



evidence.<sup>1</sup> The Board directed OWCP to refer appellant to an impartial medical specialist. In an April 13, 2012 decision, the Board found that the case was not in posture for decision as the conflict in the medical evidence remained unresolved.<sup>2</sup> The Board remanded the case for OWCP to secure a supplemental report from the impartial medical examiner, Dr. David A. Bundens, Board-certified in orthopedic surgery. The Board found that OWCP improperly indicated that OWCP medical adviser's opinion represented the weight of the medical evidence. The Board noted that, to properly resolve the conflict of medical opinion, the impartial medical specialist should provide a reasoned opinion regarding the extent of permanent impairment. The Board set aside the February 23, 2011 decision and remanded the case for OWCP to request a supplemental report from Dr. Bundens regarding whether appellant had work-related permanent impairment in his arms or legs attributable to his accepted conditions.<sup>3</sup> The facts and history contained in the prior appeals are incorporated herein by reference.

In a May 15, 2012 letter, OWCP referred Dr. Bundens to his June 22, 2010 report, which rated spinal impairment, and asked that he clarify whether appellant had any ratable impairment of the arms or legs attributable to his accepted conditions. It requested that he utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6<sup>th</sup> ed. 2008) (A.M.A., *Guides*).

In a May 23, 2012 report, Dr. Bundens explained that, as noted in his previous report, appellant was neurologically normal in the upper and lower extremities. He opined that this was the reason he did not give a percentage for the upper or lower extremities, and why no impairment was found. Dr. Bundens opined that appellant's primary problem was within the cervical, thoracic, and lumbar spine. He further noted that his report "stands as dictated."

On August 17, 2012 OWCP denied appellant's claim for a schedule award.

On August 22, 2012 appellant's counsel requested a hearing, which was held on November 13, 2012. OWCP received a copy of a March 14, 2006 report from Dr. David Weiss, an orthopedic surgeon, in which he had examined appellant, but the report was updated on November 19, 2010 under the A.M.A., *Guides*. Dr. Weiss opined that appellant had an impairment of 15 percent to both the right and left lower extremities.

By decision dated January 29, 2013, an OWCP hearing representative set aside the August 17, 2012 decision. She found that the impartial medical specialist was provided with an inaccurate statement of accepted facts as not all accepted conditions were listed. The hearing representative directed that OWCP prepare a new statement of accepted facts and obtain a supplemental opinion from Dr. Bundens.

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<sup>1</sup> Docket No. 09-1290 (issued May 12, 2010).

<sup>2</sup> Docket No. 11-1485 (issued April 13, 2012).

<sup>3</sup> OWCP accepted appellant's claim for a lumbar sprain, lumbar radiculitis, and permanent aggravation of these conditions. Appellant also has an accepted claim for a contusion to his buttocks and low back strain. This claim was doubled into the present claim.

By letter dated February 5, 2013, OWCP provided Dr. Bundens with an updated statement of accepted facts and asked that he provide an opinion on impairment causally related to the accepted conditions.

In a report dated April 3, 2013, Dr. Bundens advised that he had reviewed the new statement of accepted facts. He advised that he saw nothing new that would change his opinion. Dr. Bundens reiterated that appellant sustained an injury to his spine, but that his “findings, percentages, etc. remained unchanged.”

By decision dated May 29, 2013, OWCP denied appellant’s claim for a schedule award. It found that the evidence did not establish a ratable impairment. On June 3, 2013 appellant’s counsel requested a hearing.

In an August 2, 2013 decision, an OWCP hearing representative set aside the May 29, 2013 decision. She found that OWCP failed to forward Dr. Bundens’ most recent supplemental report to an OWCP medical adviser for review prior to the issuance of its final decision. The hearing representative directed that OWCP have its medical adviser verify that Dr. Bundens properly arrived at his conclusion regarding permanent impairment.

On August 19, 2013 OWCP referred the updated statement of accepted facts and the reports from Dr. Bundens to an OWCP medical adviser for an opinion on whether Dr. Bundens had properly applied the A.M.A., *Guides*, in determining permanent impairment.

In an August 26, 2013 report, an OWCP medical adviser reviewed the reports of Dr. Bundens and concurred with him that there was no basis for finding permanent impairment under the A.M.A., *Guides*.

In a November 25, 2013 decision, OWCP denied appellant’s claim for a schedule award.

On December 2, 2013 appellant’s counsel requested a video hearing, which was held on May 22, 2014. He argued that Dr. Bundens did not complete any neurologic testing.

By decision dated August 5, 2014, an OWCP hearing representative affirmed the November 25, 2013 decision finding that Dr. Bundens’ opinion represented the weight of the medical evidence.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>4</sup> and its implementing federal regulations,<sup>5</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

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>7</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.<sup>8</sup> 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.<sup>9</sup> A schedule award is not payable for an impairment of the whole body.<sup>10</sup>

Section 8123(a) of FECA<sup>11</sup> provides, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.<sup>12</sup> 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.<sup>13</sup>

### ANALYSIS

The evidence of record is insufficient to establish that permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

In the most recent appeal, the Board remanded the case for OWCP to obtain a supplemental report from the impartial medical specialist, Dr. Bundens, regarding whether appellant had a ratable impairment in his arms or legs attributable to his accepted conditions.<sup>14</sup>

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<sup>6</sup> *Id.* at § 10.404.

<sup>7</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>8</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>9</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>10</sup> *N.M.*, 58 ECAB 273 (2007).

<sup>11</sup> 5 U.S.C. §§ 8101-8193.

<sup>12</sup> *Id.* at § 8123(a).

<sup>13</sup> *Barbara J. Warren*, 51 ECAB 413 (2000).

<sup>14</sup> *See I.H.*, Docket No. 08-1352 (issued December 24, 2008) (when OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report).

On remand, in a letter dated May 15, 2012, OWCP requested that Dr. Bundens provide a supplemental report with an opinion as to whether appellant had a ratable impairment to his arms or legs attributable to his accepted conditions. In a May 23, 2012 report, Dr. Bundens responded that he explained that appellant was neurologically normal in the upper and lower extremities and that was the reason he did not give a percentage for the upper or lower extremities, and why no award was granted. He opined that appellant's primary problem was within the cervical, thoracic, and lumbar spine. Dr. Bundens further advised that there were no changes in his opinion.

In an April 13, 2013 supplemental report, Dr. Bundens reviewed a new statement of accepted facts and advised that his opinion on permanent impairment remained unchanged. The Board finds that the impartial medical specialist explained why appellant did not qualify for an impairment rating and his report is entitled to special weight.<sup>15</sup> In an August 26, 2013 report, OWCP medical adviser reviewed the reports of Dr. Bundens and agreed that he had accurately applied the A.M.A., *Guides* in reaching his conclusion on impairment. Consequently, the medical evidence does not establish that appellant sustained a permanent impairment to a scheduled member of the body.

Subsequent to the most recent appeal, appellant submitted a November 19, 2010 report from Dr. Weiss, who advised that he updated his March 14, 2006 report, without an updated medical examination, to reflect use of the current edition of the A.M.A., *Guides*.<sup>16</sup> He opined that appellant has an impairment of 15 percent to both the right and left lower extremities. However, as Dr. Weiss 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.<sup>17</sup>

On appeal, appellant's counsel argued that the impartial medical examiner's report was vague, speculative, or unrationalized. He also argued that Dr. Weiss provided new findings and asserted that Dr. Bundens only performed one medical examination on June 22, 2010 and provided no proof of a neurological examination. Counsel argued that his report could not carry the weight of the evidence and a new impartial medical examination was needed. However, as found above, Dr. Bundens explained why he determined no impairment was warranted, noting that appellant's neurological examination was normal in the arms and legs. Additionally, Dr. Weiss, as noted above, was on one side of the conflict and is not sufficient to create a new conflict.

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

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<sup>15</sup> See *supra* note 13.

<sup>16</sup> Although Dr. Weiss noted a report updated to reflect the sixth edition of the A.M.A., *Guides*, there is no indication that he conducted a new examination contemporaneous with his updated report.

<sup>17</sup> See *supra* note 13. See also *Alice J. Tysinger*, 51 ECAB 638 (2000).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish permanent impairment due to his accepted work-related injuries.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 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