United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
	)	**Docket No. 15-1736**
and	)	**Issued: August 4, 2016**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Somerset, NJ, Employer	)	

Appearances:
Robert D. Campbell, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 14, 2015 appellant filed a timely appeal from a May 22, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that he is entitled to greater than seven percent permanent impairment of the right lower extremity and greater than two percent permanent impairment of the left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. On October 29, 2010 the Board set aside OWCP's August 7, 2009 decision, which denied appellant's claim for a schedule award, and remanded the case for further development.[3] The Board found that the October 30, 2008 supplemental report of Dr. Steven H. Fried, a Board-certified orthopedic surgeon selected as the impartial medical specialist, improperly excluded consideration of permanent impairment to the left leg because appellant did not sustain injury to that member.[4] The Board further found that OWCP did not advise Dr. Fried of the appropriate standard for determining impairment to the lower extremities in light of the accepted lumbar conditions. The case was remanded to OWCP to obtain clarification from Dr. Fried on this point or, if Dr. Fried was unable to clarify his opinion, to select a new impartial medical examiner. The facts and circumstances as outlined in the prior Board's order are incorporated herein by reference. The relevant facts are set forth below.

On December 20, 2001 appellant, then a 44-year-old regular carrier, injured his back when he slipped on a step and twisted his body the wrong way. He did not fall. OWCP accepted the claim for lumbar sprain. The claim was subsequently expanded to include the conditions of degenerative lumbar sprain, displaced lumbar intervertebral disc, and lumbar spinal stenosis. OWCP retroactively authorized a total lumbar laminectomy at L4-5 and L5-S1, bilaterally, posterior interbody fusion L4-S1, which appellant underwent on February 7, 2005. It accepted that appellant sustained a recurrence of total disability on March 4, 2004. Appellant received compensation for total disability from March 27, 2004 through January 2, 2006 and he returned to full-time limited-duty work on January 3, 2006.

On October 4, 2006 appellant requested a schedule award. In a June 14, 2006 report, Dr. Weiss opined that, pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had 19 percent left lower extremity impairment and provided his impairment calculations. In a December 4, 2006 addendum report, he noted further testing.

On February 27, 2007 an OWCP medical adviser reviewed the medical record. He found additional details on Dr. Weiss' testing procedures for the sensory components of the L4 and L5 nerves in the lower extremities were needed. The medical adviser also noted that it was highly unlikely that atrophy of the left calf was related to spinal nerve root problems. In a March 30,

[3] Docket No. 10-252 (issued October 29, 2010).

[4] A conflict in medical opinion existed between Dr. Bernard Rineberg, a Board-certified orthopedic surgeon and OWCP referral physician, and Dr. David Weiss, an osteopath and appellant's attending physician, regarding whether appellant experienced any lower extremity impairment and whether any impairment was related to the work injury.

2007 report, he reviewed additional reports from before and after appellant's surgery and recommended a second opinion evaluation to rate appellant's impairment due to significant differences between Dr. Weiss' and the neurosurgeon's evaluations.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical evidence of record, to Dr. Bernard Rineberg, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Dr. Weiss and the medical adviser. In a May 22, 2007 report, Dr. Rineberg concluded that appellant's degenerative arthritis of the lumbar spine was not work related. He indicated that appellant had a normal physical examination and his current complaints were not causally related to the work injury, but were related to degenerative arthritis of the lumbar spine. Dr. Rineberg advised that appellant's nerve roots were not affected and there was no permanent impairment due to loss of function from sensory deficit or decreased strength of the lower extremities. On June 14, 2007 another medical adviser reviewed Dr. Rineberg's report. He opined that, since there were no abnormal neurological findings in either lower extremity, there was no impairment and, thus, no schedule award.

By decision dated June 19, 2007, OWCP denied the claim for a schedule award because the medical evidence did not demonstrate any permanent impairment of a scheduled member due to appellant's work injury. Appellant requested a hearing. In a September 6, 2007 decision, an OWCP hearing representative determined that the case was not in posture for a hearing. The hearing representative found no true conflict of medical opinion existed at the time the referral was made to Dr. Rineberg, but a subsequent conflict in medical opinion arose between Dr. Weiss and Dr. Rineberg and an impartial medical examination was needed.

Appellant was referred, along with a SOAF and the medical record, to Dr. Steven H. Fried, a Board-certified orthopedic specialist, for an impartial medical examination. In a December 18, 2007 report, Dr. Fried reviewed the medical reports of record, noted appellant's complaints, and presented his examination findings. He opined that appellant had degenerative disc disease and arthritis of the lumbar spine that, at worst, was temporarily symptomatically aggravated during the December 1, 2002 work incident. Dr. Fried indicated that the degenerative disc disease was due to an accumulation of various factors, the most important of which was the aging process. He explained the single traumatic twist was a self-limiting temporary problem with symptoms due to inflammation in the soft tissues surrounding the lumbar region. Dr. Fried noted that the magnetic resonance imaging (MRI) scan examination of the lumbar spine taken two years after the work injury reported bulging discs, which were not trauma induced, but rather were due to the natural physiologic aging of the discs. He opined that appellant reached MMI on January 3, 2006, the date he returned to work. Dr. Fried further opined that appellant had an entirely normal neurologic examination, except for the complaint of a subjective basis of decreased sensation in his entire left lower extremity, which he found to be nonphysiologic. He advised that there was nothing on examination to indicate a specific nerve root or branch deficit that could be correlated to any injury. Thus, Dr. Fried opined that there was no permanent disability due to loss of function or from decreased strength and appellant had zero impairment for each lower extremity.

On January 25, 2008 a medical adviser noted that Dr. Fried's examination did not document any neurologic or other objective abnormalities indicative of an impairment. Thus, he opined that, under the fifth edition of the A.M.A., *Guides*, there would be no impairment of

either lower extremity. The medical adviser advised that he was in agreement that the accepted condition should be a resolved lumbar strain with underlying osteoarthritis and degenerative disc disease that was not aggravated by the work injury of December 1, 2001. He opined that appellant reached MMI on May 22, 2007, the date of Dr. Rineberg's examination, as there was no difference in appellant's examination when Dr. Fried examined him on December 18, 2007.

By decision dated January 31, 2008, OWCP denied the claim for a schedule award based upon Dr. Fried's referee examination report, confirmed by the medical adviser. On February 4, 2008 appellant requested a hearing, which was held on May 13, 2008. By decision dated August 4, 2008, an OWCP hearing representative set aside and remanded the case for further development because Dr. Fried had not been provided with a complete and accurate SOAF upon which to base his evaluation.[5] She also found no evidence to support that Dr. Fried was improperly selected through the Physician Directory System as suggested by appellant's counsel.

OWCP submitted an updated SOAF dated September 9, 2008 to Dr. Fried which noted the accepted conditions of lumbar sprain, degenerative lumbar sprain, displaced lumbar intervertebral disc, lumbar stenosis, and lumbar laminectomy and fusion. It requested that Dr. Fried review the September 9, 2008 SOAF and advise whether appellant had sustained any permanent impairment causally related to the accepted conditions and surgery.

In an October 3, 2008 supplemental report, Dr. Fried reviewed the September 9, 2008 SOAF and the medical evidence of record. He opined that there was nothing in the record to indicate any injury to the left lower extremity and that appellant's physical examination of December 18, 2007 confirmed that fact. Dr. Fried noted that the accepted facts of degenerative lumbar sprain, displaced lumbar intervertebral disc, and lumbar spinal stenosis were diagnoses referable to the lumbar spine and unrelated to the left lower extremity. He further opined that there was no evidence of any permanent partial impairment of the left lower extremity causally related to the accepted conditions. On December 21, 2008 OWCP's medical adviser agreed with Dr. Fried.

By decision dated February 4, 2009, OWCP denied the claim for a schedule award based on Dr. Fried's October 3, 2008 supplemental report, which the medical adviser confirmed. On February 10, 2009 appellant requested a hearing, which was held on June 22, 2009. Counsel raised various arguments concerning Dr. Fried's examination. He additionally argued Dr. Fried's supplemental report merely restated his previous opinion without rationale. By decision dated August 7, 2009, an OWCP hearing representative affirmed the February 4, 2009 decision.

Appellant appealed to the Board. In an order dated October 29, 2010, the Board remanded the case to OWCP to request a supplemental report from Dr. Fried, because OWCP did not advise Dr. Fried of the standard in determining lower extremity impairments due to a spinal injury.

[5] OWCP had only advised that the case had been accepted for a lumbar strain whereby the case had also been accepted for degenerative lumbar sprain, displaced disc, and surgery.

On February 28, 2011 OWCP arranged for a new referee examination to resolve the conflict of medical opinion between Dr. Weiss and Dr. Rineberg. In a March 23, 2011 report, Dr. Michael L. Silverstein, a Board-certified orthopedic surgeon, noted the history of injury, his review of the medical records and SOAF, and set forth examination findings. He indicated that he did not find any impairment referable to the work-related incident exacerbating a preexisting lumbar spondylosis problem. Dr. Silverstein noted that appellant had sustained a major injury to his right lower extremity in a vehicular accident. He found diminished sensation to light touch at the L5 and L1 dermatomes of appellant's left leg, which he opined were related to the preexisting lumbar problem, but were exacerbated by the December 2001 work-related incident which resulted in the subsequent surgical procedures. Based on his evaluation and the sixth edition of the A.M.A., *Guides*, Dr. Silverstein opined that appellant had eight percent whole person impairment. He also opined that appellant reached MMI. In an April 30, 2011 report, an OWCP medical adviser advised that Dr. Silverstein did not provide specific lower extremity impairment and requested that Dr. Silverstein provide an impairment rating based upon peripheral nerve loss and objective data.

On May 17, 2011 OWCP requested a supplemental report from Dr. Silverstein regarding appellant's lower extremity impairment. In a May 31, 2011 report, Dr. Silverstein indicated that appellant's peripheral nerve loss warranted two percent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides.* On June 21, 2011 an OWCP medical adviser provided a report agreeing with Dr. Silverstein's impairment assessment. He indicated that the date of MMI was the date of the examination of March 23, 2011.

By decision dated August 5, 2011, OWCP awarded appellant two percent impairment of left lower extremity. The award ran 5.76 weeks from March 23 to May 2, 2011.

On August 12, 2011 appellant requested a hearing before OWCP's Branch of Hearings and Review held on December 5, 2011. In a November 18, 2011 report, Dr. Weiss utilized the sixth edition of the A.M.A., *Guides* with his examination findings of June 14, 2006. He recommended that appellant sustained a combined 11 percent impairment of the right lower extremity and 11 percent impairment of the left lower extremity.

Following the December 5, 2011 hearing, OWCP's hearing representative, by decision dated February 27, 2012, set aside OWCP's August 5, 2011 decision. She determined that appellant should not have been referred to Dr. Silverstein for a referee examination as Dr. Fried, the original referee physician, was not contacted to provide a supplemental report to clarify his opinion regarding appellant's lower extremity impairment. The hearing representative remanded the case to OWCP to contact Dr. Fried and obtain a supplemental report.

On March 29, 2012 OWCP requested that Dr. Fried clarify his opinion regarding appellant's work-related permanent impairment of the lower extremities. Dr. Fried was advised that a schedule award was payable for any extremity impairment related to a spinal injury. He was further advised that any preexisting impairment must be considered if there was impairment to an extremity as a result of the accepted conditions. Dr. Fried was also instructed to use the sixth edition of the A.M.A., *Guides* and explain his impairment findings.

In a July 30, 2012 report, Dr. Fried indicated that appellant did not sustain any permanent impairment of either lower extremity as a result of his back injury. On August 23, 2012 an OWCP medical adviser concurred with Dr. Fried's assessment.

By decision dated October 25, 2012, OWCP determined that appellant had not established an increase in schedule award beyond the two percent impairment of the left lower extremity already paid.

On October 31, 2012 appellant requested a hearing before OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated December 12, 2012, an OWCP hearing representative found the case not in posture for decision on schedule award entitlement. He advised that Dr. Fried's supplemental report was insufficient to resolve the conflict in medical opinion and a new supplemental report should be requested which utilized *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairments" and which explained how the impairment rating was calculated. It was also requested that Dr. Fried comment on Dr. Weiss' supplemental impairment report.

In a May 30, 2013 supplemental report, Dr. Fried opined that appellant had no permanent injuries as a result of the December 1, 2001 incident and that his opinion was based on *The Guides Newsletter* of "Rating Spinal Nerve Extremity Impairment." He reviewed Dr. Weiss' report, which recommended 11 percent impairment to both the right and left lower extremities, and advised that Dr. Weiss had based this rating on appellant's degenerative arthritis and disc disease, which were not related to the work-related injury. Dr. Fried indicated that he agreed with Dr. Rineberg's opinion that the degree of permanent impairment due to the loss of function from sensory deficit, pain, or discomfort in each lower extremity was nil or zero percent.

By decision dated October 10, 2013, OWCP found that appellant had no more than two percent permanent impairment of the left lower extremity and no permanent impairment of the right lower extremity. Determinative weight was accorded to Dr. Fried's report.

On October 17, 2013 appellant requested a hearing from the Branch of Hearings and Review. By decision dated January 10, 2014, an OWCP hearing representative found the case not in posture for decision as Dr. Fried's report was insufficiently reasoned and, therefore, could not represent the weight of the medical evidence. OWCP was instructed to refer appellant to a new referee physician to resolve the conflict of medical opinion between Dr. Weiss and Dr. Rineberg to properly assess the degree of impairment of the lower extremities and to offer a reasoned opinion based on *The Guides Newsletter*.

On May 14, 2014 OWCP referred appellant, along with a SOAF, the medical record, and a list of questions to Dr. Ian Fries, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion evidence. In a June 19, 2014 report, Dr. Fries noted the history of injury, his review of the medical record, and set forth examination findings of June 13, 2014. He advised that appellant reached MMI by July 13, 2005, when he was documented to have no pain in his legs, significantly improved low back pain, and no focal neurologic deficits. Dr. Fries opined that appellant had residuals of both the right and left lower extremities due to his work-related injury of December 1, 2001. Under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009, he opined that appellant had seven percent permanent impairment

of the right lower extremity, two percent permanent impairment of the left lower extremity, and set forth his calculations. For the right lower extremity, Dr. Fries found that appellant had class 1 S1 moderate motor deficit with default value eight percent under *The Guides Newsletter* due to depressed ankle reflex. Utilizing Table 16-6 through Table 16-8 of the A.M.A., *Guides*, he assigned grade modifier 2 for Functional History (GMFH); excluded grade modifier Physical Examination (GMPE) as the neurological findings defined the impairment values; and assigned grade modifier Clinical Studies (GMCS) as zero as there was no available clinical studies or relevant findings. Under the net adjustment formula, Dr. Fries found (GMFH-CDX) (2-1) + (GMPE-CDX) (n/a) + (GMCS-CDX) (0-1) equaled -2, which moved the default C to A or five percent. For moderate sensory defect, he found default C equaled two percent. Dr. Fries found under Table 16-6, page 516 GMFH adjustment was not applicable; under Table 16-7, page 517, GMPE was excluded; and under Table 15-8, page 519, GMCS was zero. Under the net adjustment formula, (GMFH-CDX) (n/a) + (GMPE-CDX) (n/a) + (GMCS-CDX) (0-1) equaled -1, which moved default value from C to B or two percent. Thus, he opined that appellant had seven percent total right lower extremity impairment. For the left lower extremity, Dr. Fries found class 1 S1 root involved for moderate sensory had default C or two percent impairment. Under Table 16-6, page 516, grade 2 modifier for moderate functional history was assigned; under Table 16-7, page 517, grade modifier physical examination was excluded; and under Table 15-8, page 519, grade modifier clinical studies was zero. Under the net adjustment formula, (GMFH-CDX) (2-1) + (GMPE-CDX) (n/a) + (GMCS-CDX) (0-1) = 0, which left the default C or two percent. Thus, Dr. Fries opined that appellant had two percent left lower extremity permanent impairment.

On July 24, 2014 an OWCP medical adviser reviewed Dr. Fries' impairment evaluation report and concurred with the permanent impairment determinations. However, the medical adviser disagreed with the date of maximum medical improvement (MMI) of July 13, 2005. He opined that a more appropriate date would be the date Dr. Fries performed the impairment evaluation on June 13, 2014. In a September 4, 2014 supplemental report, the medical adviser reiterated that the date of MMI was June 13, 2013, when Dr. Fries performed a correct and proper assessment of impairment. He argued that to select any prior date would be speculation.

By decision dated September 22, 2014, OWCP awarded appellant a schedule award for seven percent right lower extremity and two percent left lower extremity (already paid). Appellant received 20.16 weeks of compensation for the period June 13 to November 1, 2014. This determination was based on Dr. Fries' reports and the date of MMI was determined to be June 13, 2014 the date of Dr. Fries examination.

On October 2, 2014 appellant requested an oral hearing before the Branch of Hearings and Review, which was held telephonically on March 3, 2015. At the hearing, counsel raised several arguments. He advised that appellant has two relevant work-related injuries for back injuries which should be combined and which affect the permanent impairment of the lower extremities. This included the current claim for the December 1, 2001 work injury and a subsequent work-related injury of December 10, 2013, OWCP number xxxxxx670, when appellant fell off a chair and landed on his backside. Counsel advised that appellant was off work for several months due to a worsening of his left and right lower extremities, and returned

to work in April 2014.[6] He indicated that Dr. Weiss evaluated appellant on July 16, 2014 and found appellant had 15 percent right lower extremity impairment. Counsel advised that appellant's condition had worsened as Dr. Weiss' impairment evaluation of 15 percent right lower extremity impairment differed from Dr. Fries' opinion that appellant had 7 percent impairment of the right lower extremity. He noted that Dr. Weiss performed a supplementary evaluation on December 29, 2014 without an examination. Counsel argued that Dr. Weiss' reports of December 29, 2014 and July 16, 2015 were not provided to the referee physician. He also argued that the referee physician should have been made aware of the December 10, 2013 work-related incident in rendering his impairment assessment. Counsel noted that appellant provided a written statement about his condition and impairment.

Following the hearing, OWCP received appellant's February 25, 2015 affidavit describing his current condition and letters from counsel dated April 6 and 13, 2015 in which he presented additional arguments. Counsel argued that Dr. Weiss' recent reports supported an increased impairment of the lower extremities and should be given greater weight than that of Dr. Fries, as Dr. Weiss was aware of both work injuries, while Dr. Fries was not. He argued that Dr. Fries also did not perform a prior examination of appellant, while Dr. Weiss was able to identify a worsening of appellant's condition from the time of his 2006 examination of appellant. Counsel also argued that Dr. Fries did not appear to follow *The Guides Newsletter* of July/August 2009 to the same extent as Dr. Weiss in evaluating impairment to the lower extremities.

In a July 16, 2014 report, Dr. Weiss noted the history of the December 10, 2013 work-related injury when appellant's chair came out from under him, he fell to the ground, and injured his back. He also noted that he previously evaluated appellant on June 14, 2006 for a lumbar spine injury sustained in December 2001 at work. Dr. Weiss reviewed medical records provided and set forth examination finding. He diagnosed post-traumatic lumbosacral strain and sprain, aggravation of preexisting lumbar spine pathology from workers' compensation injury of December 1, 2001, and bilateral lumbar radiculopathy. Dr. Weiss opined that the December 10, 2013 work incident was the competent producing factor for appellant's subjective and objective findings. He opined that appellant had 6 percent right lower extremity impairment due to sensory deficit right L4 nerve root, 4 percent severe sensory deficit right S1 nerve root, and 5 percent moderate sensory deficit right L5 nerve root, for total 15 percent combined right lower extremity. Dr. Weiss also opined that appellant had 6 percent severe sensory deficit left L5 nerve root, 4 percent severe sensory deficit left S1 nerve root, and 5 percent moderate sensory deficit left L4 nerve root, for a total combined left lower extremity impairment of 15 percent. He provided his impairment calculations under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 and opined that appellant reached MMI on July 16, 2014.

In his December 29, 2014 report, Dr. Weiss reviewed his July 16, 2014 report and his previous report of June 14, 2005. He indicated that the December 1, 2001 work injury resulted in impairments due to L4 and L5 nerve root sensory deficits and the April 11, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine revealed an L4-5 disc bulge and degenerative

[6] Under claim number xxxxxx670, OWCP denied the injury of December 10, 2013 by decision dated January 31, 2014 and upheld by a hearing representative in a September 29, 2014 decision.

bulging disc at L5-S1 with facet arthrosis, which contributed to moderate left and moderate-to-severe right foraminal stenosis. Dr. Weiss indicated that the most recent work injury of December 10, 2013 revealed impairment in L4, L5, and S1 nerve roots. He compared the April 11, 2003 MRI scan to his current findings and opined that, since there were no S1 findings on the June 14, 2006 evaluation to relate the S1 findings to the December 1, 2001 work injury, those new findings were related to the December 10, 2013 work injury.

By decision dated May 22, 2015, an OWCP hearing representative affirmed the September 22, 2014 decision. He noted that, as claim number xxxxx670 was denied, it had no impact on the issue of permanent impairment under the current claim.

LEGAL PRECEDENT

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his employment.[7]

The schedule award provision of FECA and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as the appropriate standards for evaluating schedule losses.[8]

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.[9] 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.[10]

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 decade has offered an alternative approach to rating spinal nerve impairments.[11] For peripheral nerve impairments to

[7] *Veronica Williams*, 56 ECAB 367 (2005).

[8] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

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

the upper or lower extremities resulting from spinal injuries, OWCP's procedures provide that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied as provided in section 3.700 of its procedures.[12] Specifically, OWCP will address lower extremity impairments originating in the spine through Table 16-11[13] and upper extremity impairment originating in the spine through Table 15-14.[14]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15]

Section 8123(a) of FECA provides, if there is a 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.[16] 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.[17] When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report.[18]

ANALYSIS

The Board finds this case not in posture for decision as further clarification is required from Dr. Fries, the impartial medical specialist, selected to resolve the outstanding unresolved conflict in medical opinion between Dr. Weiss, appellant's treating physician, and Dr. Rineberg, an OWCP referral physician, concerning the extent of permanent partial impairment to appellant's lower extremities.

OWCP accepted appellant's claim for lumbar sprain, degenerative lumbar sprain, displaced lumbar intervertebral disc, lumbar stenosis, and lumbar laminectomy and fusion. It found a conflict in medical opinion arose between Dr. Weiss, appellant's treating physician, and

[12] 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); *supra* note 4; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[13] A.M.A., *Guides* 533, Table 16-11.

[14] *Id.* at 425, Table 15-14.

[15] *Id.* at 521, Table 15-14. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[16] 5 U.S.C. § 8123(a).

[17] *Barbara J. Warren*, 51 ECAB 413 (2000).

[18] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

Dr. Rineberg, an OWCP referral physician, concerning the extent of permanent partial impairment to appellant's lower extremities.[19] Accordingly, OWCP properly referred appellant to Dr. Fried, an orthopedic specialist, for an impartial medical examination.[20] Following a complicated procedural history and the Board's remand on October 29, 2010, OWCP referred appellant to Dr. Silverstein to resolve the conflict in medical opinion and on August 5, 2011 issued a schedule award for two percent impairment of the left lower extremity. On September 22, 2014 it awarded appellant a schedule award for seven percent right lower extremity and two percent left lower extremity (already paid). Due to the inadequacy of Dr. Fried's reports, OWCP eventually determined that a new impartial medical specialist was needed to resolve the outstanding conflict between Dr. Weiss and Dr. Rineberg regarding schedule award entitlement. On June 23, 2014 appellant was referred to Dr. Fries, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion and to provide a permanent impairment rating.

The Board finds that the opinion of Dr. Fries cannot be accorded special weight as it is not based upon a proper factual background. In a June 19, 2014 report, Dr. Fries noted the history of injury, his review of the medical record, and set forth examination findings of June 13, 2014. Under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009, Dr. Fries opined that appellant had seven percent impairment of the right lower extremity and two percent impairment of the left lower extremity and set forth his calculations. It is important to note that Dr. Fries' examination of appellant on June 13, 2014 occurred after the alleged work event of December 10, 2013 and the right lower extremity impairment evaluation was based on evidence of S1 nerve root motor and sensory deficit, which appear to be a new impairment from previous impairment findings concerning the L4 and L5 nerve roots. As previously noted, appellant's claim number xxxxxx670 for the December 10, 2013 work injury was denied.[21] OWCP procedures provide: impairment ratings for schedule awards include those conditions accepted by OWCP as job related and any preexisting permanent impairment of the same member or function.[22] Thus, a denied claim which allegedly occurred on December 10, 2013 should not be included as a part of permanent impairment calculating under the current claim as it was not a preexisting condition. Furthermore, there is no evidence that OWCP had advised Dr. Fries that appellant had a December 10, 2013 work injury and that it was denied. As Dr. Fries had based his right lower extremity evaluation on new findings of an S1 nerve root impairment which appear to have stemmed from the denied December 10, 2013 work injury,[23] his opinion is not based on a complete and accurate history. Accordingly, Dr. Fries' report cannot represent the weight of the medical evidence. Therefore,

[19] Dr. Weiss opined that appellant had 19 percent left lower extremity impairment while Dr. Rineberg opined that there was a zero percent impairment of each lower extremity.

[20] *See Talmadge Miller*, 47 ECAB 673 (1996).

[21] *See supra* note 6.

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.5(d) (February 2013).

[23] Dr. Weiss specifically opined in his December 29, 2014 report that the S1 nerve root findings relate to the December 10, 2013 work injury.

the case will be remanded to OWCP to issue an updated SOAF noting to include December 10, 2013 work injury that was denied and to obtain clarification from Dr. Fries on this point or, if Dr. Fries is unable to clarify his impairment opinion, to have a new impartial medical examiner selected to resolve the outstanding unresolved conflict in medical opinion between Dr. Weiss, appellant's treating physician, and Dr. Rineberg, an OWCP referral physician, concerning the extent of permanent partial impairment to appellant's lower extremities with a complete factual history of the accepted condition and nonaccepted conditions.

CONCLUSION

The Board finds that the case is not in posture for decision as clarification is needed from the impartial medical specialist, Dr. Fries.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 22, 2015 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 4, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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