

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

L.S., Appellant	)	
	)	
and	)	<b>Docket No. 14-1460</b>
	)	<b>Issued: January 2, 2015</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Milwaukee, WI, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 16, 2014 appellant filed a timely appeal from a June 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for an increased 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.<sup>2</sup>

**ISSUE**

The issue is whether appellant has more than a 21 percent permanent impairment of each upper extremity for which he received schedule awards.

**FACTUAL HISTORY**

This case has previously been before the Board. In an order dated June 2, 2003, the Board granted the Director's motion to set aside an October 29, 2001 decision and remand the

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

<sup>2</sup> The record also contains a June 16, 2014 OWCP decision denying authorization for a cane. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c).

case for additional development of the medical evidence regarding the extent of appellant's permanent impairment of the right upper extremity.<sup>3</sup> On August 1, 2003 the Board reversed a January 17, 2002 loss of wage-earning capacity determination.<sup>4</sup> In a 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.<sup>5</sup> The Board found that OWCP failed to obtain a supplemental medical report addressing the extent of his permanent impairment as recommended by an OWCP medical adviser. By 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 left upper extremity,<sup>6</sup> and remanded the case for further development on the extent of any permanent impairment of the right upper extremity. In an 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.<sup>7</sup> The Board found that OWCP did not sufficiently explain its finding that he received an overpayment which should be recovered by withholding a portion of his schedule award. By 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 OWCP erroneously paid him a schedule award for more than a nine percent permanent impairment of the right upper extremity.<sup>8</sup> The Board determined that OWCP did not properly adjudicate the extent of his permanent impairment of the right upper extremity and remanded the case for further development of the medical evidence.

In a decision dated April 4, 2011, the Board set aside an April 19, 2010 OWCP decision, finding that appellant had no more than a nine percent permanent impairment of the right upper extremity.<sup>9</sup> It 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*, (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009). The Board remanded the case for OWCP to obtain a medical opinion regarding the extent of his right upper extremity impairment consistent with the July/August 2009 edition of *The Guides Newsletter*. In an *Order Remanding Case* dated August 24, 2012, the Board set aside a November 30, 2011 decision granting

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<sup>3</sup> *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. He 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. Appellant further underwent bilateral foraminotomies and fusion at C4-5, C5-6 and C6-7 on December 10, 2004.

<sup>4</sup> Docket No. 02-1072 (issued August 1, 2003).

<sup>5</sup> Docket No. 05-1726 (issued November 22, 2005).

<sup>6</sup> Docket No. 06-122 (issued October 19, 2006).

<sup>7</sup> *Order Remanding Case*, Docket No. 07-1753 (issued December 31, 2007).

<sup>8</sup> Docket No. 08-1247 (issued December 12, 2008).

<sup>9</sup> Docket No. 10-1562 (issued April 4, 2011).

appellant an increased schedule award.<sup>10</sup> It 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 appellant's impairment caused by the injury to his cervical spine. On March 3, 2014 the Board set aside an April 24, 2013 decision finding that he had a total of a 21 percent permanent impairment of each upper extremity due to cervical radiculopathy.<sup>11</sup> It found that the medical adviser had not applied *The Guides Newsletter* in reaching his impairment rating and remanded the case for OWCP to obtain an opinion on the extent of appellant's impairment in accordance with the sixth edition. The facts and circumstances as set forth in the prior decisions and orders are hereby incorporated by reference. The medical evidence set forth in the prior decisions relevant to the present appeal will be briefly summarized.

In a report dated July 28, 2009, Dr. Kenneth H. Yuska, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant had weakness of the right long finger flexors and small muscle due to a motor deficit at C6-7 and a probable partial sensory loss in the left hand "not entirely physiologic." Using the sixth edition of the A.M.A., *Guides*, he found that appellant had a 25 percent whole person impairment due to radiculopathy at multiple levels. Dr. Yuska stated, "[Appellant's] condition is a mild motor radiculopathy of the right hand, and a left sensory radiculopathy which, although at multiple levels, does not strictly correlate to the surgery involved."

In a supplemental report dated February 24, 2010, Dr. Yuska indicated that Chapter 15 of the A.M.A., *Guides* did not provide a rating for radicular pain and thus found that appellant had no upper extremity impairment.

In a report dated July 13, 2011, Dr. Plooster noted that appellant's upper extremity impairment originated in the spine. On examination he found "marked hypesthesia of the left upper extremity from the elbow distalward," absent brachial radialis, biceps and triceps reflexes in the bilateral extremities, and loss of sensation of the right index finger and thumb. Dr. Plooster further found a positive Tinel's sign on both sides of the neck. He advised that appellant had permanent disability due to his employment injury, including "pain, numbness in both upper extremities, loss of manual dexterity in his right hand, and loss of motion in his neck." Dr. Plooster questioned how to rate an upper extremity impairment originating in the spine using the sixth edition of the A.M.A., *Guides*. He selected the diagnosis of brachial plexus using Table 15-20 on page 434 to find a 20 percent left upper extremity impairment and a 13 percent right upper extremity impairment.

Electrodiagnostic testing performed on January 21, 2014 revealed bilateral mild carpal tunnel syndrome and chronic cervical radiculopathy on the left at C6 and C7.

On April 21, 2014 an OWCP medical adviser reviewed the evidence of record, in particular the July 28, 2009 and February 24, 2010 reports from Dr. Yuska and the July 13, 2011 report from Dr. Plooster. He indicated that OWCP authorized posterior foraminotomies on the right at C3-4 and bilaterally at C4-5 and an anterior discectomy and fusion at C5-6 and C6-7.

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<sup>10</sup> *Order Remanding Case*, Docket No. 12-661 (issued August 24, 2012).

<sup>11</sup> Docket No. 13-1703 (issued March 3, 2014).

Appellant also underwent a nonwork-related fusion at C3 to C7. The medical adviser noted that Dr. Yuska found an inconsistent sensory examination and weakness at C6 and C7 of the right hand, which was consistent with Dr. Plooster's finding. Citing *The Guides Newsletter*, he identified the diagnosis as grade 1 right C6 and C7 radiculopathy with mild motor deficits. The medical adviser applied a grade 1 modifier for functional history due to pain with strenuous activity and no modifier for clinical studies based on electrodiagnostic studies conducted January 21, 2014 of mild radiculopathy on the left rather than right side. He determined that a grade modifier for physical examination was not applicable as it was used to identify the diagnosis. Applying the net adjustment formula, the medical adviser found no adjustment. He concluded that appellant had a 5 percent impairment due to a motor deficit at C6 and a 5 percent impairment due to a motor deficit at C7, for a total right upper extremity impairment of 10 percent. The medical adviser found "no evidence to suggest a left upper extremity impairment."

By decision dated June 5, 2014, OWCP found that appellant had no more than the previously awarded 21 percent permanent impairment of each upper extremity.

On appeal, appellant argues that he incurred financial difficulties due to actions by OWCP. He requested compensation for leave used and for leave without pay taken from the date of his initial surgery until he stopped work in 2001. Appellant asserts that he could have worked longer if the employing establishment had provided him with limited duty.

#### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>12</sup> and its implementing federal regulations,<sup>13</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>14</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>15</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments.<sup>16</sup> OWCP has adopted this approach for rating impairment to the

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<sup>12</sup> 5 U.S.C. § 8107.

<sup>13</sup> 20 C.F.R. § 10.404.

<sup>14</sup> *Id.* at § 10.404(a).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>16</sup> *Id.* at Chapter 3.700, Exhibit 4 (January 2010); *see R.M.*, Docket No. 12-1811 (issued March 14, 2013).

upper or lower extremities caused by a spinal injury.<sup>17</sup> The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.<sup>18</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>19</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>20</sup> Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.<sup>21</sup>

### ANALYSIS

The Board remanded the case for OWCP to evaluate the extent of appellant's permanent impairment consistent with the provisions of *The Guides Newsletter*. On remand, an OWCP medical adviser reviewed the evidence of record, in particular the July 28, 2009 and February 24, 2010 reports from Dr. Yuska and the July 13, 2011 report from Dr. Plooster. Based on their reports, he opined that appellant had a 10 percent permanent impairment of the right upper extremity and no impairment of the left upper extremity.

The Board finds that the case is not in posture for decision regarding the extent of appellant's permanent impairment of each upper extremity. The medical adviser related that Dr. Yuska found weakness at C6 and C7 of the right hand and an inconsistent sensory examination. He noted that Dr. Plooster confirmed the finding of weakness of the right hand. The medical adviser identified the diagnosis as a mild motor deficit at C6 and C7 on the right, which yielded a default value of five percent under the provisions of *The Guides Newsletter*. The medical adviser found no alteration from the default value after applying grade modifiers. Dr. Plooster, however, determined that appellant had absent biceps, triceps, and brachial radialis reflexes and pain, and numbness in the bilateral upper extremities due to his employment injury. The medical adviser did not provide a rating due to sensory loss or explain why he did not accept Dr. Plooster's finding that appellant had a sensory impairment of the bilateral upper extremities other than to note that the prior OWCP referral physician, Dr. Yuska, found an inconsistent sensory examination. He further found that there was no evidence showing any permanent impairment of the left upper extremity even though electrodiagnostic testing dated January 21, 2014 revealed chronic cervical radiculopathy on the left at C6 and C7. Consequently, the medical adviser's opinion is insufficient to establish the extent of appellant's permanent impairment of the bilateral upper extremities.

Given the length of time since the last impairment evaluation by Dr. Plooster in 2011, on remand OWCP should refer appellant for another impairment evaluation to determine the extent of his bilateral upper extremity impairment. After such further development as deemed

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>20</sup> 20 C.F.R. § 10.121.

<sup>21</sup> *Melvin James*, 55 ECAB 406 (2004).

necessary, OWCP shall issue a *de novo* decision regarding the extent of any upper extremity impairment.

On appeal, appellant requests compensation for time lost from the time of his first surgery until he stopped working in 2001. OWCP, however, did not adjudicate the issue of disability from work in its June 5, 2014 schedule award decision and thus is not an issue presently before the Board.<sup>22</sup> Appellant further contends that OWCP caused him to sustain financial losses and that the employing establishment should have provided him with limited duty. The Board's jurisdiction, however, is limited to reviewing final adverse decisions of OWCP issued under FECA.<sup>23</sup>

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** decision of the Office of Workers' Compensation Programs dated June 5, 2014 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 2, 2015  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>22</sup> See 20 C.F.R. § 501.2(c).

<sup>23</sup> *Id.* at §§ 501.2(c) and 501.3(a) and *see supra* note 1.