

when he slipped on a small battery in a van while lifting sacks. It paid compensation and medical benefits, including surgery to remove L4-L5 disc on October 17, 1989.

On July 21, 1999 OWCP issued a schedule award for 12 percent permanent impairment to the left leg. The period of the award ran from April 22 through December 19, 1999 for 34.56 weeks of compensation.²

On June 4, 2009 appellant filed a Form CA-7 claim for an additional schedule award. As no new evidence was received from appellant's physicians, appellant was referred for a second opinion examination with Dr. Steven Lancaster, a Board-certified orthopedic surgeon. In a November 9, 2009 report, Dr. Lancaster opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), appellant had six percent permanent impairment of the left lower extremity. An OWCP medical adviser reviewed the medical evidence on file and concluded that the additional evidence did not demonstrate more than the previously issued 12 percent left lower extremity award. By decision dated November 30, 2009, OWCP denied an additional schedule award.

On August 24, 2012 appellant again filed a Form CA-7 claim for an additional schedule award. In a July 17, 2012 report, Dr. Samy F. Bishai, Board-certified in emergency medicine, noted appellant's subjective complaints and reviewed appellant's medical records, which included office notes by various physicians and all diagnostic tests. He noted that appellant worked for the employing establishment as a mail handler with restrictions and had previous back surgery on July 21, 1989. Examination findings were provided along with results from a March 17, 2009 magnetic resonance imaging (MRI) scan of the lumbar spine and a June 4, 2009 nerve conduction study and electromyogram. A diagnosis of chronic lumbosacral strain, herniated lumbar disc at L4-L5 and L5-S1, status postoperative lumbar laminectomy and disc excision at L4-L5 left side, and bilateral radiculopathy right and left legs, more severe left side, was provided. Dr. Bishai opined that appellant reached maximum medical improvement on July 17, 2012. Utilizing tables within the sixth edition of the A.M.A., *Guides* and the July/August 2009 *The Guides Newsletter*, Dr. Bishai opined that appellant had 15 percent impairment of the left lower extremity and 15 percent impairment of the right lower extremity, for a total impairment rating of 30 percent of the lower extremities.

On August 30, 2012 an OWCP medical adviser stated maximum medical improvement was reached on July 17, 2012. He reviewed Dr. Bishai's report and noted that appellant had been paid a schedule award of six percent for each lower extremity. The medical adviser agreed with Dr. Bishai's calculations of 15 percent to each lower extremity. As he contended that appellant had previously received 6 percent to each lower extremity, the medical adviser subtracted 6 percent from 15 percent current impairment and opined that appellant was due 9 percent right lower extremity and 9 percent left lower extremity. However, in a September 6, 2012 report, the medical adviser corrected the record that appellant had received only 12 percent

² By decision dated December 9, 1997 (Docket No. 95-2590), the Board affirmed OWCP's June 19, 1995 decision which found that the position of modified mail handler to which appellant returned on October 1, 1994 fairly and reasonably represented his wage-earning capacity. The Board also affirmed OWCP's April 24, 1995 decision which had denied appellant's untimely request for reconsideration of a previous schedule award claim. The facts and law as present in the Board's previous decision are incorporated herein.

impairment to the left lower extremity. Therefore, he opined that the impairment for the right lower extremity should remain at nine percent and there was zero percent additional impairment for the left lower extremity.

By decision dated September 24, 2012, OWCP awarded nine percent right leg impairment but no additional impairment for the left leg. The period of the award ran for 25.92 weeks from September 23, 2012 to March 23, 2013.

On January 22, 2014 OWCP referred appellant to Dr. Samuel D. Young, a Board-certified orthopedic surgeon, to determine his current disability status. In a February 12, 2014 report, Dr. Young evaluated appellant and reviewed the medical record along with a statement of accepted facts. He opined that while the lumbar sprain has resolved the sequelae from the intervertebral disc herniation, namely the radiculopathy, had not resolved. In relevant part to this case, Dr. Young indicated that in reviewing and performing his own assessment, he agreed with Dr. Bishai's assessment and would also give appellant a schedule award of 15 percent for each lower extremity.

On August 8, 2014 appellant filed a Form CA-7 claim for an additional schedule award. He contended in an August 8, 2014 letter, which he requested be either construed as a request for reconsideration or a new claim, that he was only partially paid for his schedule award on September 24, 2012. Appellant contended that there was clear error on OWCP's part as a second opinion examination by Dr. Young in February 2014 agreed with Dr. Bishai's 30 percent impairment assessment, which should supercede the medical adviser's impairment ratings of 9 percent.

On September 5, 2014 OWCP referred the case to a new medical adviser to review the record along with Dr. Bishai's July 17, 2012 report. In a September 11, 2014 report, an OWCP medical adviser indicated that the rating of the impairment depended on an accurate assessment of the specific spinal nerve root deficits, *e.g.*, the radiculopathy. He advised that he was not confident of the electrodiagnostic studies dated June 4, 2009 and recommended repeating the study in order to accurately define the location of severity of the specific spinal nerve root involved.

In a September 11, 2014 report, Dr. Bishai noted appellant's examination findings. He also noted diagnostic test results of a March 17, 2009 MRI scan of the lumbar spine and the June 4, 2009 nerve conduction studies and EMG of both lower extremities, which showed an abnormal study with the left lower extremity showing denervation changes indicating radiculopathy at the L4 level with S1 involvement. Dr. Bishai indicated that appellant reached maximum medical improvement on July 17, 2012. He again noted his calculations and cited to tables in the A.M.A., *Guides* as well as the July/August 2009 *The Guides Newsletter* regarding his impairment calculation of July 17, 2012, which resulted in 15 percent left lower extremity impairment and 15 percent right lower extremity. Dr. Bishai noted that OWCP's medical adviser at that time had agreed with his impairment calculation. In a September 11, 2014 attachment to schedule award development letter, he opined that appellant was entitled to a final percentage of 15 percent impairment to the left lower extremity and 15 percent impairment to right lower extremity.

By decision dated October 20, 2014, OWCP denied appellant's claim for an increased schedule award. It found the medical evidence did not support an increase in impairment already compensated.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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.⁵ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his employment.⁶

ANALYSIS

In the instant case, OWCP accepted the conditions of sprain of back, lumbar region, and displacement of lumbar intervertebral disc without myelopathy. It also authorized appellant's October 17, 1989 removal of a disc at L4-L5 on the left side. On July 21, 1999 appellant received a schedule award for 12 percent impairment to the left leg. On September 24, 2012 appellant received a schedule award for nine percent impairment to the right leg.

On August 8, 2014 appellant sought an additional award contending that he was only partially paid for his schedule award as the evidence supported that he had 15 percent impairment of each of his lower extremities. In support of his assertion, he submitted Dr. Young's February 12, 2014 second opinion examination, who noted his agreement with Dr. Bishai's July 17, 2012 impairment evaluation and rating. Appellant also submitted a September 11, 2014 report from Dr. Bishai, who noted his previous impairment calculations of July 17, 2012 under the A.M.A., *Guides* and opined that appellant had 15 percent right lower extremity impairment and 15 percent left lower extremity impairment. The Board agrees that appellant is entitled to an additional schedule award to equal 15 percent permanent impairment of each lower extremity.

The only medical report of record which properly evaluates appellant's permanent impairment pursuant to the A.M.A., *Guides* is the July 17, 2012 report from Dr. Bishai. In this report Dr. Bishai explained that his evaluation was done pursuant to *The Guides Newsletter*, July/August 2009 rating process. He stated that he used the lumbar spine regional grid to obtain the class of diagnosis and it was a class 3. The grade modifier for functional history was 3, and

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁵ *Id.*

⁶ *Veronica Williams*, 56 ECAB 367, 370 (2005).

the modifier for physical examination was 2, therefore the net adjustment was -2. By using Table 2, Spinal Nerve Lower Extremity Impairments, L5 radiculopathy, the right lower extremity moderate sensory deficit at grade A (-2 from default grade C) equaled 2 percent left and right extremity impairments, while the moderate motor deficit at grade A equaled 13 percent left and right extremity impairments. Dr. Bishai concluded that appellant had 15 percent permanent impairments of each lower extremity.

At the time of OWCP's July 21, 1999 schedule award decision, an OWCP medical adviser reviewed Dr. Bishai's July 17, 2012 impairment rating and concurred in its result, which was 15 percent impairment to the left lower extremity and 15 percent impairment to the right lower extremity. He, however, miscalculated the amount of impairment as properly noted by Dr. Bishai in his September 11, 2014 report and appellant on appeal. The medical adviser found appellant entitled to 15 percent impairment to the left lower extremity and 15 percent impairment to the right lower extremity. As appellant previously received a schedule award for only 12 percent impairment to the left lower extremity on July 21, 1999, he is entitled to an additional 3 percent schedule award as 12 percent left lower extremity impairment minus 9 percent left lower extremity impairment, yields an additional 3 percent award. On September 24, 2012 OWCP awarded appellant 9 percent impairment to right lower extremity, as appellant is entitled to 15 percent impairment for the right lower extremity, it must pay appellant an additional schedule award for 6 percent impairment (15 percent entitled minus 9 percent received is equal to 6 percent).

While a new OWCP medical adviser reviewed the previous medical adviser's notes and found that the June 4, 2009 electrodiagnostic study should be repeated, no clear explanation was provided for why such study was unreliable. This opinion is therefore of limited probative value.

The Board further notes that OWCP's second opinion physician, Dr. Young in his September 11, 2014 report also concurred with Dr. Bishai's ratings.

In this case, appellant has contended, both before OWCP and on appeal, he was only partially paid for his schedule award on July 21, 1999 as the evidence supports he has 15 percent permanent impairment of his right lower extremity and 15 percent permanent impairment of his left lower extremity. The Board agrees.

Accordingly, OWCP's October 20, 2014 decision is amended to reflect the additional impairment.

CONCLUSION

The Board finds that appellant has established an additional permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed, as modified.⁷

Issued: September 7, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.