

ISSUE

The issue is whether appellant has established more than two percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On December 17, 2009 appellant, then a 58-year-old general manager, filed a traumatic injury claim (Form CA-1) alleging that on December 4, 2009 he injured his lower back while picking up a box of meat while in the performance of duty. He stopped work on December 17, 2009. OWCP accepted the claim for cervical radiculitis, thoracic and lumbar sprains, and shoulder pain. It paid appellant wage-loss compensation and medical benefits on the supplemental rolls from February 1, 2010 to August 27, 2011, and on the periodic rolls commencing August 28, 2011. Appellant returned to a modified job on August 30, 2013.

On May 1, 2013 appellant filed a claim for a schedule award (Form CA-7).

OWCP subsequently received a June 17, 2011 report from Dr. Michael C. Chabot, a treating Board-certified orthopedic surgeon, in support of appellant's claim for a schedule award. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (A.M.A., *Guides*) and *The Guides Newsletter* July/August 2009 edition, Dr. Chabot opined that appellant had 10 percent whole person permanent impairment. He based his impairment rating on a diagnosis of radiculopathy, which he related would result in 9 to 14 percent impairment under Table 17-2, pp. 564 and 565.

By decision dated July 9, 2013, OWCP denied appellant's claim for a schedule award. It found that he failed to establish a permanent impairment of a scheduled member due to his accepted employment injury.

In a letter dated July 15, 2013, counsel requested a telephonic hearing before an OWCP hearing representative. By letter dated November 11, 2013, he requested that the hearing request be dismissed as appellant was requesting reconsideration.

On November 13, 2013 counsel requested reconsideration of the July 9, 2013 decision denying his request for a schedule award.

Counsel subsequently submitted a May 22, 2013 impairment rating by Dr. Neil Allen, a Board-certified neurologist and internist, in support of his request. Dr. Allen provided examination findings and reviewed x-ray interpretations and magnetic resonance imaging scans. He noted diagnoses of lumbar and thoracic strains and brachial radiculitis, or neuritis. Based on the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 edition, Dr. Allen opined that appellant had 18 percent left upper extremity motor impairment. Using Table 16-11, p. 533 and Table 1, p. 4 of *The Guides Newsletter* he opined that appellant had five percent upper extremity impairment due to his C6 condition and five percent upper extremity impairment due to his C7 condition. Referencing Table 17-6, p. 575 Dr. Allen assigned a grade modifier of 2 for

³ A.M.A., *Guides* (6th ed. 2009).

functional history based on a Pain Disability Questionnaire (PDQ) score of 100. He assigned a grade modifier of 2 for clinical studies using Table 17-9, p. 581. Next, Dr. Allen determined that appellant had four percent left upper extremity permanent impairment from his L5 conditions. He applied a grade modifier of 2 for functional history and clinical studies for C6-7 conditions using Table 17-6, p. 575 and Table 17-9, p. 581.

In a November 12, 2013 report, an OWCP medical adviser determined that appellant had two percent left upper extremity permanent impairment. He observed that examination findings by Dr. Allen and Dr. Chabot were dissimilar. The medical adviser opted to use Dr. Chabot's findings as he was an orthopedic surgeon and had treated appellant for many months. He assigned a grade 1 diagnosis for mild sensory C6 deficit on the left using proposed Table 1 of *The Guides Newsletter*. Referencing Table 15-7, p. 406 the medical adviser assigned a grade modifier of 2 for functional history based on a PDQ score of 100 and pain with normal activity. He referenced Table 15-8, p. 408 for physical examination findings as clinical studies were inapplicable using Table 17-9, p. 581. Using the net adjustment formula, the medical adviser found a +1 adjustment, which resulted in two percent left upper extremity permanent impairment. He found July 18, 2013 as the date of maximum medical improvement.

By decision dated November 25, 2013, OWCP granted appellant a schedule award for two percent permanent impairment of his left upper extremity.

In a letter dated December 6, 2013, received by OWCP on December 6, 2013, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on June 17, 2014.

Appellant retired on disability from the employing establishment effective January 28, 2014.

By decision dated September 9, 2014, the hearing representative set aside the December 25, 2013 decision and remanded the case for referral to a second opinion physician to obtain an updated physical evaluation of appellant's permanent impairment. He found that it was improper for the medical adviser to accord more weight to Dr. Chabot's findings and reject the findings made by Dr. Allen. The hearing representative also found that the medical adviser failed to offer any opinion as to whether Dr. Allen's impairment rating was in accordance with the A.M.A., *Guides*.

On October 7, 2015 OWCP referred appellant for second opinion evaluation with Dr. Richard T. Katz, a Board-certified physiatrist, for an updated assessment of appellant's permanent impairment. It provided a statement of accepted facts (SOAF), a list of questions, and the case record for his review and comment.

In an October 19, 2015 report, Dr. Katz determined appellant had zero percent permanent impairment due to his accepted spinal conditions. He noted that *The Guides Newsletter* was used to rate spinal impairment. Based on no reliable loss of sensation, strength, or reflex in the cervical or lumbar spine, Dr. Katz found no evidence supporting a cervical or lumbar nerve root impairment. He further observed that appellant had no positive impairment or sensory deficits

supporting thoracic radiculopathy. Next, Dr. Katz found zero percent shoulder impairment based on a normal shoulder examination with no pain and normal range of motion.

In a February 29, 2016 report, an OWCP medical adviser reviewed the medical evidence and found zero percent left upper extremity permanent impairment. Using Table 15-5, p. 401, he assigned a class 0 based on nonspecific shoulder pain, full range of motion, and negative impingement tests. Next, the medical adviser assigned a class 0 for appellant's cervical radiculopathy using Table 17-2, p. 564 based on the lack of objective findings, full cervical range of motion and no upper extremity sensory or motor deficits. Using Table 17-3, p. 567, he assigned a class 0 for the accepted thoracic strain due to the lack of objective findings.

On March 7, 2016 OWCP requested clarification from OWCP's medical adviser regarding how he arrived at his impairment determination.

In an April 15, 2016, OWCP's medical adviser responded to OWCP's request for clarification and noted his agreement with Dr. Katz' impairment determination.

By decision dated June 30, 2016, OWCP denied modification of the December 2, 2014 schedule award determination as it found that appellant was not entitled to "an additional schedule award" (Emphasis in the original) for his left upper extremity.

In a letter dated July 8, 2016, received by OWCP on July 12, 2016, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on January 25, 2017.

By decision dated March 2, 2017, the hearing representative affirmed the June 22, 2016 decision denying appellant's claim for an additional schedule award for permanent impairment of the left upper extremity.⁴

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement FECA program with the Director of OWCP.⁵ 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.⁶ FECA 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 under the law, good administrative practice requires

⁴ The hearing representative also affirmed a June 22, 2016 decision denying appellant's claim for an additional schedule award for the right upper extremity under OWCP File No. xxxxxx766. The Board notes that it only has jurisdiction to adjudicate the left upper extremity impairment under OWCP File No. xxxxxx238, as counsel only referenced the current file number on the AB-1 form in filing this appeal. *See* 20 C.F.R. § 501.3.

⁵ *Id.* at §§ 1.1-1.4.

⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A., issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*” The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁸ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁹

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.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

The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹² OWCP has adopted this approach for 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*.¹³ Specifically, OWCP will address upper extremity impairment originating in the spine through Table 15-14.¹⁴

⁷ 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a) (February 2013).

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹¹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹² *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹³ FECA Transmittal No. 10-0004 (issued January 9, 2010); *supra* note 8 at Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

¹⁴ *Supra* note 3 at 425.

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish more than two percent permanent impairment of his left upper extremity for which he received a schedule award. The Board finds that the medical evidence of record does not establish entitlement to any additional impairment of the left upper extremity beyond the two percent he was previously awarded.

On May 1, 2013 appellant filed a schedule award claim and submitted a June 17, 2011 report by Dr. Chabot, who concluded that appellant had 10 percent whole person impairment using Tables 17-2, pp 564 and 565 and Table 17-7, p. 576. Dr. Chabot's opinion is of diminished probative value as he provided a whole person permanent impairment rating, which is not permitted under FECA.¹⁵

Appellant subsequently submitted a report by Dr. Allen who concluded that appellant had 18 percent upper extremity motor impairment using *The Guides Newsletter*. Dr. Allen's opinion was found to be of limited probative value as his May 22, 2013 report provided findings inconsistent with the rest of the medical evidence of record. Appellant was however granted a schedule award for two percent permanent impairment of the left upper extremity, based upon OWCP's medical adviser's review of the reports from Dr. Chabot and Dr. Allen.

Thereafter, an OWCP hearing representative referred appellant for a second opinion evaluation due to the markedly different examination findings observed by Dr. Allen and Dr. Chabot.

As instructed by OWCP's hearing representative, OWCP obtained a second opinion from Dr. Katz, who rated appellant under the A.M.A., *Guides* and using *The Guides Newsletter* determined that appellant had zero percent permanent impairment due to the accepted spinal conditions. He found no evidence supporting a cervical or lumbar nerve root impairment due to the lack of any reliable loss of sensation, strength, or reflex in the cervical or lumbar spine. Dr. Katz further observed that there was no positive impairment or sensory deficits supporting thoracic radiculopathy. Next, he found zero percent shoulder impairment based on a normal shoulder examination with no pain and normal range of motion.

OWCP referred Dr. Katz' opinion to a new OWCP medical adviser, who found zero percent left upper extremity permanent impairment. Using Table 15-5, p. 401, the medical adviser assigned a class 0 based on nonspecific shoulder pain, full range of motion, and negative impingement tests. Next, he assigned a class 0 for appellant's cervical radiculopathy using Table 17-2, p. 564, based on the lack of objective findings, full cervical range of motion, and no upper extremity sensory or motor deficits. Using Table 17-3, p. 567, the medical adviser assigned a class 0 for the accepted thoracic strain due to the lack of objective findings. On April 15, 2016 he noted his agreement with Dr. Katz' impairment determination.

¹⁵ A.L., Docket No. 08-1730 (issued March 16, 2009); Marilyn S. Freeland, 57 ECAB 607 (2006).

The Board finds that that OWCP properly accorded the weight of the evidence to the impairment rating made by Dr. Katz and concurred in by OWCP's medical adviser.¹⁶ Dr. Katz' opinion was based on a SOAF and the complete medical record. He provided a detailed impairment rating, utilizing the appropriate portions of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Katz described how objective clinical and electrodiagnostic findings warranted the specified percentage of impairment.¹⁷

There is no probative medical evidence of record demonstrating that appellant sustained more than two percent permanent impairment of his left upper extremity due to the accepted conditions. Thus, the Board finds that he has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time 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 has no more than two percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

¹⁶ See *D.M.*, Docket No. 13-2073 (issued March 18, 2014).

¹⁷ *D.P.*, Docket No. 16-1550 (issued May 5, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2017 is affirmed.

Issued: December 27, 2017
Washington, DC

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

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

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