

FACTUAL HISTORY

This case has previously been before the Board. On April 18, 2003 appellant, then a 61-year-old clerk, filed a traumatic injury claim alleging that he injured his back lifting a parcel in the performance of duty on April 18, 2003. OWCP accepted his claim for aggravation of sciatic nerve on June 12, 2003. A magnetic resonance imaging (MRI) scan dated September 11, 2003 demonstrated a very mild grade I/IV anterolisthesis of L3-4 without lysis with bilateral facet degeneration and mild disc bulges from L3 to S1. Appellant underwent x-rays on December 14, 2006 which demonstrated mild grade I/IV anterolisthesis of L3-4. He underwent a second MRI scan which found no gross interval change with no herniation or foraminal stenosis. OWCP accepted a recurrence of disability on September 13, 2007.

Appellant filed a claim for a schedule award on March 4, 2010. In support of his claim, he submitted a report dated February 2, 2009 from Dr. Arthur Becan, an orthopedic surgeon, who diagnosed chronic post-traumatic lumbar strain and sprain, herniated disc L3-4, anterolisthesis with spinal instability L4 over L5, discogenic disease of the lumbar spine and left lumbar radiculopathy. Dr. Becan evaluated appellant's right lower extremity and found a class 1 moderate sensory deficit of the right L5 and S1 nerve roots (sciatic) with a default impairment of four percent. He found Functional History grade modifiers of 3 (GMFH) and Clinical Studies grade modifiers of 3 (GMCS) to reach a net adjustment of 4 and a final right lower extremity impairment of nine percent. In regard to appellant's motor strength deficit of the right quadriceps/extensor hallucis longus (sciatic), Dr. Becan found the diagnosis had a default rating of nine percent for a class 1, mild IV/V deficit. He found functional history and clinical studies modifiers of 3 and a net adjustment of 4 to reach 13 percent impairment of the right lower extremity. Dr. Becan found a total right lower extremity impairment of 21 percent. He opined that appellant reached maximum medical improvement on February 2, 2009.

OWCP referred appellant, a statement of accepted facts, and a list of specific questions to Dr. Edward B. Krisiloff, a Board-certified orthopedic surgeon and second opinion physician, to determine appellant's permanent impairment due to his accepted back injury. In a report dated June 30, 2010, Dr. Krisiloff described the physical examination of appellant and noted that he found no hard neurologic findings. He stated, "The motor examination reveals some breakaway weakness that is likely secondary to pain and is not a true neurologic finding. The patient also complains of some decreased sensation, but a careful examination shows that it follows no anatomic dermatomal distribution and is therefore not a reliable finding." Dr. Krisiloff concluded, "He did not exhibit any hard neurologic findings in the lower extremities on my examination. Therefore, Dr. Krisiloff has no permanent neurologic residuals as a result of his condition."

On April 29, 2011 OWCP requested a supplemental report from Dr. Krisiloff, who responded on June 14, 2011 and opined that appellant had reached maximum medical improvement in July 2003. Dr. Krisiloff stated that appellant had continued issues with his lower back and left leg, but these were related to his underlying degenerative disc disease and not the employment injury of April 18, 2003. He found that appellant had no objective neurologic deficits in the lower extremities and that the peripheral nerve impairment table for residual radiculopathy could not be used. Dr. Krisiloff stated, "Left lower extremity impairment would therefore, be zero."

In a report dated September 19, 2011, Dr. Becan disagreed with Dr. Krisiloff's finding of no hard neurologic findings, breakaway weakness, or decreased sensation without anatomic dermatomal distribution. He stated that Dr. Krisiloff did not perform Semmes Weinstein Monofilament testing and that motor strength deficits were not graded. Dr. Becan reported that he found positive findings on his examination on February 2, 2009.

By decision dated November 23, 2011, an OWCP hearing representative found that appellant had no permanent impairment of the left lower extremity and remanded the case for additional development regarding any permanent impairment of appellant's right lower extremity. The Board reviewed this decision on June 13, 2013² and affirmed the hearing representative's decision that appellant had no permanent impairment of his left lower extremity.

Following remand from the hearing representative, OWCP issued a decision dated August 2, 2012 finding that appellant had no permanent impairment of his right leg due to his April 18, 2003 employment injury. Counsel requested an oral hearing and the hearing representative affirmed this decision on February 19, 2013, finding that appellant had no permanent impairment of his right lower extremity.

The Board reviewed this decision on December 24, 2013³ and found that there was an unresolved conflict of medical opinion evidence between Drs. Becan and Krisiloff regarding the permanent impairment of appellant's right lower extremity. The Board remanded the case for referral to an impartial medical specialist to resolve the conflict, pursuant to 5 U.S.C. § 8123(a). The facts and circumstances of the case as set forth in the Board's prior decisions are adopted herein by reference.

In a letter dated December 30, 2013, counsel asked to participate in the selection of the impartial medical specialist. By decision dated January 2, 2014, OWCP denied appellant's participation request.

On March 27, 2014 OWCP referred appellant, a statement of accepted facts and a list of questions to Dr. Aaron Sporn, a Board-certified orthopedic surgeon, for an independent evaluation. Dr. Sporn completed a report on April 15, 2014 noting that he had reviewed the statement of accepted facts, appellant's medical records, and performed a physical examination. He described appellant's history of low back injury. Appellant reported that he had no radiating symptoms into his right leg. He noted that he stumbled when walking. On examination Dr. Sporn found that appellant's gait was normal, with mildly diminished range of motion in the thoracic, and lumbar spines. He reported no trigger points, swelling, spasm, or clinically significant curves in the spine. Dr. Sporn stated that appellant's right lower extremity demonstrated range of motion within normal limits, with no signs of soft tissue swelling, tenderness, tendinitis, bursitis, ligamentous laxity, or nerve entrapment. He performed a peripheral neurological examination including motor strength testing, testing of reflexes and test of sensation. Dr. Sporn stated that there were no muscle deficits of the right lower extremity and that sensation of the right lower extremity was intact with grade 1 reflexes. He diagnosed

² Docket No. 12-772 (issued June 13, 2013).

³ Docket No. 13-1277 (issued December 24, 2013).

lumbar sprain and strain with left-sided lumbar radiculopathy symptoms. Dr. Sporn reviewed Dr. Becan's findings and conclusions regarding appellant's right lower extremity. He noted that appellant reported no right lower extremity symptoms. Dr. Sporn stated that appellant had significant neurological deficits of the left lower extremity, but that neurological examination of appellant's right lower extremity was normal. He concluded that on a strictly objective basis appellant's examination demonstrated no abnormalities in the right lower extremity attributable to appellant's accepted employment incident. Dr. Sporn stated, "There does not exist any disability or impairment of the right lower extremity that causally related to the April 18, 2003 accident."

OWCP's medical adviser reviewed Dr. Sporn's report on May 8, 2014 and agreed with his findings of no impairment as there were no objective findings of any neuropathy in appellant's right lower extremity.

By decision dated June 5, 2014, OWCP denied appellant's claim for a schedule award for permanent impairment of his right lower extremity. Counsel requested a review of the written record from OWCP's Branch of Hearings and Review on June 10, 2014.

The hearing representative issued a decision on November 20, 2014 finding that Dr. Sporn's report was entitled to the weight of the medical evidence. He stated that Dr. Sporn based his report on a proper factual and medical background and provided complete findings on physical examination noting no objective findings and no basis for a rating due to permanent impairment of the right lower extremity. The hearing representative noted that there were no motor or sensory impairments that could be rated under the appropriate tables of the A.M.A., *Guides*. He affirmed OWCP's June 5, 2014 decision denying a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁶

⁴ 5 U.S.C. §§ 8101-8193, 8107.

⁵ 20 C.F.R. § 10.404.

⁶ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.⁷ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,⁸ no claimant is entitled to such an award.⁹ FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.¹⁰ Payment is authorized only for the permanent impairment of specified members, organs, or functions of the body.

Amendments to FECA, however, 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. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹¹

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 certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹² 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.¹³ Specifically, it will address lower extremity impairments originating in the spine through Table 16-11.¹⁴

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based on a proper factual background, must be given special weight.¹⁵

⁷ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

⁸ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

⁹ *W.D.*, *supra* note 7. *Timothy J. McGuire*, 34 ECAB 189 (1982).

¹⁰ *W.D.*, *id.*

¹¹ *Id.* *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹² FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

¹³ Federal (FECA) Procedure Manual, *id.* at (Exhibits 1, 4).

¹⁴ A.M.A., *Guides* 533, Table 16-11.

¹⁵ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

ANALYSIS

The Board finds that appellant has not established a permanent impairment of his right lower extremity due to his accepted employment injury, thereby entitling him to a schedule award.

In the most recent appeal, the Board remanded the case for OWCP to obtain a report from an impartial medical examiner to resolve the existing conflict between Drs. Becan and Krisiloff, regarding whether appellant had a ratable impairment in his right leg attributable to his accepted conditions.

On remand, OWCP referred appellant, a statement of accepted facts, and a list of questions to Dr. Sporn for an impartial medical examination to determine whether appellant had a ratable impairment to his right leg attributable to his accepted conditions. In his April 15, 2014 report, Dr. Sporn indicated that he had reviewed the statement of accepted facts, appellant's medical records and performed a physical examination. Appellant reported no radiating-type symptoms into his right leg, but that he stumbled when walking. On examination Dr. Sporn found that appellant's gait was normal, that appellant's right lower extremity demonstrated range of motion within normal limits, no signs of soft tissue swelling, tenderness, tendinitis, bursitis, ligamentous laxity, or nerve entrapment. He performed a peripheral neurological examination including motor strength testing, testing of reflexes, and test of sensation. Dr. Sporn stated that there were no muscle deficits of the right lower extremity and that sensation of the right lower extremity was intact with grade 1 reflexes. He diagnosed lumbar sprain and strain with left-sided lumbar radiculopathy symptoms. Dr. Sporn reviewed Dr. Becan's findings and conclusions regarding appellant's right lower extremity. He found that on a strictly objective basis appellant's examination demonstrated no abnormalities in the right lower extremity attributable to appellant's accepted employment incident. Dr. Sporn concluded that appellant had no disability or impairment of the right lower extremity that causally related to the April 18, 2003 employment injury.

Dr. Sporn explained that appellant was neurologically normal in the right lower extremity and that was the reason he did not give an impairment percentage for the right lower extremity. He opined that appellant's primary problem was left leg radiculopathy. The Board finds that the impartial medical specialist adequately explained why appellant did not qualify for an impairment rating and his report is entitled to special weight.¹⁶

In a May 8, 2014 report, the medical adviser reviewed the report from Dr. Sporn and agreed that he had accurately reached his conclusion on impairment. Consequently, the weight of the medical evidence does not establish that appellant sustained a permanent impairment to a scheduled member of the body.

On appeal, counsel argued that the impartial medical specialist's report provided no proof of an accurate sensory examination. He argued that this report could not carry the weight of the evidence. Counsel further argued that Dr. Becan provided evidence of 21 percent impairment of appellant's right lower extremity. However, as Dr. Becan did not submit an additional report and

¹⁶ D.S., Docket No. 15-227 (issued May 12, 2015).

his original findings had been on one side of the conflict in the medical opinion that the impartial medical specialist resolved, the treating physician's reports were insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.¹⁷

Counsel further argued that Dr. Sporn did not correlate his findings with the A.M.A., *Guides* and therefore his report was not sufficient to resolve the conflict of medical opinion evidence. Both Dr. Sporn and the medical adviser found that there were no abnormal findings to correlate with the A.M.A., *Guides* and that due to appellant's normal lower extremity examination he had no permanent impairment of his right lower extremity entitling him to a schedule award.

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 has not met his burden of proof to establish permanent impairment due to his accepted work-related injuries. Therefore, appellant is not entitled to a schedule award.

¹⁷ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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