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

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| **R.M., Appellant** | ) | |
| **and** | ) | **Docket No. 16-1116** |
| | ) | **Issued: October 20, 2016** |
| **DEPARTMENT OF DEFENSE, PENTAGON MAINTENANCE DEPARTMENT, Washington, DC, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### *JURISDICTION*

On May 4, 2016 appellant, through counsel, filed a timely appeal from an April 4, 2016 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 case.

[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 met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he received schedule awards.

## ***FACTUAL HISTORY***

On October 25, 2007 appellant, then a 47-year-old, maintenance work inspector, filed an occupational disease claim (Form CA-2) alleging a cervical condition due to repetitive neck movements at work over time. OWCP accepted his claim for cervical stenosis/dystonia. After filing his claim, appellant began working in a light-duty position for the employing establishment.[3]

The findings of a magnetic resonance imaging (MRI) scan of appellant's cervical spine obtained on November 3, 2000 had shown an impression of cord compression at C3-4.

On January 25, 2008 Dr. William Maggio, an attending Board-certified neurosurgeon, performed an authorized discectomy and fusion at C3-4.

A report of April 21, 2009 x-rays of appellant's cervical spine contained an impression of unremarkable postoperative changes apart from mild dextroscoliosis. On July 9, 2009 Dr. Maggio noted that a computerized tomography (CT) scan was normal and that appellant had no neurologic complaints.

On February 12, 2014 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted work injury.

In a July 9, 2014 report, Dr. Robert W. Macht, an attending Board-certified general surgeon, determined that appellant had 10 percent impairment of his left upper extremity. He opined that appellant had a cervical radiculopathy as shown by recent electromyogram (EMG) and nerve conduction velocity (NCV) testing. Dr. Macht referenced tables relating to spinal nerves in the American Medical Association publication, *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) (hereinafter *The Guides Newsletter*). He indicated that appellant reached maximum medical improvement (MMI) as of June 1, 2014.

On December 5, 2014 Dr. Morley Slutsky, a Board-certified occupational medicine physician, and OWCP medical adviser, indicated that he had reviewed appellant's file. He noted that Dr. Macht's findings contrasted with those of Dr. Maggio in that Dr. Maggio had previously reported that appellant had a normal CT scan and did not have any neurologic complaints. Dr. Slutsky noted that the file did not contain a report of the EMG and NCV testing referenced by Dr. Macht. He determined that the medical record was insufficient to support an impairment rating.

[3] Appellant received a leave buyback payment for the period August 22, 2007 to February 15, 2008.

In January 2015 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on upper extremity impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). In a report dated February 12, 2015, Dr. Draper discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. Appellant exhibited findings of 5/5 upper extremity strength bilaterally, restricted cervical range of motion, +2 symmetric reflexes, normal light touch sensation, negative bilateral shoulder impingement, and diminished left hand motion. Dr. Draper noted that appellant had no objective motor deficits, sensory loss, or neurologic abnormalities and indicated that his findings were consistent with those reported by Dr. Maggio in 2009. However, he found that paresthesia in appellant's upper extremities reflected cervical radiculopathy related to the accepted injury. Citing Table 1 in *The Guides Newsletter*, Dr. Draper classified appellant at a class 1, grade C, or one percent impairment of bilaterals referable to C6 sensory deficit. In each upper extremity, appellant had grade modifiers of 1 for physical examination, 1 for functional history, and 1 for clinical studies which yielded a net adjustment of zero and a final impairment rating of one percent for each upper extremity. He indicated that appellant reached MMI as of February 18, 2008.

The report from Dr. Draper was referred to OWCP's medical adviser for review. On March 11, 2015 Dr. Slutsky indicated that Dr. Draper's report showed that there was no objective evidence of sensory or motor loss and that, therefore, there was no ratable impairment. He indicated that the report of EMG and NCV testing referenced by Dr. Macht was not in the case record and concluded that appellant had no upper extremity impairment.

In a report dated June 2, 2015, Dr. Macht noted that the EMG and NCV testing referenced in his earlier report was conducted on April 1, 2014 by another attending physician, who provided an impression of left C5 radiculopathy. He indicated that this testing showed evidence of motor loss. The record does not contain a copy of this EMG and NCV testing report.

In a report dated June 16, 2015, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, noted that the November 3, 2000 cervical spine MRI scan showed cord compression at C3-4, and the postsurgery CT scan showed residual posterior osteophyte at C3-4. He opined that these findings were consistent with the paresthesia reported by Dr. Draper, and therefore constituted evidence of bilateral upper extremity sensory deficit. Citing Table 1 in *The Guides Newsletter*, Dr. Berman agreed with Dr. Draper's finding that appellant had one percent permanent impairment of each arm. He indicated that appellant reached MMI on February 18, 2008.

In a June 29, 2015 decision, OWCP granted appellant a schedule award for one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. The award ran for 6.24 weeks from February 18 to April 1, 2008 and was based on a determination that the weight of the medical opinion evidence with respect to impairment rested with the opinions of Dr. Draper and Dr. Berman.

Appellant, through counsel, requested a telephonic hearing with an OWCP hearing representative. During the hearing held on February 29, 2016 counsel argued that OWCP did not properly consider the June 2, 2015 report of Dr. Macht.

By decision dated April 4, 2016, an OWCP hearing representative affirmed OWCP's June 29, 2015 decision noting that appellant had not established more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. He noted that the degree of schedule award compensation granted to appellant was supported by the opinions of Dr. Draper and Dr. Berman. The hearing representative indicated that Dr. Macht's June 2, 2015 report did not contain an impairment rating supported by the EMG and NCV findings of record.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[4] and its implementing regulations[5] 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 to all claimants, good administrative practice necessitates 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 the implementing regulations as the appropriate standard for evaluating schedule losses.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7]

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.[8] A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.[9] Moreover, neither FECA nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[10]

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.[11]

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

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

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

[10] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[11] *Supra* note 9.

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[12] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[13] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[14]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on grade modifier for Functional History (GMFH) and, if electrodiagnostic testing was done, grade modifier for Clinical Studies (GMCS).[15] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[16]

## ***ANALYSIS***

OWCP accepted appellant's claim for cervical stenosis/dystonia and on January 25, 2008 Dr. Maggio, an attending physician, performed OWCP-authorized discectomy and fusion at C3-4. In a June 29, 2015 decision, it granted appellant a schedule award for one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. The award was based on a determination that the weight of the medical opinion evidence with respect to impairment rested with the opinions of Dr. Draper, an OWCP referral physician, and Dr. Berman, an OWCP medical adviser.

The Board finds that appellant has not met his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he received a schedule award. The weight of the medical opinion evidence rests with the opinions of Dr. Draper and Dr. Berman who found that appellant had one percent permanent impairment of each arm.

In a report dated February 12, 2015, Dr. Draper noted that physical examination revealed no objective motor deficits, sensory loss, or neurologic abnormalities and indicated that his findings were consistent with those reported by Dr. Maggio in 2009. He further pointed out that paresthesia in appellant's upper extremities did in fact document a cervical radiculopathy related

[12] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[13] *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

[14] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[15] A.M.A., *Guides* 515-21, 533.

[16] *Id.* at 521.

to the accepted injury. Citing Table 1 in *The Guides Newsletter*, Dr. Draper properly determined that appellant had a class 1, grade C, or one percent impairment of each upper extremity referable to C6 sensory deficit. He applied the net adjustment formula to his selected grade modifiers for physical examination, functional history, and clinical studies (which yielded a net adjustment of zero) and properly determined that appellant had a final impairment rating of one percent for each upper extremity.[17] On June 16, 2015 Dr. Berman explained that Dr. Draper's examination findings were consistent with MRI and CT scan results of record which show ratable sensory loss of the upper extremities. Citing Table 1 in *The Guides Newsletter*, he agreed with Dr. Draper's determination that appellant had one percent permanent impairment of each upper extremity.

Appellant did not submit probative evidence showing that he has more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. In a June 2, 2015 report, Dr. Macht, an attending physician, reported that appellant had work-related bilateral motor loss associated with his C5 nerve. However, this report does not contain an impairment rating supported by the EMG and NCV findings of record. Dr. Macht had previously indicated on July 9, 2014 that appellant had 10 percent impairment of his left upper extremity as evidenced by the findings of EMG and NCV testing. This opinion is of limited probative value because Dr. Macht did not adequately describe the rationale for this opinion under the standards of the sixth edition of the A.M.A., *Guides* and the referenced EMG and NCV testing results are not in the record. The Board has held that 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.[18]

For these reasons, appellant has failed to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity.

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 his burden of proof to establish more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he received schedule awards.

[17] *See supra* notes 11 through 15.

[18] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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