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

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| **D.S., Appellant** | ) | |
| **and** | ) | **Docket No. 15-0606** |
| | ) | **Issued: July 2, 2015** |
| **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On January 27, 2015 appellant, through counsel, timely appealed a December 16, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 a ratable impairment of the lower extremities due to his employment-related lumbar condition.

[1] 5 U.S.C. §§ 8101-8193 (2006).

## ***FACTUAL HISTORY***

This case was previously before the Board.[2] Appellant, a 53-year-old custodian, injured his low back in the performance of duty on May 4, 2009.[3] OWCP accepted the claim for sciatica and lumbar radiculopathy. On September 16, 2010 appellant filed a claim (Form CA-7) for a schedule award. The last time the case was before the Board, OWCP had denied appellant's claim by decision dated November 1, 2012, which the Branch of Hearings and Review had affirmed on April 8, 2013. OWCP relied on the January 4, 2011 second opinion evaluation of Dr. Nathan A. Fogt, who found zero (0) percent upper or lower extremity impairment.[4] In a February 18, 2014 decision, the Board affirmed OWCP's denial of the schedule award based on Dr. Fogt's opinion. The Board found that the then-current record did not establish a ratable impairment of the lower extremities due to the accepted lumbar condition.[5]

On December 10, 2014 appellant's counsel filed a timely request for reconsideration. In support of the request, he submitted a November 19, 2014 impairment rating from Dr. Catherine E. Watkins-Campbell, who is Board-certified in both family medicine and occupational medicine. Dr. Watkins-Campbell found 15 percent left lower extremity impairment. She rated appellant for spinal nerve extremity impairment involving the L5 and S1 nerve roots. With respect to the left S1 nerve root, Dr. Watkins-Campbell found a moderate sensory deficit (two percent) and a mild motor deficit (three percent) for a combined five percent impairment. The left L5 nerve root revealed a mild sensory (2 percent) deficit and a mild motor (9 percent) deficit for a combined 11 percent impairment. Dr. Watkins-Campbell then combined the multilevel nerve root impairments, resulting in a 15 percent left lower extremity impairment.

In a decision dated December 16, 2014, OWCP reviewed the merits of the schedule award claim, but denied modification of the Board's February 18, 2014 decision.[6] It determined that the findings of the second opinion physician, Dr. Fogt, represented the weight of the medical evidence regarding appellant's impairment.

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[2] Docket No. 13-2011 (issued February 18, 2014).

[3] Appellant was injured lifting a bucket of water, which he then emptied into a sink.

[4] Dr. Fogt, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed employment-related lumbar sprain/strain and radicular back pain. He advised that appellant reached maximum medical improvement. Dr. Fogt also indicated that appellant was able to perform his custodian duties. Additionally, Dr. Fogt found zero (0) percent impairment of the upper or lower extremities under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2008). In a February 13, 2012 supplemental report, he reaffirmed his January 4, 2011 opinion. OWCP forwarded the case to its district medical adviser (DMA), and in a report dated September 1, 2012, Dr. Brian M. Tonne concurred with Dr. Fogt's finding of zero percent lower extremity impairment.

[5] The facts of the Board's February 18, 2014 decision is incorporated herein by reference.

[6] OWCP is not authorized to review Board decisions. Although the February 18, 2014 decision was the latest merit decision, the hearing representative's April 8, 2013 decision is the appropriate subject of possible modification by OWCP. 20 C.F.R. § 501.6(d).

## ***LEGAL PRECEDENT***

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[7] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[8] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[9]

Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[10] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[11] The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.[12] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the FECA procedure manual.[13]

## ***ANALYSIS***

The Board finds that the case is not in posture for decision. OWCP previously had determined that appellant had no ratable impairment based on the January 4, 2011 and February 13, 2012 reports of Dr. Fogt, an OWCP referral physician. Although appellant's July 20, 2009 electromyography (EMG) revealed mild left L5 lumbar radiculopathy, Dr. Fogt's January 4, 2011 neurological examination revealed no clinically relevant sensory deficits related to appellant's accepted work injury. In its prior decision, the Board explained that notwithstanding appellant's positive clinical studies, the neurological examination findings

[7] For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[8] 20 C.F.R. § 10.404.

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[10] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3).

[12] The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009).

[13] *See supra* note 9 at Chapter 3.700, Exhibit 4.

define the impairment value assigned under the A.M.A., *Guides* (6th ed. 2008).[14] The Board further explained that, without objective evidence of sensory and/or motor deficits on neurological examination, the appropriate impairment designation is "[c]lass 0" which corresponds to no ratable lower extremity impairment.[15] As noted, Dr. Fogt's neurological examination revealed no clinically relevant sensory deficits, and therefore, he found no ratable impairment. Dr. Tonne, the DMA, concurred with Dr. Fogt's findings. Accordingly, the Board affirmed OWCP's April 8, 2013 decision denying appellant's claim for a schedule award.

Subsequently, Dr. Watkins-Campbell examined appellant on November 19, 2014 and provided a left lower extremity rating ostensibly in accordance with the FECA-approved methodology for rating spinal nerve extremity impairment. She found 15 percent left lower extremity impairment based on a combination of motor and sensory deficits involving the L5 and S1 nerve roots. Dr. Watkins-Campbell noted that the 2009 and 2012 electrodiagnostic studies confirmed mild chronic bilateral L5 radiculopathy. She also noted that physical examination findings revealed evidence of both L5 and S1 radiculopathy in the left lower extremity. Dr. Watkins-Campbell's findings included decreased sensation to pinprick in the entire left leg in a stocking distribution. She also noted a grade 4/5 deficit with dorsiflexion of the left foot and ankle. The left L5 nerve root revealed a mild sensory deficit (two percent), which was based on decreased sensation to pinprick. There was also a mild motor deficit (nine percent) based on grade 4/5 strength with respect to ankle dorsiflexion. The sensory and motor deficits at L5 represented a combined left lower extremity impairment of 11 percent impairment. With respect to the left S1 nerve root, Dr. Watkins-Campbell found a moderate sensory deficit (two percent) based on pain in the S1 distribution. She also found a mild motor deficit (three percent) based on appellant's difficulty toe walking. The combined left S1 nerve root impairments represented 5 percent lower extremity impairment, and the combined L5 and S1 nerve root impairments resulted in a 15 percent left lower extremity impairment. Dr. Watkins-Campbells' report is probative as to permanent impairment due to appellant's accepted conditions of sciatica and lumbar radiculopathy.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.[16]

Appellant has filed a timely request for reconsideration of a denied schedule award and submitted a new impairment rating that is ostensibly based on the FECA-approved methodology for rating spinal nerve extremity impairment. Accordingly, the December 16, 2014 decision shall be set aside, and the case remanded to OWCP for further proper development of the new

[14] In addition to the July 20, 2009 EMG, the record included a June 5, 2012 EMG that demonstrated mild chronic bilateral L5 radiculopathies without ongoing denervation. This latest study when compared to appellant's 2009 left lower extremity study revealed an interval improvement in that there was no active denervation. A follow-up study on June 12, 2012 showed evidence for a mild distal axonal sensory polyneuropathy. Additionally, the report noted there had not been any significant interval change compared with the 2009 study.

[15] *See supra* note 13, Proposed Table 2.

[16] *William J. Cantrell*, 34 ECAB 1223 (1983).

medical evidence.[17] After such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding entitlement to a schedule award.

## ***CONCLUSION***

The case is not in posture for decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 16, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: July 2, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *John J. Carlone*, 41 ECAB 354 (1989).