



## **ISSUE**

The issue is whether appellant met her burden of proof to establish permanent impairment due to the accepted lumbar conditions.

On appeal appellant asserts that she is entitled to full compensation due to her employment injury. She also questions whether she was entitled to receive FECA wage-loss or schedule award compensation in addition to Office of Personnel Management (OPM) retirement compensation.

## **FACTUAL HISTORY**

On August 28, 2013 appellant, then a 58-year-old supply technician, filed a traumatic injury claim (Form CA-1) alleging that on August 13, 2013 she injured her lower back when lifting heavy boxes. She returned to work in a modified-duty status.<sup>4</sup> On October 30, 2013 OWCP accepted lumbar back sprain.

Appellant came under the care of Dr. William Brandt, a Board-certified physiatrist, in November 2013. A November 19, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated minor degenerative disc disease at L4-5 and L5-S1 with no evidence of herniation or extruded fragment.

Appellant voluntarily resigned from the employing establishment, effective November 29, 2013. She noted that she had a graduate degree and was resigning because she had been given no opportunity to advance.<sup>5</sup>

In February 2014, OWCP referred appellant to Dr. Michael E. Callahan, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a March 13, 2014 report, Dr. Callahan described the history of injury and noted his review of the medical record and appellant's complaints of intermittent muscle spasms and constant back pain, aggravated by activity. He performed a physical examination, noting that appellant recently had lower extremity vein surgery. Back range of motion was diminished, with guarding present. Strength examination was normal in both lower extremities. Dr. Callahan diagnosed temporary acute exacerbation of preexisting degenerative disc disease and degenerative joint disease of the lumbar spine. He advised that she had not reached maximum medical improvement, and provided restrictions in lifting, bending, stooping, twisting, pushing, and pulling for a 12-month period. Dr. Callahan advised that walking and standing were limited to two hours.

On March 21, 2014 appellant filed a Form CA-7 claim for a schedule award. In correspondence dated March 31, 2014, OWCP noted that Dr. Callahan advised that she had not reached maximum medical improvement and informed her of the evidence needed to establish spinal nerve extremity impairments.

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<sup>4</sup> The modified assignment was for sedentary work only and required no lifting, carrying, pushing, or pulling over 10 pounds; no bending, twisting, squatting, stooping, kneeling, or crawling; no climbing ladders; no overhead shoulder lifting; and no back lifting.

<sup>5</sup> Appellant also indicated that she had an accepted claim and was also a disabled veteran. The record indicates that she receives Department of Veterans Affairs (VA) benefits for asthma and sleep apnea.

Appellant filed a second schedule award claim on April 6, 2014. She submitted an April 24, 2014 report in which Dr. Michael M. Hess, a Board-certified orthopedic surgeon, noted the history of injury and appellant's complaint of nonradiating back pain. Dr. Hess advised that her physical examination was not reliable because she demonstrated three of five Waddell signs in that she had a negative sitting straight leg raise and a positive lying supine straight leg raise which would be a positive distraction sign; a positive simulation sign and a compression on her head that caused pain in her low back; and a positive regional sign in that she had sensory loss that was not in the dermatome distribution. He indicated that, in accordance with Table 17-4 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>6</sup> appellant had three percent whole person impairment, noting no clinical studies, a zero physical examination grade modifier based on inconsistent examination findings, and a functional history modifier of two.

On April 30, 2014 appellant filed a Form CA-7, claims for compensation, for the period December 1, 2013 to April 19, 2014. The employing establishment noted that appellant had voluntarily resigned on November 29, 2013.

On May 12, 2014 OWCP additionally accepted temporary aggravation of degeneration of lumbar disc L4-5 and L5-S1. In a May 12, 2014 letter, it informed appellant of the evidence needed to support her claims for compensation.

By decision dated July 16, 2014, OWCP denied appellant's claims for compensation for the period December 1, 2013 to April 19, 2014. It noted that she submitted no evidence to explain why she could not perform the duties of the modified position from which she resigned.<sup>7</sup>

On October 6, 2014 OWCP informed Dr. Hess that under FECA, awards for permanent impairment could not be paid for the spine and could not be given for a whole person impairment. OWCP advised that if a spinal nerve caused an extremity impairment, it was proper to use the July/August 2009 *The Guides Newsletter* to rate an extremity impairment. Dr. Hess was asked to submit an impairment rating in accordance with *The Guides Newsletter*, found in Exhibit 4, Chapter 3.700, of OWCP procedures. He was asked to indicate a date of maximum medical improvement.

In an October 28, 2014 report, Dr. Hess advised that appellant would have reached maximum medical improvement on November 13, 2013. He reported that, because appellant's physical examination was unreliable, as noted in his prior report, he could not give an effective extremity impairment, indicating that appellant had no objective evidence of spinal nerve involvement.<sup>8</sup>

In a January 23, 2015 report, Dr. Morley Slutsky, an OWCP medical adviser who is Board-certified in occupational medicine, noted his review of the medical record including

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<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>7</sup> Appellant did not file an appeal with the Board from the July 16, 2014 decision. For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e); *D.G.*, Docket No. 12-770 (issued April 20, 2012).

<sup>8</sup> Dr. Brandt continued to submit treatment notes. He did not provide an impairment rating.

Dr. Hess' reports. He advised that maximum medical improvement was reached on November 13, 2013. The medical adviser noted that multiple doctors, including Dr. Hess, did not find objective evidence of lower extremity sensory, motor, or reflex changes related to the accepted low back conditions and, as such, there was no basis for a lower extremity impairment rating using July/August 2009 *The Guides Newsletter*.

By decision dated April 23, 2015, OWCP denied appellant's claim for a schedule award because the medical evidence did not demonstrate measurable impairment in accordance with the A.M.A., *Guides*.<sup>9</sup>

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>10</sup> and its implementing federal regulations,<sup>11</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>12</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.<sup>13</sup>

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.<sup>14</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>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. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.<sup>16</sup> OWCP has adopted this approach for

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<sup>9</sup> The decision was initially issued on April 15, 2015. Because it was mailed to an incorrect address, the decision was reissued on April 23, 2015.

<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> *Id.* at § 10.404(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.803.5a (February 2013) and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>14</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>15</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>16</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July-August 2009 *The Guides Newsletter*.<sup>17</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>18</sup>

### ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish permanent impairment due to the accepted lumbar conditions, which are lumbar strain and temporary aggravation of degeneration of lumbar disc L4-5 and L5-S1.

The only physician who provided an impairment rating was appellant's treating physician, Dr. Hess. In an April 24, 2014 report, Dr. Hess explained that appellant's physical examination was unreliable at that time, noting three of five positive Waddell signs. He indicated that, under Table 17-4 of the A.M.A., *Guides*, appellant had three percent whole person impairment.

As noted above, under FECA a schedule award is not payable for injury to the spine.<sup>19</sup> However, 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>20</sup> Chapter 17 of the A.M.A., *Guides* is entitled "The Spine and Pelvis."<sup>21</sup> Table 17-4 is used to rate the lumbar spine.<sup>22</sup>

Following a request by OWCP for Dr. Hess to submit an impairment rating in accordance with *The Guides Newsletter*, in an October 28, 2014 report, Dr. Hess advised that appellant reached maximum medical improvement on November 13, 2013. He reported that, because appellant's physical examination was unreliable, he could not give an effective extremity impairment, indicating that she had no objective evidence of spinal nerve involvement.<sup>23</sup> On January 23, 2015 Dr. Slutsky, OWCP medical adviser, reviewed the record, including Dr. Hess' reports. He concluded that, as appellant had no lower extremity sensory or motor impairments, she would not be entitled to a lower extremity schedule award under *The Guides Newsletter*.

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<sup>17</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>18</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *Supra* note 15.

<sup>21</sup> *Supra* note 6 at 557-601.

<sup>22</sup> *Id.* at 570.

<sup>23</sup> Dr. Brandt continued to submit treatment notes. He did not provide an impairment rating.

The Board finds that OWCP medical adviser, Dr. Slutsky, properly reviewed the medical record and evaluated appellant's condition in accordance with OWCP procedures found in the July/August 2009 *The Guides Newsletter*, using Proposed Table 2.<sup>24</sup> There is no medical evidence in conformance with the A.M.A., *Guides* showing any lower extremity impairment. The Board finds that, as the medical adviser properly applied the A.M.A., *Guides* to Dr. Hess' clinical findings, his opinion represents the weight of the medical evidence in this case.<sup>25</sup>

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 did not meet her burden of proof to establish permanent impairment due to the accepted lumbar conditions.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2016  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>24</sup> *Supra* note 14.

<sup>25</sup> *See N.B.*, Docket No. 15-1390 (issued November 6, 2015).