity since there were no objective sensory/motor deficits in the lower extremities related to the accepted lumbar conditions. He noted that Dr. Dunne reported normal lower extremity strength and sensation. Dr. Slutsky also noted that Dr. Dunne based his rating on tables in Chapter 17 of the sixth edition of the A.M.A., *Guides*,⁵ which referred to impairment of the spine itself and not to the lower extremities. He explained that impairment of a lower extremity, referable to an accepted spinal injury, was covered by the July/August 2009 *The Guides Newsletter* and not the spine tables in Chapter 17.

By decision dated July 25, 2013, OWCP denied appellant's schedule award claim. The weight of the medical evidence was accorded to the medical adviser's opinion. Appellant, through his attorney, requested a telephonic hearing, which was held on December 2, 2013. He testified that, while he was still working full duty as a letter carrier, he had difficulty with personal matters such as jogging and swimming due to his back condition. Appellant's attorney argued that the July/August 2009 *The Guides Newsletter* was faulty and OWCP should apply a rating method more favorable to appellant, such as that determined by Dr. Dunne.

In a decision dated January 27, 2014, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of OWCP's medical adviser, Dr. Slutsky, finding that Dr. Dunne's rating was not based on *The Guides Newsletter*.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ and its implementing federal regulations,⁷ 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.⁸ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.⁹ For decisions issued after May 1, 2009, the sixth edition is to be used.¹⁰

⁵ A.M.A., *Guides* (6th ed. 2008).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁰ FECA Bulletin No. 09-03 (issued March 15, 2009).

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.¹¹ 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.¹²

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.¹³ 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*.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a ratable impairment of the left upper extremity or either of his lower extremities due to his accepted left arm and back conditions. OWCP accepted that, under the current case file, he sustained lumbar sprain, lumbosacral neuritis or radiculitis and a herniated disc as a result of the December 27, 2002 fall. Under subsidiary case file number xxxxxx026, it accepted that appellant sustained an April 9, 2003 temporary aggravation of his lumbar sprain and a lumbar disc herniation, resolved as of August 2, 2004. Appellant filed a schedule award claim.

In his June 19, 2012 report, Dr. Dunne opined that there was zero percent impairment of the left upper extremity. Thus, there was no basis for a left upper extremity rating related to the accepted left elbow condition. Accordingly, appellant has not established entitlement to left upper extremity impairment.

In his June 19, 2012 report, Dr. Dunne also opined that there was 12 percent whole person impairment based on the accepted spinal injury under Chapter 17 of the A.M.A., *Guides*. FECA does not authorize schedule awards for loss of use of the spine.¹⁵ A claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The*

¹¹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹³ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁴ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 3.700, Exhibit 1, n.5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

¹⁵ *See J.Q.*, 59 ECAB 366 (2008).

Guides Newsletter. In this case, Dr. Dunne failed to utilize the proper standard. Therefore, his opinion as to the extent of appellant's permanent impairment was of limited probative value.¹⁶

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Slutsky, an OWCP medical adviser, who explained how Dr. Dunne's impairment evaluation did not comport with the sixth edition of the A.M.A., *Guides*. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁷ Dr. Slutsky reviewed Dr. Dunne's impairment ratings. He agreed with Dr. Dunne that there was no ratable impairment for the left upper extremity. Dr. Slutsky also noted that, since Dr. Dunne reported normal lower extremity strength and sensation, there was no basis for lower extremity impairment. He correctly pointed out that Dr. Dunne's impairment for the spine was not based on the standards set forth in *The Guides Newsletter*. Dr. Slutsky properly noted that, while Dr. Dunne provided an impairment rating by using the tables in Chapter 17, the A.M.A., *Guides* provides the appropriate method of evaluating extremity impairments resulting from a spinal nerve injury such as radiculopathy.¹⁸ 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.¹⁹ Accordingly, the weight of the medical opinion evidence is accorded to Dr. Slutsky's medical report.

There are no other impairment evaluations of record which find a ratable permanent impairment to either the left upper extremity or the lower extremities.

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for permanent impairment based on the accepted left arm and back conditions.

¹⁶ *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

¹⁷ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *James Mack*, 43 ECAB 321, 329 (1991).

¹⁸ *See, e.g., P.G.*, Docket No. 12-30 (issued May 15, 2012).

¹⁹ *See supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board