

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

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L.C., Appellant )

and )

DEPARTMENT OF THE ARMY, )  
TRAINING DOCTRINE COMMAND, )  
Fort Rucker, AL, Employer )

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**Docket No. 15-1671  
Issued: May 24, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On August 3, 2015 appellant filed a timely appeal from a May 21, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member, warranting a schedule award.

On appeal appellant contends that OWCP did not review all of the medical evidence.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 2, 1996 appellant, then a 43-year-old heating and air conditioning mechanic, filed an occupational disease claim (Form CA-2) alleging that, while working in the steam pits during the week of January 16 through 23, 1996, he experienced low back pain. On May 29, 1996 OWCP accepted appellant's claim for lumbar strain. This was subsequently expanded to include an L4-5 herniated disc. Appellant underwent a lumbar laminectomy for recurrent L4-5 herniated disc on April 4, 1998. He stopped work in January 1996 after the injury. Appellant returned to work on May 30, 1996 and worked in light-duty status intermittently through September 1999. In September 1999, he elected to retire from civil service and has not returned to work. On September 12, 2001 appellant underwent a repeat discectomy with a fusion at L4-5. On July 31, 2002 he elected to receive compensation benefits from FECA due to his work-related accepted conditions and subsequent treatment. Appellant has been receiving compensation benefits on the periodic rolls beginning July 31, 2002.

On December 9, 2010 OWCP had referred appellant to Dr. Darrell J. Potter, a Board-certified orthopedic surgeon, for a second opinion to determine whether appellant continued to have any residuals of his accepted conditions. In a February 1, 2011 report, Dr. Potter diagnosed intervertebral disc herniation with arthrodesis. He stated that appellant had failed back surgery syndrome and that, by March 2003, he was no longer able to work. Dr. Potter noted that his present symptoms were related to the residuals of his herniated nucleus pulposa and subsequent surgeries. He indicated that the short periods appellant worked between 1996 and 2003 were because his job duties were of a very limited capacity, and because significant adjustments had been made to allow him to maintain employment. Dr. Potter also determined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had 25 percent whole person impairment based on the lumbar spine regional grid.<sup>2</sup>

Appellant's treating physicians continued to find appellant totally disabled.

On June 21, 2012 OWCP referred appellant to Dr. Tai Q. Chung, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine his continued disability. Dr. Chung listed an impression of lumbar disc herniation L4-5 status post lumbar discectomy and fusion. She noted that appellant had ongoing pain and tenderness in the lumbar spine and restricted range of motion. Dr. Chung noted that there was evidence that the surgical procedures to treat his work-related injury caused his disability. She recommended a sedentary job.

On September 5, 2012 OWCP referred appellant to Dr. Roland Hester, a Board-certified orthopedic surgeon, to resolve a conflict with regard to appellant's work restrictions and ability to work. In an October 23, 2012 report, Dr. Hester noted that appellant's lumbar strain had resolved and that the L4-5 herniated disc had been fused and was no longer causing disability. However, he determined that there were significant residuals from the surgery. Dr. Hester opined that appellant could not perform his date-of-injury job but could work in a sedentary

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<sup>2</sup> A.M.A., *Guides* 570, Table 17-4.

position. On December 20, 2012 the claims examiner declined to pursue vocational rehabilitation as appellant's limitations did not meet the requirements for sedentary employment.

Dr. John C. Wessner, appellant's treating Board-certified internist, also indicated in a June 25, 2013 note, that appellant was unable to work in any capacity and that this condition was permanent.

On September 3, 2014 appellant filed a claim for a schedule award (Form CA-7). By letter dated September 8, 2014, OWCP advised him to submit a medical report in support of his schedule award claim. It noted that this report should include objective findings on examination, subjective complaints and diagnosis of the condition affecting appellant's extremities, as well as a percentage of impairment of the affected extremities with an explanation as to how it was calculated using the A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In a September 16, 2014 note, Dr. Wessner stated that appellant has been disabled based on well-documented lumbar disc disease. He noted that appellant continued to experience severe back pain on a daily basis and that his condition had not improved despite surgery, therapy, and medication. Dr. Wessner believed that appellant's disability was total and permanent at this stage and that he had reached maximum medical improvement.

By decision dated October 15, 2014, OWCP denied appellant's claim for a schedule award as he had not established employment-related permanent impairment of a scheduled member.

On October 28, 2014 appellant requested a review of the written record by an OWCP hearing representative. Subsequent to his request, he submitted multiple reports detailing his treatment in 1996. Appellant resubmitted the aforementioned January 24, 2011 report by Dr. Potter which found 25 percent whole person impairment as well as reports by his treating Board-certified orthopedic surgeon, Dr. Max E. Burr, from 1996, which included previously considered operative reports.

By decision dated May 21, 2015, the hearing representative affirmed OWCP's October 15, 2014 decision. He found that appellant had not submitted any evidence establishing a permanent impairment of his lower extremities causally related to his accepted back injury.

### **LEGAL PRECEDENT**

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.<sup>3</sup>

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.<sup>4</sup> FECA,

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<sup>3</sup> *Veronica Williams*, 56 ECAB 367 (2005).

<sup>4</sup> 5 U.S.C. § 8107.

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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>5</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.<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 schedule 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>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairment of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter*, July/August 2009, offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>10</sup> OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.<sup>11</sup>

An opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.<sup>12</sup>

### ANALYSIS

The Board finds that the weight of the medical evidence does not establish a ratable impairment of a scheduled member as a result of the accepted lumbar condition.

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<sup>5</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

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

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

<sup>10</sup> *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>12</sup> *R.L.*, Docket No. 14-1479 (issued October 28, 2014).

OWCP accepted appellant's claim for lumbar strain and L4-5 herniated disc. On September 3, 2014 appellant filed a claim for a schedule award. In response to OWCP's request for medical evidence in support of his claim, appellant submitted a September 16, 2014 note wherein Dr. Wessner opined that appellant had reached maximum improvement. However, Dr. Wessner did not make any physical findings in this brief note, nor did he apply the A.M.A., *Guides*. Therefore, his report is insufficient to meet appellant's burden of proof.

Appellant requested that OWCP consider other medical evidence in the record. He submitted multiple reports from Dr. Burr from 1996 detailing his treatment for his back. However, these reports were written 18 years prior to appellant's claim for a schedule award and prior to appellant reaching maximum medical improvement. In 1996 appellant was still actively seeking treatment and had not yet reached maximum medical improvement. It is well established that a schedule award cannot be determined and paid until a claimant has reached maximum medical improvement.<sup>13</sup> Furthermore, reports written in 1996 are not relevant to appellant's condition at the time he filed for a schedule award 18 years later. Appellant also resubmitted the second opinion report by Dr. Potter, who determined that appellant had 25 percent whole person impairment based on the lumbar spine regional grid in his February 1, 2011 report. A schedule award cannot be granted for impairment to the cervical spine and FECA does not provide for an impairment of the whole person.<sup>14</sup> FECA also excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.<sup>15</sup> Thus, Dr. Potter's January 24, 2011 report is of limited probative value.<sup>16</sup> The Board notes that neither Dr. Chung nor Dr. Hester reached any conclusion with regard to permanent impairment. Therefore, the Board finds that appellant failed to meet his burden of proof to establish his claim for a schedule award.

Appellant argues on appeal that he has serious injury to his back that is permanent. However, as there is no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* showing a ratable impairment of a scheduled member, appellant has not met his burden of proof to establish a claim for a schedule award.

Appellant may request a schedule award or increased schedule award based on evidence of any 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 failed to meet his burden of proof to establish a permanent impairment of a scheduled member caused by his employment injury.

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<sup>13</sup> *D.H.*, Docket No. 13-1642 (issued January 7, 2014).

<sup>14</sup> *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>15</sup> 5 U.S.C. § 8101(a); *Francesco C. Venesiani*, 48 ECAB 572 (1997).

<sup>16</sup> *S.S.*, Docket No. 13-2044 (issued February 20, 2014).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 21, 2015 is affirmed.

Issued: May 24, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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